University of Miami International and Comparative Law Review

Volume 30 | Issue 1 Article 6

12-19-2022

Foreclosing Asylum: "Neo-Refoulement" and the Ripple Effects of U.S. Interdiction at Sea

Edgar Cruz
University of Miami School of Law

FORECLOSING ASYLUM: "NEO-REFOULEMENT" AND THE RIPPLE EFFECTS OF U.S. INTERDICTION AT SEA

Edgar Cruz[*]

ABSTRACT

This Note argues that U.S. interdiction of asylum seekers at sea and the Migrant Protection Protocols (MPP) program undermine the object and purpose of international refugee law. The U.S. Government uses both practices to evade its international obligation of non-refoulement, or non-return. Such practices unjustly restrict access to asylum in the U.S. These policies can be characterized as tools of "neo-refoulement." Neo-refoulement is a strategy used to foreclose the possibility of asylum. It allows States parties to the 1951 Refugee Convention to evade their international obligation to refrain from returning people to places where they may be at risk of harm. Section I provides a brief history of the origins and spirit of refugee law. Section II discusses the Baker *cases, which laid the groundwork for enforcing U.S. interdiction and return practices. Section III discusses* Sale v. Haitian Centers Council, Inc.*, a Supreme Court case that sanctioned those practices. Section IV discusses how the MPP continues the U.S. Government's pattern of neo-refoulement. Section V briefly discusses the MPP's procedural history at the time of writing.*

[*] J.D. Candidate, Class of 2023. University of Miami School of Law. Managing Editor, *International and Comparative Law Review*. Thank you to Professors Rebecca A. Sharpless, Irwin P. Stotzky, and Ira J. Kurzban for their suggestions and guidance while writing this Note. Thank you to the members of the *International and Comparative Law Review* for their hard work and dedication throughout the publication process. A very special thank you to Bree for her unyielding love and support.

INTRODUCTION

In 2021, history seemed to be repeating itself. Political instability in Haiti after the assassination of President Jovenel Moïse and other crises left many Haitians "feeling they had no option but to leave—despite the difficulties they face in fleeing to other countries."[1] Thousands of Haitians arrived at the Texas border in late September 2021.[2] They raised makeshift encampments under a bridge that connected Del Rio, Texas, to Mexico's Ciudad Acuña.[3] Their fate was uncertain. Many hoped for asylum but to no avail.

By September 24th, border enforcement agencies had cleared the encampments.[4] Most Haitians were sent back to Haiti under "Title 42 [of the Public Health Service Act], a controversial measure that the Trump Administration used, citing COVID-19 risk, to expel asylum seekers before granting them hearings."[5] Others were sent to border regions in Mexico to wait for a hearing in immigration court.[6] Only

---

[1] Jasmine Aguilera, *How History Is Repeating Itself for Haitian Migrants Trying to Enter the U.S.*, TIME (Sept. 30, 2021, 11:55 AM), https://time.com/6102229/haitian-migrants-us-border-texas.
[2] *Id*.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*

some were allowed into the U.S. to make formal asylum claims.[7] During that time, some estimated that the Biden Administration "expelled more Haitians back to Haiti, without granting them the opportunity to present asylum claims, than the Trump Administration did."[8] This is not the first time the U.S. Government has restricted the rights of Haitians, and other migrants, to make asylum claims in the U.S.[9] The U.S. has a history of unjustly restricting access to asylum.

In the 1970s, the U.S. Government faced the overwhelming arrival of unauthorized Haitians by boat. These Haitian boat people fled the Duvalier dictatorship and arrived by the thousands on the shores of Southern Florida.[10] The Haitian exodus was so massive that President Carter created a special immigrant category for them and for boat people from Cuba: the Cuban-Haitian Entrant Category.[11] Yet, the category did not exist for long; the Florida Southern District Court deemed it unlawful because it discriminated against Haitians on account of their race and nationality.[12]

In 1980, President Carter signed the Refugee Act into law. The Refugee Act aligned U.S. immigration law with the United Nations' 1951 Refugee Convention. This led to the amendment of § 243(h)(1) of the Immigration and Nationality Act (INA)[13]—today, renumbered as INA § 241(b)(3).[14] The amended version of then § 243 pertained to "withholding" the removal of migrants deemed to be refugees as defined in the Refugee Act[15] or, more specifically, those migrants who could establish a well-founded fear of persecution on account of their

---

[7] *See id.*
[8] *Id.*
[9] *See generally* IRWIN P. STOTZKY, SEND THEM BACK (2018).
[10] *See id.* at 52.
[11] ALISON MOUNTZ, THE DEATH OF ASYLUM: HIDDEN GEOGRAPHIES OF THE ENFORCEMENT ARCHIPELAGO 41 (2020).
[12] *See* Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), *modified sub nom*. Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. 1982); *see also* STOTZKY, *supra* note 9, at 52-53 (discussing *Civiletti*).
[13] 8 U.S.C. § 1253(h)(1) (1996).
[14] 8 U.S.C. § 1231(b)(3) (2005).
[15] STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 1161 (7th ed. 2019).

"race, religion, nationality, membership of a particular social group, or political opinion."[16]

Theoretically, the post-1980 version of INA § 243 expanded protections for refugees by mirroring the Refugee Convention's principle of *non-refoulement*, or non-return, under Article 33.[17] The principle of non-refoulement prohibits the return of refugees to territories where their life or freedom would be endangered.[18] Notwithstanding, several cases in the early 1990s tested the protections in INA § 243.[19]

From late 1991 to early 1992, the Eleventh Circuit Court of Appeals heard a series of cases concerning a class of interdicted Haitians being held in Guantanamo, Cuba. Collectively, these cases can be referred to as *Haitian Refugee Center, Inc. v. Baker*,[20] or simply as "the *Baker* cases." Briefly stated, the *Baker* cases arose because the Bush Administration was forcibly repatriating interdicted Haitians despite the precarious political conditions in Haiti due to a military coup.[21] The Haitian Refugee Center, Inc. (HRC) requested "that the court enjoin [Secretary of State, James Baker III, and the other government defendants] from forcefully repatriating Haitians not identified as candidates for asylum until the implementation of procedures providing adequate protection to Haitians pursuing political asylum."[22] The HRC asserted rights under "the First and Fifth Amendments; an Executive Order; guidelines promulgated pursuant to the Executive Order; the Refugee Act of 1980; the Immigration and

---

[16] United Nations Convention relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter 1951 Convention]; *see* United Nations Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (incorporating the provisions of the 1951 Convention but removing its temporal and geographical restrictions) [hereinafter 1967 Protocol].

[17] *See* 1951 Convention, *supra* note 16, at art. 33.

[18] *Id.*

[19] *See, e.g.*, Haitian Refugee Ctr., Inc. v. Baker, 789 F. Supp. 1552 (S.D. Fla. 1991) [hereinafter *Baker I*]; Haitian Refugee Ctr., Inc. v. Baker, 949 F.2d 1109 (11th Cir. 1991) [hereinafter *Baker III*]; Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498 (11th Cir. 1992) [hereinafter *Baker VI*].

[20] *See Baker I*, 789 F. Supp. at 1552; *Baker III*, 949 F.2d at 1109; *Baker VI*, 953 F.2d at 1498.

[21] STOTZKY, *supra* note 9, at 145-159 (discussing the events giving rise to the *Baker* cases).

[22] *Id.* at 159.

Nationality Act; the Administrative Procedure Act; and rules of International Law . . . ."[23]

After a series of back-and-forth litigations, granting and reversing the HRC's request for injunctive relief, the Eleventh Circuit Court of Appeals ultimately held in the government's favor.[24] The court held, among other things, that the Haitians could not "avail themselves of any judicially enforceable rights under [INA § 243(h)]" because they had "not yet reached 'a land border' or a 'port of entry.' Therefore, their claims under the INA must fail."[25] The HRC applied for certiorari but was denied on February 24, 1992, thereby "giving the government the authority to repatriate the Haitians, whatever the consequences."[26] Later, however, the Supreme Court granted certiorari to resolve conflicting decisions between the Eleventh and Second Circuit Courts of Appeals concerning interdicted Haitians and INA § 243(h).[27] That case was *Sale v. Haitian Centers Council, Inc.*[28]

In *Sale*, the Supreme Court ruled that INA § 243(h) and Article 33 of the Refugee Convention did not apply on the high seas. [29] *Sale* was a case about whether the U.S. Coast Guard could intercept Haitian boat people from the high seas and forcibly repatriate them to Haiti.[30] The majority held that the Coast Guard's actions did not violate § 243's withholding-of-removal protections, nor did they violate the obligation of non-refoulement under Article 33 of the Refugee Convention.[31] However, Justice Blackmun filed a lone, stinging dissent.[32]

Nevertheless, the majority's decision in *Sale* authorized the U.S. Government to continue bending its duty of non-refoulement; the decision made U.S. interdiction at sea a tool of "neo-refoulement." "Neo-refoulement" is a concept that refers to the strategic policies that

---

[23] *Id.*
[24] *Baker VI*, 953 F.2d at 1510.
[25] *Id.*
[26] STOTZKY, *supra* note 9, at 167.
[27] *See* Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1357 (2d Cir. 1992), *rev'd sub nom*. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993).
[28] *Sale*, 509 U.S. at 155.
[29] *Id.* at 159.
[30] *See id.* at 158.
[31] *Id.* at 159.
[32] *See id.* at 188 (Blackmun, J., dissenting).

States parties to the Refugee Convention enact to evade their international obligation of non-refoulement under Article 33.[33] One such strategy is by preventing migrants from ever reaching, or remaining within, sovereign territory.[34] The *Baker* cases and *Sale* opened the door for other policies of neo-refoulement, such as the Migrant Protection Protocols (MPP).

The MPP, also known as the "Remain in Mexico" program, forces asylum seekers arriving from Mexico to wait there for the duration of their immigration proceedings.[35] Asylum seekers are sent to dangerous border regions in Mexico where they are often targeted by criminal cartels and are at risk of extreme violence.[36] They are isolated away. For all intents and purposes, the southern border regions are metaphorical islands for MPP enrollees. They are sent there to create "physical, psychological, and legal distance" between them and the public.[37] They are kept out of sight to be kept out of mind. As a result, their access to a fair asylum adjudication process is severely restricted.

This Note argues that the *Baker*[38] cases and *Sale*[39] paved the way for the U.S. Government to use interdiction as a tool to evade its obligation of non-refoulement under Article 33 of the Refugee Convention and opened the door to the Migrant Protection Protocols

---

[33] *See* Jennifer Hyndman & Alison Mountz, *Another Brick in the Wall? Neo-"Refoulement" and the Externalization of Asylum by Australia and Europe*, 43 GOV'T & OPPOSITION 249, 250 (2008); *see also* MOUNTZ, *supra* note 11, at 7 n.2.

[34] *See* MOUNTZ, *supra* note 11, at 29.

[35] Press Release, Dep't Homeland Sec., Migrant Protection Protocols (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols [hereinafter DHS Press Release] (stating that certain asylum seekers are not subject to MPP, including those who claim a fear of return to Mexico and unaccompanied alien children).

[36] Jonathan Blitzer, *How the U.S. Asylum System Is Keeping Migrants at Risk in Mexico*, NEW YORKER (Oct. 1, 2019), https://www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico.

[37] Geoffrey Heeren, *Distancing Refugees*, 97 DENV. L. REV. 761, 761 (2020).

[38] *See, e.g.*, Haitian Refugee Ctr., Inc. v. Baker, 789 F. Supp. 1552, 1552 (S.D. Fla. 1991) [hereinafter *Baker I*]; Haitian Refugee Ctr., Inc. v. Baker, 949 F.2d 1109, 1109 (11th Cir. 1991) [hereinafter *Baker III*]; Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1498 (11th Cir. 1992) [hereinafter *Baker VI*].

[39] Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 158 (1993).

program. It argues that both interdiction at sea and the MPP are used as tools of neo-refoulement, which undermine international refugee law and nullify the object and purpose of the Convention. Additionally, both practices unjustly restrict access to asylum in the U.S.[40]

Section I provides a brief history of the origins and spirit of refugee law. Section II discusses the *Baker* cases, which laid the groundwork for enforcing U.S. interdiction and return practices. Section III analyzes the majority's reasoning in *Sale*, as well as Justice Blackmun's dissent. Section IV discusses how the MPP is the U.S. Government's latest tool of neo-refoulement. Finally, Section V briefly discusses the MPP's procedural history at the time of writing.

I: HISTORICAL BACKGROUND OF REFUGEE LAW

A. Origins of International Refugee Law

To understand the MPP's impact on access to asylum, it is first important to understand why and how modern refugee law developed. It began at the international level. The concept of "asylum" entered the international consciousness in the wake of World War II.[41] The United Nations (UN) recognized that the millions of people displaced by the war needed protection.[42] The UN strived to accomplish that through international cooperation.[43] In 1950, it established the United Nations High Commissioner for Refugees (UNHCR).[44]

The UNHCR has three multifaceted functions. First, it promotes international agreements to protect refugees.[45] Second, it works with governments to improve conditions within countries to

---

[40] *See* STOTZKY, *supra* note 9, at 142 n.5 (discussing the United States' commitment to the United Nations' Universal Declaration of Human Rights which states in Article 13 that "'[e]veryone has the right to leave any country, including his own….' Article 14 states that '[e]veryone has the right to seek and enjoy in other countries asylum from persecution.'").
[41] *See* LEGOMSKY & THRONSON, *supra* note 15, at 1142-43.
[42] *Id.* at 1144.
[43] *Id.* at 1145.
[44] *Id.*
[45] *Id.*

reduce the number of people requiring protection.[46] Lastly, the UNHCR promotes admission of people requiring protection.[47] To fulfill those humanitarian functions, the UNHCR adopted the 1951 Convention Relating to the Status of Refugees (Convention).[48]

Under the Convention, a "refugee" was a person who was unable or unwilling to return to their country of origin because of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[49] The Convention's original definition also included a geographic and temporal limitation. Under Article I, a "refugee" was a person who was outside her country of origin due to "events occurring in Europe before 1 January 1951."[50] To address that limitation, the UNHCR amended the Convention in 1967 through a *protocol*.[51]

The 1967 Protocol Relating to the Status of Refugees (Protocol) expanded the Convention's "refugee" definition by removing the Convention's geographic and temporal limitations.[52] This left the international community "with a more generic refugee agreement," one that provided universal coverage.[53] Despite this change, the Protocol maintained the Convention's fundamental principles of "non-discrimination, non-penalization and *non-refoulement*."[54] Among these, the principle of non-refoulement is the Convention's cornerstone.

B. The Principle of Non-Refoulement

The term "*non-refoulement*" derives from the French word "*refouler*," which means to return or "[t]o repulse . . . to drive back, to

---

[46] *Id.*
[47] *Id.*
[48] *See* 1951 Convention, *supra* note 16.
[49] 1951 Convention, *supra* note 16.
[50] *Id.*
[51] A "protocol" is "[a] treaty amending and supplementing another treaty." *Protocol*, BLACK'S LAW DICTIONARY POCKET EDITION (5th ed. 2016).
[52] 1967 Protocol, *supra* note 16, at art. 1.
[53] LEGOMSKY & THRONSON, *supra* note 15, at 1147.
[54] 1951 Convention, *supra* note 16, at 3.

repel."[55] Under Article 33 of the Convention, signatory States are prohibited from returning 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 obligation of non-refoulement is triggered when a migrant reaches the sovereign territory of a signatory State.[57]

Notwithstanding, contracting States have no obligation to protect *all* refugees. States owe no duty of non-refoulement to those "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 . . . of a particularly serious crime, constitutes a danger to the community of that country."[58] In other words, the Convention "does not . . . apply to all persons who might otherwise satisfy the definition of a refugee in Article 1."[59] That aside, the principle of non-refoulement has become customary in international law.

Scholars of international law consider the principle of non-refoulement to have "attained the normative value of *jus cogens*."[60] In international law, *jus cogens*, or "compelling law," refers to a hierarchically superior form of law considered to be above local or national laws.[61] Norms of *jus cogens* are therefore peremptory, which means that States are not allowed to enact laws that deviate from them.[62] That is because *jus cogens* norms "are considered norms so

---

[55] Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting) (quoting *refouler*, LAROUSSE MODERN FRENCH-ENGLISH DICTIONARY (1981)).

[56] 1951 Convention, *supra* note 16, at art. 33.

[57] *See* MOUNTZ, *supra* note 11, at 7 ("In a simple exclusionary equation, states use geography strategically to undermine access to the rights accrued when a person lands on sovereign territory, including the right to seek asylum.").

[58] 1951 Convention, *supra* note 16, at art. 33.

[59] *Id.* at 4.

[60] Jean Allain, *The* jus cogens *Nature of* non-refoulement, 13 INT'L J. REFUGEE L. 533, 533 (2001).

[61] Amber Couzo, *Asylum or Exile? A Look at How the Trump Administration Is Changing U.S. Asylum Policies*, 52 U. MIAMI INTER-AM. L. REV. 169, 198 (2021) (citing Kamrul Hossain, *The Concept of* Jus Cogens *and the Obligation Under the U.N. Charter*, 3 SANTA CLARA J. INT'L L. REV. 72, 73 (2005)).

[62] *See* Allain, *supra* note 60, at 534 n.3 (quoting Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties which state, respectively, that "a peremptory norm

essential to the international system that their breach places the very existence of that system in question."[63] The purpose of the Convention is to shield people from persecution, not to deliver them to it. With that in mind, it is easy to see why the principle of non-refoulement should be considered *jus cogens*.

When contracting States enact policies that deviate from the principle of non-refoulement, they undermine the object and purpose of the Convention, thereby weakening the integrity of international refugee law. Although *jus cogens* norms exist, as expressed in Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties,[64] signatory States have enacted policies that bend the principle of non-refoulement to its limit. One way they have done this is through interdiction at sea. *Interdiction* refers to the act of intercepting or seizing something, such as contraband, or someone, such as an asylum seeker, at sea.[65] Interdiction is a tool of what border scholars have called "neo-refoulement."

II. INTERDICTION AT SEA AS A TOOL OF NEO-REFOULEMENT

Neo-refoulement "refers to a geographically based strategy of preventing the possibility of asylum through a new form of forced return different from non-*refoulement*."[66] It is a way for States parties to the 1951 Refugee Convention to "evad[e] the legal obligation not to return people to places where they may be at risk of harm."[67] According to migration expert and geographer Alison Mountz, States parties to the Convention use neo-refoulement strategies to regain control over unauthorized and unexpected migration.[68] So, although the United States acceded to the Protocol in 1968, simultaneously

---

of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted," and that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.").

[63] *Id.* at 535.

[64] *See id.* at 534 n.3.

[65] To "interdict" means to "intercept and seize (contraband, etc.)." *Interdict*, BLACK'S LAW DICTIONARY POCKET EDITION (5th ed. 2016).

[66] Hyndman & Mountz, *supra* note 33.

[67] MOUNTZ, *supra* note 11, at 247.

[68] *See id.* at 33-34.

binding it to the 1951 Convention,[69] it has used interdiction at sea as a way to restrict access to asylum. One of the most notorious examples of U.S. interdiction at sea traces back to the 1970s and involves Haitians.

A. A Brief History of Haitian "Boat People"

In the 1970s, thousands of Haitians arrived in the United States by boat. These "boat people" fled the dictatorship of Jean-Claude "Baby Doc" Duvalier, who took over Haiti's leadership after the death of his father, François "Papa Doc" Duvalier.[70] In 1978, President Jimmy Carter's Administration created the "Haitian Program" in response to the arrival of thousands of unauthorized Haitians by sea.[71] The Haitian Program was designed to "process asylum claims and remove people quickly and en masse, speeding up removal by denying parole once people were detained through creation of an exceptional legal category called the 'Cuban-Haitian entrant category.'"[72]

However, in 1980, the Southern District Court of Florida found that the expeditious nature of the Cuban-Haitian entrant program denied Haitian asylum seekers adequate review of their cases.[73] The court also found that the program unlawfully discriminated against Haitians because of their nationality and race, thereby denying their rights to due process under the Fifth Amendment of the U.S. Constitution.[74] The court enjoined the Carter Administration from removing the Haitian asylum seekers until the court approved of a new asylum application procedure.[75] But before the court's decision

---

[69] *See* 1967 Protocol, *supra* note 16, at art. 1 ("The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.").

[70] *See* Carl Lindskoog, *Violence and racism against Haitian migrants was never limited to agents on horseback*, WASH. POST (Sept. 30, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/10/02/violence-racism-against-haitian-migrants-was-never-limited-horseback-riders.

[71] MOUNTZ, *supra* note 11, at 40-41.

[72] *Id.* at 41.

[73] Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 451-52 (S.D. Fla. 1980), *modified sub nom*. Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. 1982).

[74] *Id.* at 511; *see* U.S. CONST. amend. V.

[75] *Civiletti*, 503 F. Supp. at 532-33.

was announced, changes in U.S. refugee law had already been developing.

In 1980, President Carter signed the Refugee Act (the Act) in response to the "hundreds of thousands of Vietnamese and Cambodians [fleeing] political chaos and physical danger in their homelands."[76] The Act "raised the annual ceiling for refugees from 17,400 to 50,000" and authorized the intake of more in emergency circumstances.[77] It also aligned U.S. immigration law with international refugee law. For example, the Act modeled its definition of "refugee" after the Convention, as amended by the Protocol.[78] Indeed, the Act adopted the international standard of "well-founded fear of persecution" to determine refugee status.[79] However, a significant difference between the Refugee Act and the Convention is that the Act covers both noncitizens who have reached U.S. territory and noncitizens who are still abroad.[80] Despite the 1980 Refugee Act's humanitarian promise, the U.S. Government restricted access to asylum when President Reagan entered office.[81]

When President Reagan entered office in 1981, the U.S. Government's approach to Haitian boat people changed. On September 23, 1981, the U.S. and the Republic of Haiti agreed to allow the U.S. Coast Guard to intercept vessels on the high seas and return passengers to Haiti.[82] This was known as the U.S.-Haitian Interdiction Program. The program's purpose was to "intercept vessels engaged in the illegal transportation of undocumented aliens to [U.S.] shores."[83] The agreement included a non-penalization guarantee; that is, the Haitian government promised not to punish the repatriated Haitians for their illegal departure.[84] Furthermore, the U.S. Government agreed to refrain from returning Haitians who qualified for refugee status.[85]

---

[76] *Refugee Act of 1980*, NAT'L ARCHIVES FOUND., https://www.archivesfoundation.org/documents/refugee-act-1980 (last visited Oct. 20, 2022).
[77] *Id.*
[78] *See* LEGOMSKY & THRONSON, *supra* note 15, at 1149.
[79] *Refugee Act of 1980*, *supra* note 76.
[80] *See* LEGOMSKY & THRONSON, *supra* note 15, at 1145-49.
[81] *See* 3 C.F.R. § 12324 (1981).
[82] Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 160 (1993).
[83] *Id.*
[84] *Id.*
[85] *Id.*

Six days later, on September 29, 1981, President Reagan issued Proclamation 4865,[86] "in which he characterized 'the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States' as 'a serious national problem detrimental to the interests of the United States.'"[87] President Reagan then issued Executive Order 12324, titled "Interdiction of Illegal Aliens," to suspend the entry of unauthorized migrants arriving by sea.[88] Reagan "ordered the Coast Guard to intercept vessels carrying such aliens and to return them to their point of origin," except for Convention refugees who did not consent to being returned.[89] Haitians intercepted at sea were interviewed on Coast Guard cutter ships to determine if they made a credible showing for refugee status.[90]

In the asylum process, this initial interview is known as a "credible fear" interview—the first screening threshold. Those deemed to be economic migrants were "screened out" and returned to their country of origin.[91] In contrast, those deemed to have shown a credible fear of being returned to their country of origin were "'screened in' and transported to the United States to file formal applications for asylum."[92] Notwithstanding the U.S.-Haitian Interdiction Program and Reagan's Executive Order, the Haitian exodus continued into President George H.W. Bush's term.

From October 1991 to April 1992, the U.S. Coast Guard had interdicted over 34,000 Haitians.[93] Such high volumes made processing on Coast Guard cutters unsafe. For that reason, the U.S. Department of Defense opened the U.S. Naval Base at Guantanamo, Cuba, for detention and processing of interdicted Haitians.[94] Regardless, the Haitian exodus continued by the thousands. By the third week of May 1992, the Coast Guard had intercepted approximately 10,497 undocumented migrants.[95] This overwhelmed

---

[86] 3 C.F.R. § 4865 (1981).
[87] *Sale*, 509 U.S. at 160.
[88] 3 C.F.R. § 12324 (1981).
[89] *Sale*, 509 U.S. at 160-61.
[90] *Id.* at 161.
[91] *Id.*
[92] *Id.* at 161-62.
[93] *See id.* at 163.
[94] *Id.*
[95] *Id.*

the facilities at Guantanamo and led the U.S. Navy to conclude "that no additional migrants could safely be accommodated [there]."[96]

The inability to safely screen interdicted Haitians at facilities in Guantanamo, or onboard Coast Guard cutters, led President Bush to issue Executive Order No. 12807 (Order 12807).[97] Order 12807 called for the Coast Guard to forcibly repatriate Haitians interdicted *on the high seas* without first determining whether they qualified as refugees.[98] In international law, "high seas" refers to the "ocean waters beyond the jurisdiction of any country."[99] Thus, questions emerged about the reach of the U.S. Immigration and Nationality Act of 1952 (INA) and of Article 33 of the Convention.

B. The Route to Sale: The Baker Cases

In September 1991, the Haitian military displaced Haiti's first democratically elected president, Jean-Bertrand Aristide.[100] In the weeks following the military coup in Haiti, the U.S. paused the forced repatriation of interdicted Haitians.[101] However, forced repatriations resumed by mid-November 1991.[102] This prompted the Haitian Refugee Center, Inc. (HRC) to sue for injunctive relief to prevent the U.S. Government from forcibly returning to Haiti interdicted Haitians being held at Guantanamo.[103]

In the *Baker* cases, the HRC first sought injunctive relief in the Southern District Court of Florida.[104] The district court certified the case as a class action.[105] The HRC asserted that the government "failed to use minimally adequate procedures to 'identify and protect' Haitians fleeing the de facto government in Haiti, and that such actions

---

[96] *Id.*
[97] 3 C.F.R. § 12807 (1992); s*ee Sale*, 509 U.S. at 163-66.
[98] *Sale*, 509 U.S. at 164 n.13.
[99] *High Seas*, BLACK'S LAW DICTIONARY POCKET EDITION (5th ed. 2016).
[100] JEFFREY S. KAHN, ISLANDS OF SOVEREIGNTY: HAITIAN MIGRATION AND THE BORDERS OF EMPIRE 3 (2019).
[101] *Sale*, 509 U.S. at 162.
[102] *Id.*
[103] *See id.* at 163.
[104] Haitian Refugee Ctr., Inc. v. Baker, 789 F. Supp. 1552, 1552 (S.D. Fla. 1991) [hereinafter *Baker I*].
[105] STOTZKY, *supra* note 9, at 160.

violated" the U.S. Government's non-refoulement obligation under Article 33 of the Convention and Protocol.[106] Additionally, the HRC claimed that the government violated § 243(h) of the INA, the Administrative Procedure Act, the "HRC's First Amendment rights to speak with class members and potential members at Guantanamo," and the plaintiffs' right to due process under the Fifth Amendment.[107]

On December 3, 1991, Senior District Judge C. Clyde Atkins entered a preliminary injunction against the government.[108] Judge Atkins found that forcibly repatriating the interdicted Haitians being held at Guantanamo would cause them "irreparable, even fatal, injury if the injunction [was] not granted."[109] The district court also found that Immigration and Nationality Services (INS) officials had used "substantially inadequate" procedures, which violated the INS's own guidelines when screening interdicted Haitians.[110] Finally, the "district court held that the government's actions violated Article 33 of the United Nations Protocol Relating to the Status of Refugees and that the HRC's First Amendment rights had been violated by the government's total ban on HRC's access to its clients."[111] The government was prohibited from repatriating interdicted Haitians "either until the merits of the underlying action [were] resolved or until defendants implement[ed] and follow[ed] procedures . . . adequate to ensure that Haitians with bona fide political asylum claims [were] not forced to return to Haiti in violation of Article 33 of the Protocol."[112] The government quickly appealed the injunction.[113]

On December 17, 1991, the Eleventh Circuit Court of Appeals dissolved the lower court's injunction and remanded the case.[114] The Eleventh Circuit held that Article 33 of the Protocol Relating to the Status of Refugees is not a "self-executing" international agreement;

---

[106] *Id.*
[107] *Id.*
[108] *Baker I*, 789 F. Supp. at 1554.
[109] *Id.* at 1554; *see* STOTZKY, *supra* note 9, at 159-61 (discussing the *Baker I* opinion).
[110] STOTZKY, *supra* note 9, at 160 (quoting *Baker I*, 789 F. Supp. at 1577).
[111] STOTZKY, *supra* note 9, at 160.
[112] *Baker I*, 789 F. Supp. at 1578.
[113] STOTZKY, *supra* note 9, at 161.
[114] *See* Haitian Refugee Ctr., Inc. v. Baker, 949 F.2d 1109, 1111 (11th Cir. 1991) [hereinafter *Baker III*]; for *Baker II*, *see* Haitian Refugee Ctr., Inc. v. Baker, 789 F. Supp. 1579 (S.D. Fla. 1991).

therefore, it does not apply to aliens who have not yet reached United States territory.[115] "A 'self-executing' international agreement is one that directly accords enforceable rights to persons without the benefit of Congressional implementation."[116] In simpler terms, U.S. courts were not bound to enforce Article 33 of the Protocol absent legislative implementation. As such, the Eleventh Circuit dissolved the Southern District Court's injunction and remanded the case with instructions.[117]

On remand, the Southern District Court again granted injunctive relief,[118] and again the government appealed.[119] On February 4, 1992, the Eleventh Circuit Court of Appeals "issued an opinion vacating all injunctive orders by the district court and remanded with instructions to dismiss the action because the complaint 'fail[ed] to state a claim upon which relief c[ould] be granted.'"[120] The HRC applied for certiorari, but the Supreme Court denied their application on February 24, 1992.[121] Thus, the *Baker* cases came to an end, but their legal questions were still open to debate.

On July 29, 1992, the Second Circuit Court of Appeals decided *Haitian Centers Council, Inc. v. McNary*.[122] *McNary* was a case dealing with virtually the same issues as the *Baker* cases, but in New York. The *McNary*[123] court, however, held that the government's forcible repatriation of interdicted Haitians under Executive Order 12807[124] indeed violated INA § 243(h).[125] The Second Circuit disagreed with the Eleventh Circuit's conclusion that interdicted Haitians could not assert a claim based on § 243(h) because they had not reached U.S.

---

[115] *Baker III*, 949 F.2d at 1110.
[116] *Id.*
[117] *Id.* at 1110-11; *see also* STOTZKY, *supra* note 9, at 161, 163 (discussing Judge Hatchett's dissenting opinion in *Baker III*).
[118] Haitian Refugee Ctr., Inc. v. Baker, 950 F.2d 685 (11th Cir. 1991) [hereinafter *Baker IV*].
[119] Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1498 (11th Cir. 1992) [hereinafter *Baker VI*]; for *Baker V*, *see* Baker v. Haitian Refugee Ctr., Inc., 502 U.S. 1083 (1992).
[120] STOTZKY, *supra* note 9, at 165 (quoting *Baker VI*, 953 F.2d at 1515).
[121] *Id.* at 167.
[122] Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350 (2d Cir. 1992), *rev'd sub nom*. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 167 (1993).
[123] *See id.* at 1367-68.
[124] 3 C.F.R. § 12807 (1992).
[125] 8 U.S.C. § 1253(h)(1).

territory.[126] The Second Circuit's decision in *McNary*[127] therefore created a split with the Eleventh Circuit's decision in *Baker VI*.[128] On June 21, 1993, however, the Supreme Court resolved the circuit split through its decision in *Sale v. Haitian Centers Council, Inc.*[129]

III. SALE V. HAITIAN CENTERS COUNCIL, INC.

In 1993, the Supreme Court decided *Sale v. Haitian Centers Council, Inc.*[130] *Sale* was a case about the interdiction of Haitians on the high seas by the U.S. Coast Guard under the auspices of President Bush and his successor, President Bill Clinton.[131] There, the Court decided whether the interdiction and forced repatriation of Haitians under Order 12807[132] violated INA § 243(h)(1)—today, renumbered as § 241(b)(3).[133] It also decided whether the Order violated the United States' non-refoulement obligation under Article 33 of the Convention.[134] Ultimately, the Court held that Order 12807 did not violate either.[135]

A. Justice Stevens's Majority Opinion

Justice Stevens wrote the majority opinion in *Sale*, which seven other justices joined. The Court held that Order 12807 violated neither INA § 243(h)(1) nor Article 33 of the Convention; Justice Stevens reasoned that neither had extraterritorial effect.[136] Simply put, refugee protections under § 243(h)(1) and Article 33 of the Convention did not

---

[126] *See McNary*, 969 F.2d at 1354.
[127] *Id.* at 1367–68.
[128] Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1525 (11th Cir. 1992) [hereinafter *Baker VI*].
[129] Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 158 (1993).
[130] *Id.*
[131] *See id.* at 164-65.
[132] 3 C.F.R. § 12807 (1992).
[133] *See Sale*, 509 U.S. at 158.
[134] *See id.* at 159.
[135] *Id.*
[136] *See id.* at 183.

apply beyond the United States' geographic limits:[137] here, on the high seas. The overarching reason was that Article 33 is not self-executing. That means Congress needed to pass "subsequent implementing legislation" for U.S. courts to enforce the duty of non-refoulement.[138] The Court explained by parsing out the language of both provisions.

1. The Distinctive Meaning in INA § 243(h)(1)

First, the Court interpreted the text of INA § 243(h)(1) (§ 243) by looking at its legislative history. Before the 1980 Refugee Act, § 243 read as follows: "[t]he Attorney General is authorized to *withhold deportation* of any alien . . . *within the United States* to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion."[139]

After the Refugee Act passed, § 243 read as follows: "[t]he Attorney General *shall not deport or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[140] Both versions of INA § 243 protect refugees; however, the Court read the post-1980 version to be more expansive. The Court reasoned that "[b]y adding the word 'return' and removing the words 'within the United States' from § 243(h), Congress extended the statute's protection to both [deportable and excludable aliens]."[141]

The words "deportable" and "excludable" describe aliens in different situations.[142] On one hand, deportable aliens are in the

---

[137] *Id.* at 176; *see Extraterritorial*, BLACK'S LAW DICTIONARY POCKET EDITION (5th ed. 2016) ("Occurring outside a particular state or country; beyond the geographic limits of a particular jurisdiction.").
[138] LEGOMSKY & THRONSON, *supra* note 15, at 1163.
[139] *Sale*, 509 U.S. at 202.
[140] *Id.* at 170 (emphasis added).
[141] *Id.* at 175-76.
[142] *See also* Wu v. Holder, 567 F.3d 888, 891-92 (7th Cir. 2009) (noting that *Sale* distinguished between "deportation" and "exclusion" proceedings, but that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 "eliminated [that] distinction . . . and replaced them with a unified 'removal proceeding.'").

country and are subject to expulsion from the inside.[143] They are taken from the inside and put outside. On the other hand, excludable aliens are not in the country, but rather are at the country's border and are "ineligible for admission or entry" at that moment.[144] They are outside and not allowed inside. The Court interpreted the word "return" in the post-1980 version of the Refugee Act to apply to *excludable* aliens at the border, not to *deportable* aliens in the country.[145] The Court reasoned that any other interpretation would make the word "deport" in the post-1980 version of § 243 unnecessary and redundant.[146]

Moreover, the Court reasoned that Congress intended to extend § 243's protection to both deportable and excludable aliens because it removed the phrase "within the United States" and added the word "return." It reasoned that removing the phrase "cured" the geographic restriction that made § 243 applicable only to unauthorized aliens already inside the country, and therefore subject to deportation.[147]

Notwithstanding the "extended" protection, the Court concluded that § 243 did not have extraterritorial effect. According to the Court, the 1980 amendment "did nothing to change the presumption that both [deportable and excludable] aliens would continue to be found only within [or at the threshold of] United States territory."[148] Here, the Court is relying on the presumption that "Acts of Congress do not ordinarily apply outside [the United States'] borders" unless such an intent is clearly manifested.[149] The statute's silence on that point therefore made the interdiction of Haitians on the high seas legal under Executive Order No. 12807.[150]

---

[143] *See Deportation*, BLACK'S LAW DICTIONARY POCKET EDITION (5th ed. 2016) ("The act or an instance of removing a person to another country; esp., the expulsion or transfer of an alien from a country.").
[144] *Excludable*, BLACK'S LAW DICTIONARY POCKET EDITION (5th ed. 2016).
[145] *Sale*, 509 U.S. at 174 ("By using both ["deport" and "return"], the statute implies an exclusively territorial application, in the context of both kinds of domestic immigration proceedings."].
[146] *Id.*
[147] *Id.* at 176.
[148] *Id.*
[149] *Id.* at 173.
[150] *See id.* at 177.

2. The Geographic Limitation in Article 33

Next, the Court turned to the text of Article 33 in the Refugee Convention. Like with INA § 243, the majority concluded that Article 33 was not meant to have extraterritorial effect.[151] To come to that conclusion, the Court used the second paragraph in Article 33 (Article 33.2) to interpret the first paragraph (Article 33.1). As discussed above,[152] Article 33 establishes the obligation of non-refoulement. The principle of non-refoulement prohibits the return of refugees "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."[153] However, the Court reasoned that Article 33.2 restricts certain refugees from claiming the benefit of non-refoulement in Article 33.1.[154]

Article 33.2 states that the benefit of non-refoulement in Article 33.1 "may not . . . 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 . . . of a particularly serious crime, constitutes a danger to the community of that country."[155] Relying on the phrase "of the country in which he is," the Court concluded that the non-refoulement obligation under Article 33.1 did not apply on the high seas. It reasoned that:

> If the first paragraph did apply on the high seas, no nation could invoke the second paragraph's exception with respect to an alien there: *An alien intercepted on the high seas is in no country at all*. . . . It is more reasonable to assume that the coverage of 33.2 was *limited to those already in the country* because it was understood that

[151] *Id.* at 179.
[152] *See* discussion *supra* Section I.B.
[153] 1951 Convention, *supra* note 16, at art. 33.
[154] *Sale*, 509 U.S. at 179-80.
[155] *Id.* at 179.

> 33.1 obligated the signatory state only with respect to aliens within its territory.[156]

Put differently, the Court tells us that Articles 33.1 and 33.2 must be read together. Therefore, when Article 33.2 refers to a refugee's location, that is, "*the country in which he is*," it is disqualifying refugees located on the high seas because "*an alien intercepted on the high seas is in no country at all*."[157] According to the Court, interpreting Article 33.1 as having extraterritorial effect would render pointless the language of Article 33.2. It "would create an absurd anomaly" where dangerous aliens on the high seas would be able to claim the benefit of non-refoulement while dangerous aliens already in the country could not.[158]

Furthermore, the Court determined that Article 33's use of the term "*refouler*" applies to those aliens who are "merely 'on the threshold of initial entry.'"[159] In other words, the term *refouler* applies to excludable aliens, not to deportable ones. As discussed above,[160] "excludable" aliens are those at the border who are ineligible for entry. Meanwhile, "deportable" aliens are those who have entered the country and are subject to removal from within. As such, the Court interpreted Article 33's use of *refouler* as "a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination."[161] Therefore, the duty of non-refoulement under Article 33 is triggered only when an alien actually reaches sovereign territory. "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."[162]

In sum, the majority in *Sale* determined that the silence of both INA § 243(h)(1) and Article 33 regarding extraterritorial effect prevented the Court from overruling the interdiction of Haitians on

---

[156] *Id.* at 179-80 (emphasis added).
[157] *Id.* at 179 (emphasis added).
[158] *Id.* at 180.
[159] *Id.* (quoting *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958)).
[160] *See* discussion *supra* Section III.A.1.
[161] *Sale*, 509 U.S. at 182.
[162] *Id.* at 183.

the high seas under Executive Order No. 12807.[163] All but Justice Blackmun joined Justice Stevens's majority opinion.[164] Blackmun filed a dissenting opinion in which he challenged the majority's "tortured" reasoning.[165]

B. Justice Blackmun's Dissenting Opinion

In his dissent to *Sale*, Justice Blackmun criticized the majority's reasoning for ratifying Executive Order No. 12807. In his view, the majority ruled the way it did because, to them, "the word 'return' does not mean return . . . [and] because the opposite of 'within the United States' is not outside the United States . . . ."[166] Blackmun first turned his analysis to the language of Article 33. He argued that the language of the Convention must be interpreted according to the 1969 Vienna Convention on the Law of Treaties (VCLT).[167] The VCLT is an authoritative guide on how international treaties should be interpreted.[168] More specifically, Article 31 of the VCLT mandates that "[a] treaty *shall* be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose."[169] As Justice Blackmun saw it, the majority did not interpret the phrase "return ('*refouler*')" based on its ordinary meaning.[170]

1. The Ordinary Meaning in Article 33

According to Blackmun, the "ordinary meaning of 'return' is 'to bring, send, or put (a person or thing) back to or in a former position.'"[171] To overcome the VCLT's "ordinary meaning" mandate,

---

[163] 3 C.F.R. § 12807 (1992).
[164] *See Sale*, 509 U.S. at 158.
[165] *Id.* at 191 (Blackmun, J., dissenting).
[166] *Id.* at 188-89.
[167] *Id.* at 191.
[168] LEGOMSKY & THRONSON, *supra* note 15, at 1372.
[169] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.
[170] 1951 Convention, *supra* note 16, at art. 33.
[171] *Sale*, 509 U.S. at 191 (Blackmun, J., dissenting) (quoting *return*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986)).

countries must provide "extraordinarily strong contrary evidence" for reading a treaty's plain language differently.[172] Instead, the majority interpreted the term *refouler* "almost entirely on the fact that *American* law makes a general distinction between *deportation* and *exclusion*."[173]

As discussed above,[174] the majority in *Sale* argued that "[b]y adding the word 'return' and removing the words 'within the United States' from § 243(h)," Congress intended the phrase "return ('*refouler*')" to apply exclusively to aliens at the border—that is, excludable aliens.[175] Based on that understanding of congressional intent, the majority argued that the distinction between deportation and exclusion in American law therefore applied to the word "return" as used in Article 33 of the Refugee Convention; Justice Blackmun disagreed.[176]

Blackmun responded by emphasizing that "the Convention does not ban the 'exclusion' of aliens who have reached some indeterminate 'threshold'; it bans their 'return.'"[177] What Blackmun meant is that it should not matter where a refugee is seized "from." Rather, what matters for Article 33 purposes, is where a refugee is sent "to." In this case, the U.S. Coast Guard had "gone forth to *seize* aliens who are *not* at its borders and *return* them to persecution."[178] The majority's "strain to sanction that conduct"[179] required a "puzzling" logical progression.[180]

According to Blackmun, the majority's reasoning began by conceding that the ordinary meaning of *refouler* was "to repulse . . . to drive back, to repel."[181] So construed, the text of Article 33 would still

---

[172] *Id.* at 194 (quoting Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982)).
[173] *Id. But see* Wu v. Holder, 567 F.3d 888, 891 (7th Cir. 2009) (noting that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 superseded the distinction the *Sale* Court made between "deportation" and "exclusion" proceedings).
[174] *See* discussion *supra* Section III.A.
[175] *Sale*, 509 U.S. at 175.
[176] *See id.* at 188 (Blackmun, J., dissenting).
[177] *Id.* at 191.
[178] *Id.* at 197.
[179] *Id.* at 189.
[180] *Id.* at 192.
[181] *Id.* at 191 (quoting *refouler*, LAROUSSE MODERN FRENCH-ENGLISH DICTIONARY (1981)).

describe what the Coast Guard was doing. The Coast Guard was repulsing, driving back, and repelling interdicted Haitians to Haiti. Notwithstanding, the majority claimed that to "return ('*refouler*')" describes "a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination."[182] With that in mind, Blackmun summarized the majority's logical progression as follows: "'*refouler*' means repel or drive back; therefore 'return' means only exclude at a border; therefore the treaty does not apply [extraterritorially] . . . ."[183] Blackmun did not find that line of reasoning satisfactory.[184]

Next, Justice Blackmun turned to the majority's discussion of Article 33.2. Article 33.2 permits contracting States to return refugees "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 . . . of a particularly serious crime, constitutes a danger to the community of that country."[185] Blackmun argued that Article 33.2's geographic limitation should not be mistaken as a geographic limitation on Article 33 as a whole.

The object and purpose of the Refugee Convention is expressed in Article 33.1, which does not include a geographic limitation.[186] In contrast, Article 33.2 includes a geographic limitation to allow States to deport criminal refugees illegally present in those States.[187] Without that caveat, States may not have signed on to the Convention to begin with. Blackmun recognized that. He also recognized that projecting the geographic limitation in Article 33.2 onto Article 33.1 would defeat the object and purpose of Article 33 and of the Convention: to protect people from persecution, wherever they may be. Along the same lines, Blackmun rebutted the majority's projection of a geographic limitation onto INA § 243.[188]

---

[182] *Id.* at 182.
[183] *Id.* at 192.
[184] *See id.*
[185] *Id.* at 179.
[186] *See id.* at 190 (Blackmun, J., dissenting).
[187] *Id.* at 193.
[188] *Id.* at 202 ("To read into § 243(h)'s mandate a territorial restriction is to restore the very language that Congress removed.").

2. No Geographic Limitation in § 243(h)(1)

As noted above,[189] the Refugee Act of 1980 was enacted to align the Immigration and Nationality Act with the international Refugee Convention. Based on that purpose, Blackmun argued that the majority inappropriately read a geographic limitation into INA § 243. Section 243(h)(1)—today § 241(b)(3)—permits withholding the removal of refugees.[190] "Withholding of removal" is the phrase used in U.S. immigration law to reflect the non-refoulement principle in Article 33 of the Convention.[191] Blackmun explained that, because Article 33.1 of the Convention forbids the return of refugees to persecution regardless of where they are located, § 243 should also be read to be "devoid of territorial restrictions."[192]

Moreover, Blackmun argued that the post-1980 version of INA § 243(h) does not have a geographic limitation because Congress did not explicitly write one in when it could have done so.[193] To support his reasoning, Blackmun looked at two other sections of the INA that govern asylum: §§ 207[194] and 208.[195] Section 207 covers aliens who make claims from *overseas*,[196] and § 208 covers aliens who make claims when already "*physically present* in the United States or who arrive[] in the United States"[197] at a land border or entry port. Congress explicitly included geographic limitations in both of those sections, yet it refrained from doing the same in § 243. Therefore, Blackmun found the majority's reading of a geographic limitation into § 243 "peculiar" at best, and "puzzling" at worst.[198] "When Congress wanted a provision to apply only to aliens 'physically present in the United States, or at a land border or port of entry,' it said so."[199]

---

[189] *See* discussion *supra* Introduction.
[190] *See* LEGOMSKY & THRONSON, *supra* note 15.
[191] *Id.*
[192] *Sale*, 509 U.S. at 202 (Blackmun, J., dissenting).
[193] *Id.* at 204.
[194] 8 U.S.C. § 1157.
[195] 8 U.S.C. § 1158.
[196] § 1157.
[197] § 1158 (emphasis added).
[198] *Sale*, 509 U.S. at 192.
[199] *Id.* at 204.

Furthermore, Justice Blackmun argued that §§ 207, 208, and 243 were amended by the Refugee Act "to establish a comprehensive, tripartite system for the protection of refugees fleeing persecution."[200] One part of that system was to protect potential refugees overseas, another for those physically present in the U.S. or at a border, and yet another for those who are neither here nor there, but rather are simply seeking protection.[201] Congress amended § 243 to reflect the principle of non-refoulement. That is why "Congress (1) deleted the words 'within the United States'; (2) barred the Government from 'return[ing],' as well as 'deport[ing],' alien refugees; and (3) made the prohibition against return mandatory, thereby eliminating the discretion of the Attorney General over such decisions."[202] Reading a geographic limitation into the post-1980 version of § 243(h) "restore[s] the very language that Congress removed" and erodes the principle of non-refoulement found in Article 33 of the Refugee Convention.[203]

All in all, *Sale v. Haitian Centers Council, Inc.*[204] had a reverberating impact on access to asylum in the U.S. The majority in *Sale* believed that Executive Order No. 12807 may have bent, but did not break, the United States' obligation of non-refoulement under the Convention. However, as noted earlier,[205] the principle of non-refoulement should be considered *jus cogens*—a hierarchically superior form of law above local or national laws. That is, the principle of non-refoulement is "so essential to the international system" of protecting refugees that any deviation from it "places the very existence of that system in question."[206]

The Court in *Sale* deviated from the principle of non-refoulement and interdiction at sea continues to be U.S. policy. The Court's decision in *Sale* allows the U.S. to evade its international obligation of non-refoulement under Article 33 by allowing the U.S.

---

[200] *Id.* at 204.
[201] *See id.* ("Unlike [§§ 207 and 208], however, which explicitly apply to persons present in specific locations, the amended § 243(h) includes no such limiting language. The basic prohibition against forced return to persecution applies simply to 'any alien.'").
[202] *Id.* at 202.
[203] *Id.*
[204] *Id.* at 158.
[205] *See* discussion *supra* Section I.B.
[206] Allain, *supra* note 60, at 535.

Coast Guard to prevent migrants from getting near sovereign territory. Interdiction at sea is a tool of "neo-refoulement." Today, the U.S. continues to bend the principle of non-refoulement in ways that further restrict access to asylum. One of those ways is through the Migrant Protection Protocols.

IV. THE RIPPLE EFFECTS OF *SALE*: MIGRANT PROTECTION PROTOCOLS

On January 24, 2019, the Trump Administration announced a new policy that would impact asylum law.[207] The U.S. Department of Homeland Security (DHS) announced that it would begin implementing "an unprecedented action that will address the urgent humanitarian and security crisis at the Southern border."[208] It was referring to the Migrant Protection Protocols (MPP) program, which is informally known as the "Remain in Mexico" program. The MPP severely impacts access to asylum in the U.S. A close look at the MPP's legal framework and its practical effects expose it as the U.S. Government's latest tool of neo-refoulement.

A. The MPP's Legal Framework

The MPP is based on § 235(b)(2)(C) of the INA (§ 235).[209] Section 235 authorizes[210] the Secretary of DHS to return aliens to the foreign contiguous territory from where they arrived on land for the duration of their immigration proceedings.[211] The program applies to aliens who make affirmative claims for asylum at the Southern border,

---

[207] *See* DHS Press Release, *supra* note 35.
[208] *Id.*
[209] 8 U.S.C. § 1225(b)(2)(C).
[210] *Compare* Texas v. Biden, 554 F. Supp. 3d 818, 852 (N.D. Tex. 2021) (holding that DHS's decision to terminate MPP violated DHS's "obligation[]" to return inadmissible aliens to a contiguous territory under INA § 235 when DHS could not meet its obligation to detain them), *with* Biden v. Texas, 142 S. Ct. 2528, 2541 (2022) (holding that DHS has the "*discretionary* authority" to return aliens to a contiguous territory, not a "mandatory" authority to do so should it be unable to meet its detention obligations).
[211] § 1225(b)(2)(C); *see also* 8 U.S.C. § 1229(a).

outside of the U.S.[212] It also applies to aliens already present in the U.S. illegally and who are apprehended near the border—which can mean anywhere within 100 miles.[213] To make an "affirmative" asylum claim means to request asylum without being prompted to by a U.S. Customs and Border Patrol officer.

Notwithstanding, the MPP does not apply to Mexican asylum seekers because returning them to Mexico would violate INA § 241(b)(3)[214]—formerly known as INA § 243(h)(1).[215] It would also blatantly violate the U.S.'s obligation of non-refoulement under the Refugee Convention.[216] Aliens exempt from the program also include unaccompanied alien children, aliens in expedited removal proceedings, and others on a case-by-case basis.[217]

Before the MPP, migrants who made an affirmative asylum claim were referred to an asylum officer for a "credible fear" interview.[218] This is otherwise known as a non-refoulement interview.[219] "'Credible fear' of persecution means that there is a significant possibility, taking into account the credibility of statements and other factors, that the person could establish eligibility for asylum."[220] If the alien established a credible fear, they were entitled to remain in the U.S. while their asylum case was adjudicated.[221] The MPP changed that.

The MPP replaced the "credible fear" threshold with the "more likely than not" threshold, which is a higher burden of proof for asylum seekers to meet. Under the MPP, asylum seekers need to prove that they will "more likely than not" face persecution if returned to

---

[212] *See* DHS Press Release, *supra* note 35.
[213] *See generally* Deborah Anthony, *The U.S. Border Patrol's Constitutional Erosion in the "100-Mile Zone"*, 124 PENN ST. L. REV. 391 (2020).
[214] 8 U.S.C. § 1231(b)(3).
[215] 8 U.S.C. § 1253(h)(1).
[216] *See* 1967 Protocol, *supra* note 16, at art. 33.
[217] DHS Press Release, *supra* note 35.
[218] *See* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 913 (17th ed. 2020).
[219] *See id.* at 915.
[220] *Id.* at 914.
[221] Lauren Gambardella, *70,000 Returned to Mexico Through the Migrant Protection Protocols: Just Bad Policy or Illegal as Well?*, 35 GEO. IMMIGR. L.J. 983, 996 (2021).

Mexico.[222] This higher threshold makes it more difficult for eligible asylum seekers to avoid MPP enrollment. This is clear considering that nearly 70,000 people were returned to Mexico under the MPP from January 2019 to December 2020 alone.[223]

According to former Secretary of Homeland Security, Kirstjen Nielsen, the MPP would curb mass unauthorized immigration.[224] DHS also claimed that the "MPP [would] help restore a safe and orderly immigration process" and increase migrants' safety.[225] In a practical sense, however, the program has put migrants in danger. MPP enrollees are sent to border regions in Mexico that the U.S. Department of State has "consider[ed] as hazardous as active-combat zones."[226] As of February 2021, "[a]t least 1,544 of these individuals were raped, kidnapped, assaulted, tortured, or otherwise victimized."[227] These border regions serve as metaphorical "islands" where asylum seekers must wait, away from the "mainland" where they seek refuge.

B. The MPP's Island Logic

As described earlier,[228] neo-refoulement "refers to a geographically based strategy of preventing the possibility of asylum through a new form of forced return different from non-*refoulement*-."[229] It is a way for States to "evad[e] the legal obligation not to return people to places where they may be at risk of harm."[230] In that way, States are able to evade their international obligation of non-return. Interdiction at sea is a tool of neo-refoulement, as seen in the *Baker* cases[231] and *Sale v. Haitian Centers Council, Inc.*[232]

---

[222] *Id.*
[223] *See id.* at 984.
[224] DHS Press Release, *supra* note 35.
[225] *Id.*
[226] Gambardella, *supra* note 221, at 984.
[227] *Id.*
[228] *See* discussion *supra* Section II.
[229] Hyndman & Mountz, *supra* note 33.
[230] MOUNTZ, *supra* note 11, at 247.
[231] *See, e.g.*, Haitian Refugee Ctr., Inc. v. Baker, 949 F.2d 1109, 1109 (11th Cir. 1991) [hereinafter *Baker III*]; Haitian Refugee Ctr., Inc. v. Baker, 789 F. Supp. 1552, 1552 (S.D. Fla. 1991) [hereinafter *Baker I*]; Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1498 (11th Cir. 1992) [hereinafter *Baker VI*].
[232] Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 155 (1993).

Like interdiction in the *Baker* cases and *Sale*, the MPP bends the principle of non-refoulement, thereby undermining international refugee law. In those cases, the U.S. Government reached beyond its borders to prevent Haitian boat people from reaching sovereign U.S. territory where they would accrue the right to seek asylum. Metaphorically speaking, the U.S. pushed its borders outward, beyond its "fixed, earthbound core."[233] This expansion pushed asylum seekers back to Haiti or to offshore detention centers in Guantanamo. The MPP continues that tradition by creating metaphorical islands out of the border regions in Mexico where enrollees are sent.

Sending MPP enrollees to those regions has similar isolating effects as if they were sent to actual islands. The MPP creates "physical, psychological, and legal distance" between asylum seekers and the public.[234] This distance severely impacts asylum seekers' ability to mount an effective case in U.S. immigration courts. For example, the geographic distance alone creates a heavy logistical burden that restricts effective access to legal counsel. Time and resources are stretched thin. Hope is drained and spirits are tested as asylum seekers navigate the MPP's administrative waters. MPP enrollees are required "to check in for their hearings in the middle of the night, make an exhausting journey across the border [to a port of entry], wait for several hours, and then spend only a few minutes presenting their case—usually without the benefit of an attorney."[235] This raises important questions of procedural due process under the Fifth Amendment as in the *Baker* cases.

Indeed, some have argued that the change from a "credible fear" threshold to a "more likely than not" threshold creates issues of procedural due process.[236] The higher threshold is the same burden of proof as in regular removal proceedings, but with fewer procedural safeguards.[237] For example, during regular removal proceedings, aliens are allowed "a full evidentiary hearing before an immigration

---

[233] KAHN, *supra* note 100, at 4.
[234] Heeren, *supra* note 37.
[235] Emily J. Johanson, *The Migrant Protection Protocols: A Death Knell for Asylum*, 11 U.C. IRVINE L. REV. 873, 897 (2021).
[236] *See generally* Gambardella, *supra* note 221, at 996-97 (explaining how the "more likely than not" burden of proof violates aliens' due process rights).
[237] *See id.*

judge, notice of their rights, access to counsel, time to prepare, and administrative and judicial review."[238] Meanwhile, aliens subject to the MPP must meet the same high burden of proof in an informal interview with an asylum officer, not a judge, and without the "opportunity to present witnesses or gather documentary evidence."[239] Furthermore, the asylum officer's determination is not subject to a judicial or other administrative review process.[240] Taking that into consideration, it is easy to see how the MPP is adverse to the spirit of the Refugee Convention.

"The [MPP] contradicts the purpose of asylum as a system that allows people in danger to seek refuge by increasing the risk of refoulement."[241] It is no secret that the MPP puts asylum seekers at risk of harm.[242] The Biden Administration recognizes that MPP enrollees have been "subject[ed] to extreme violence and insecurity at the hands of transnational criminal organizations that profited from putting migrants in harms' way while awaiting their court hearings in Mexico."[243] Yet, the Biden Administration expanded the program—not by court order, but by its own choice.[244] Like being sent to an island, MPP enrollees must practically fend for themselves in dangerous border regions. They are isolated away to be forgotten.

In short, the MPP bends and eviscerates the principle of non-refoulement. Like interdiction at sea in the *Baker* cases and in *Sale*, the MPP creates distance between MPP enrollees and asylum.[245] It bends the principle of non-refoulement to its limit and erodes the object and purpose of the 1951 Refugee Convention. Like interdiction at sea, the MPP is a tool of neo-refoulement that further restricts access to asylum.

---

[238] *Id.* at 996.
[239] *Id.*
[240] *Id.* at 996-97.
[241] Johanson, *supra* note 235, at 898.
[242] *See* Blitzer, *supra* note 36.
[243] Press Release, Dep't Homeland Sec., Explanation of the Decision to Terminate the Migrant Protection Protocols 1, 2 (Oct. 29, 2021), https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-justification-memo.pdf.
[244] Nicole Narea, *Biden's bewildering decision to expand a Trump-era immigration policy*, VOX (Dec. 4, 2021, 8:30 AM), https://www.vox.com/policy-and-politics/2021/12/4/22815657/biden-remain-in-mexico-mpp-border-migrant.
[245] Heeren, *supra* note 37.

V. CHALLENGING THE MPP

When President Biden entered office in 2021, he issued Executive Order No. 14010 to have the new Secretary of Homeland Security, Alejandro Mayorkas, review the MPP. [246] After his review, Secretary Mayorkas determined that the MPP should be terminated and issued a memorandum stating so on June 1, 2021 (June 1 Memorandum).[247] However, the states of Texas and Missouri sued the Biden Administration in federal court to prevent the MPP's termination.[248]

The states argued, among other things, that the June 1 Memorandum violated INA § 235.[249] The Northern District Court of Texas found that, under § 235, DHS had the obligation to either return inadmissible aliens to the foreign contiguous territory where they came from, or else put them in mandatory detention.[250] When DHS admitted it could not meet its obligation of mandatory detention, the court reasoned that the only other option DHS had was to return the aliens.[251] Therefore, when DHS decided to terminate the MPP, while simultaneously being unable to meet its mandatory detention obligation, DHS violated its obligations under § 235. In other words, the court interpreted both INA § 235(b)(2)(C) (contiguous-territory return authority) and § 235(b)(2)(A) (mandatory detention authority) as duties. The court therefore granted injunctive relief against DHS by vacating the June 1 Memorandum.[252] The MPP had to continue "*in good faith*."[253]

Following the Northern District Court's decision, DHS reattempted to terminate the MPP. DHS appealed the district court's decision, but the Fifth Circuit Court of Appeals affirmed the Texas

---

[246] 3 C.F.R. § 14010 (2021).
[247] Texas v. Biden, 554 F. Supp. 3d 818, 828 (N.D. Tex. 2021), *enforced in part*, No. 2:21-CV-067-Z, 2021 WL 539984 (N.D. Tex. Nov. 18, 2021), *and aff'd*, 20 F.4th 928 (5th Cir. 2021), *as revised* (Dec. 21, 2021), *cert. granted*, 142 S. Ct. 1098 (2022).
[248] *Biden*, 554 F. Supp. 3d at 828.
[249] *Id.* at 828-29.
[250] *Id.* at 852.
[251] *Id.*
[252] *Id.* at 857.
[253] *Id.*

court's injunction.[254] The Supreme Court also denied DHS's application to stay the injunction.[255] On October 29, 2021, the Secretary of DHS issued a new memorandum (October 29 Memorandum) explaining the agency's new reasoning for terminating the program.[256] Based on the October 29 Memorandum, DHS again appealed the Texas injunction, but again the Fifth Circuit affirmed it.[257]

On June 30, 2022, the Supreme Court reversed and remanded the Texas injunction.[258] It disagreed with the Texas courts' conclusion that, among other things, DHS's decision to terminate the MPP violated INA § 235.[259] Chief Justice Roberts delivered the Court's opinion, reasoning that the contiguous-territory return authority given to the DHS Secretary under INA § 235(b)(2)(C) was "discretionary—and remains discretionary notwithstanding any violation of [§ 235(b)(2)(A)]."[260] The Court reasoned that the plain language of § 235(b)(2)(C) states that the Secretary of DHS "*may* return the alien to that territory pending a proceeding under section 1229a."[261] The "word 'may' *clearly* connotes discretion,"[262] therefore the North District Court of Texas and the Court of Appeals erred in concluding that the Secretary of DHS was obligated to return aliens to Mexico if DHS could not meet its burden of mandatory detention pursuant to § 235(b)(2)(A).[263] In sum, the Supreme Court held in a 5-4 decision that the Secretary of DHS has the discretionary authority to terminate the MPP because DHS is not obligated to exercise its contiguous-territory return authority as granted by § 235(b)(2)(C).[264] Following the

---

[254] Texas v. Biden, 10 F.4th 538 (5th Cir. 2021).
[255] *See* Biden v. Texas, 142 S. Ct. 926, 926 (2021).
[256] *See* Biden v. Texas, 142 S. Ct. 2528, 2544-45 (2022).
[257] Texas v. Biden, 20 F.4th 928 (5th Cir. 2021), *as revised* (Dec. 21, 2021), *cert. granted*, 142 S. Ct. 1098 (2022).
[258] *Biden*, 142 S. Ct. at 2548.
[259] *Id.*
[260] *Id.* at 2544; *see also* § 1225(b)(2)(A).
[261] *Id.* at 2541 (emphasis added).
[262] *Id.* at 2541.
[263] *See id.* at 2541-42 ("Congress conferred contiguous-territory return authority in expressly discretionary terms.").
[264] *Id.* at 2544 ("[S]ection [235(b)(2)(C)] means what it says: 'may' means 'may,' and the INA itself does not require the Secretary to continue exercising his discretionary authority under these circumstances.").

Supreme Court's June 30th decision,[265] the Fifth Circuit court lifted "the injunction that required DHS to reimplement the Migrant Protection Protocols (MPP) in good faith."[266]

At the time of writing, the MPP seemed to be winding down.[267] In an August 8th press release, DHS confirmed that "[i]ndividuals are no longer being newly enrolled into MPP, and individuals currently in MPP in Mexico will be disenrolled when they return for their next scheduled court date."[268] As such, "[i]ndividuals disenrolled from MPP will continue their removal proceedings in the United States."[269] Despite its promise, the wind down process may still be subject to interruption due to claims based on the Administrative Procedure Act yet again[270] or perhaps on claims relating to Title 42 of the Public Health Service Act.[271]

The MPP, and practices like it, are contentious because they raise important questions about the relationship between domestic and international laws. Domestically, such practices raise questions about the role the Legislature should, or must, play in all of this. Globally, they raise questions about the balance between national sovereignty and international obligations. No matter how those questions are approached, what remains salient is that people will continue to seek refuge and a better life in the United States.

CONCLUSION

The Convention and Protocol Relating to the Status of Refugees were created to protect the vulnerable. The principle of non-refoulement is at the heart of both and is expressed in Article 33. However, practices like interdiction at sea and the MPP breach norms

---

[265] *See generally id.* at 2528.
[266] Press Release, Dep't Homeland Sec., DHS Statement on U.S. District Court's Decision Regarding MPP (August 8, 2022), https://www.dhs.gov/news/2022/08/08/dhs-statement-us-district-courts-decision-regarding-mpp.
[267] *See id.*
[268] *Id.*
[269] *Id.*
[270] *See generally Biden*, 142 S. Ct. at 2536-37.
[271] *See* Jennifer Shutt, *Federal judge allows continued Title 42 migrant expulsions at the border*, LA. ILLUMINATOR (May 20, 2022, 5:53 PM), https://lailluminator.com/2022/05/20/federal-judge-title-42-migrant-expulsions.

of international law. The MPP is a ripple effect of the *Baker* cases[272] and *Sale*.[273] Like interdiction at sea, the MPP is a way for the U.S. to evade its international obligations of non-refoulement. The MPP, and practices like it, eviscerate the spirit of the Convention. They are tools of neo-refoulement that unjustly restrict access to asylum in the U.S. Advocates of due process should oppose such practices to ensure the spirit of the Convention survives in U.S. refugee law.

[272] *See* Haitian Refugee Ctr., Inc. v. Baker, 949 F.2d 1109 (11th Cir. 1991) [*Baker III*]; Haitian Refugee Ctr., Inc. v. Baker, 789 F. Supp. 1552 (S.D. Fla. 1991) [*Baker I*]; Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498 (11th Cir. 1992) [*Baker VI*].
[273] *Sale* v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993).