

International Law and the Preemptive Use of State Interdiction Authority on the High Seas: the Case of Suspected Illegal Haitian Immigrants Seeking Entry Into the U.S.

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**INTERNATIONAL LAW AND THE PREEMPTIVE USE OF
STATE INTERDICTION AUTHORITY ON THE HIGH SEAS:
THE CASE OF SUSPECTED ILLEGAL HAITIAN IMMIGRANTS
SEEKING ENTRY INTO THE U.S.**

A. G. MARIAM, PH.D*

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I. INTRODUCTION

In the Fall of 1981, the U.S. adopted an unprecedented policy to stop the flow of undocumented Haitian immigration to the U.S. by interdicting suspected illegal Haitian immigrants on the high seas.¹ A

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1. The phrase "undocumented alien" or "immigrant" is used to refer to those persons who enter the United States without visas, passports or other official travel docu-

September, 1981, Presidential Proclamation stated that illegal immigration to the U.S. represented "a serious national problem detrimental to the interests of the United States."² The Proclamation addressed the "particularly difficult aspect of the problem in the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States."³ The Proclamation further announced that "in order to protect the sovereignty of the United States. . . the entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens."⁴ Six days before the issuance of the Proclamation, the U.S. exchanged diplomatic notes with the Haitian Government for a cooperative program of interdiction and selective return to Haiti of certain Haitian migrants and vessels.⁵

The Haitian migrant interdiction policy is still in effect. Since 1983, however, due to the substantial decline in the number of undocumented Haitians seeking entry into the U.S., the Coast Guard has not actively pursued the policy. Nevertheless, the Coast Guard still inter-

mentation. The phrase "illegal alien" is avoided in this discussion because of the derogatory and inconsistent use of the phrase in the popular media.

2. See Proclamation No. 4865, 46 Fed. Reg. 48 107 (1981), *reprinted in* 8 U.S.C. app. at 993 (1982); Executive Order No. 12324, 46 Fed. Reg. 48, 109 (1981), *reprinted in* 8 U.S.C. § 1182 (supp. note) (1982) [hereinafter Executive Order].

3. *Id.*

4. *Id.*

5. The basic terms of this U.S.-Haiti interdiction agreement provide:

Upon boarding a Haitian flag vessel. . . the authorities of the United States Government may address inquiries, examine documents and take such measures as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. . . .

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

The Government of the Republic of Haiti also agrees in the case of a U.S. flag vessel, outbound from Haiti, and engaged in such illegal trafficking, to permit, upon prior notification, the return to a Haitian port of that vessel and those aboard.

In any case, where a Haitian vessel is detained, the authorities of the United States Government shall promptly inform the authorities of the Government of the Republic of Haiti. . . .

The Government of the Republic of Haiti agrees. . . to prosecute illegal traffickers of Haitian migrants who do not have requisite permission to enter the country of the vessel's destination and to confiscate Haitian vessels or stateless vessels involved in such trafficking. The United States Government likewise agrees. . . .

Exchange of letters between Ernest Preeg, U.S. Ambassador to Haiti, and Edouard Francisque, Haitian Secretary of State for Foreign Affairs (September 23, 1981) [hereinafter U.S.-Haiti Agreement].

dicts vessels carrying suspected undocumented Haitians seeking entry into the U.S. whenever reported or located.⁶

This article focuses on the use of interdiction by the U.S. as an instrument of immigration law enforcement. Before its application to Haitians, interdiction had only been used as a retaliatory measure in the context of commercial maritime navigation or in situations involving serious threats to national security. The article critically examines the use of interdiction authority to prevent undocumented Haitian immigration to the U.S. This analysis considers the unprecedented use of interdiction as an instrument of immigration control in the context of four related issues: 1) the legal and policy dilemmas arising from the application of interdictory measures within the broader framework of U.S. treaty obligations;⁷ 2) the practical consequences of an official agreement to involuntarily return Haitian citizens interdicted on the high seas to Haitian authorities despite the fact that the interdictees have left their country illegally and may be bona fide refugees escaping persecution by the Haitian regime;⁸ 3) the selective and inconsistent

6. Since the vast majority of undocumented Haitians sought entry by boat there was a substantial decline in attempted entries after 1983 partly due to the increased interdiction of vessels carrying suspected undocumented Haitians. In fact the Coast Guard did not maintain active surveillance of the Windward Passage seeking Haitian vessels after 1983. Occasionally, however, there would be a boat carrying Haitians in distress. For instance, according to a N.Y. Times report, a freighter alerted the Coast Guard that a boat carrying Haitians 20 miles east of Miami was in imminent danger of sinking. The Coast Guard sent three helicopters, one C-130 aircraft and two cutters to the scene rescuing a total of 67 persons. The reporter observed that "[i]n previous rescue operations the Coast Guard has taken Haitian refugees to Miami and turned them over to immigration authorities." N.Y. Times, Jan. 27, 1986, at B6, col. 1.

7. The U.S. policy of interdicting undocumented Haitians on the high seas presents a special problem involving a conflict between the requirements of domestic U.S. public policy aimed at immigration control and U.S. international treaty obligations. This conflict is evident in the express and implied objectives of the policy of interdicting suspected illegal aliens on the high seas who may in fact be bona fide refugees escaping persecution from their homelands. For instance, under the Protocol Relating to the Status of Refugees, the U.S. has agreed to uphold the principle of non-refoulement which protects refugees from involuntary repatriation to a country where they may be subject to persecution. Consequently, the interdiction policy arguably contravenes U.S. obligations under the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 [hereinafter Protocol].

8. There is also the issue as to whether a country can exercise its sovereign powers to enter into bilateral agreements with another country in a manner which undermines its obligations under a prior multilateral international treaty. In the Haitian context this raises the question as to the legality of an agreement entered into by the U.S. and Haiti to return Haitian citizens on the high seas who not only left their country in violation of Haitian immigration laws but also may be bona fide refugees escaping

use of rights under one international treaty to circumvent obligations under another treaty;⁹ and 4) the international human rights implications of the implementation of an interdiction policy against suspected illegal Haitian immigrants.¹⁰

II. HAITIAN IMMIGRATION TO THE U.S.

A. *Increase in Undocumented Haitian Immigration: The Regime of Francois Duvalier*

Haitian immigration to the U.S. predates the large influx of undocumented Haitians in the late 1970's.¹¹ Haitians have been coming to the U.S. in small numbers since the late 1950's. These earlier immigrants generally settled in South Florida and in some of the major urban areas in the Northeast and Midwest.

The first large-scale Haitian migration to the U.S. occurred in the late 1950's and early 1960's.¹² This was triggered by the rise to power

persecution by the Haitian regime thus becoming eligible for protection under art. I, § 2 of the Protocol.

9. The issue in this regard focuses upon the U.S. exercise of interdiction authority pursuant to the 1958 Geneva Conference on the High Seas and its obligations under the Protocol. In formulating the interdiction policy an underlying U.S. view was that the "Coast Guard is authorized to stop ships upon the high seas in order to detect violations of American law." Memorandum for the Attorney General, Re: Proposed Interdiction of Haitian Flag Vessels, from Theodore Olson, Assistant Attorney General, to Benjamin Civiletti, Attorney General (Aug. 11, 1981) (citing 14 U.S.C. § 89(a)) [hereinafter Olson Memorandum]. However, U.S. exercise of interdiction authority against the Haitians tends to undermine U.S. treaty obligations under the Protocol which provides for the protection of refugees from involuntary repatriation to a country where they may be subject to persecution.

10. The field implementation of the interdiction order and the operational aspects of the policy raise complex questions of international law and U.S. obligations under international treaties. The procedures and safeguards established for the implementation of the interdiction program point to serious legal problems involving both domestic U.S. law and international law.

11. For an analysis of the factors leading to the mass departure of Haitian businessmen, journalists, politicians and others and the widespread use of repression during the early years of the Duvalier regime, see R. D. HEINL AND G. M. HEINL, WRITTEN IN BLOOD: THE STORY OF THE HAITIAN PEOPLE, 1971, at 585-665.

12. See "Root Causes of Haitian Migration" testimony by Alex Stepick on Oct. 28, 1981 presented to the Oversight Hearings on the Reagan Administration's Proposal for Immigration Reform, House Subcommittee on Immigration, Refugees and International Law, See also Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy*, 45 LAW AND CONTEMPORARY PROBLEMS, Spring 1982, at 163, 174-78 (1982).

of Francois ("Papa Doc") Duvalier in Haiti.¹³ The regimes of Duvalier, and later his son, were characterized by increased levels of political repression. This repression is believed to be largely responsible for the exodus of thousands of people from Haiti to the U.S. and various Caribbean countries. The regime, which dealt harshly with political opposition, fashioned a ubiquitous security apparatus known as the Tonton Macoute to suppress opposition and maximize the Duvaliers' political control.¹⁴ Acts of violence and brutality by the Tonton Macoute were common. And the imprisonment, torture and persecution of political opponents came to be the hallmark of the Duvalier regime.¹⁵

Haitians who came to the U.S. in the aftermath of Duvalier's rise to power, especially in the early 1960's, are generally believed to have had middle class backgrounds.¹⁶ Unlike the more recent undocumented Haitian immigrants, the vast majority of the earlier arrivals came to the U.S. by fulfilling the established legal requirements and did not appear to pose serious problems for U.S. immigration authorities.¹⁷

In the early 1970's, however, the character of Haitian immigration changed. Haitians began coming to the U.S. in large groups often without any documentation. Haitians also began using small boats that regularly landed in Southern Florida in sizeable numbers. In addition, Haitians continued to arrive in the Bahamas until the government there began expelling Haitians on the ground that they were causing eco-

13. Stepick, *Haitian Boat People*, *supra* note 12.

14. *Id.*

15. Human rights violations by the Haitian government have been documented by various international human rights groups. *See, e.g.*, THE AMNESTY INTERNATIONAL REPORT, 1 JUNE 1975 - 31 MAY 1976, at 83-85, 101-102; INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES REPORT ON THE STATUS OF HUMAN RIGHTS IN HAITI (December 13, 1979); *International Commission of Jurists*, 19 THE REVIEW, 1977, at 3-5. The U.S. State Department in its 1978 Annual Country report on human rights practices takes a slightly different perspective stating that "human rights violations were widespread during the regime of the late Francois Duvalier in the 1960's." UNITED STATES STATE DEPARTMENT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, 172-75 (1978) [hereinafter COUNTRY REPORTS]. The report further observes "Arrests for security or political reasons have declined substantially. Following the release of 290 prisoners. . .the Government declared there were no longer any political prisoners." *Id.* *See also* M. LUNDAHL, PEASANTS AND POVERTY: A STUDY OF HAITI.

16. *See* Stepick, "Root Causes of Haitian Migration," *supra* note 12. Scholarly analyses of Haitian immigration to the U.S. after "Papa Doc" Duvalier's rise to power are scanty. Much of the journalistic reporting on Haitians during the early period may be characterized as anecdotal. For a general analysis of Haitians in the U.S., *see* M. LAGUERRE, HAITIANS IN THE UNITED STATES, 21-27 (1979).

17. Stepick, "Root Causes of Haitian Migration," *supra* note 12.

conomic problems.¹⁸ Many of these Haitians eventually ended up in the U.S.¹⁹

The undocumented Haitian immigration issue was recognized as a major problem in the Summer of 1978 when the Immigration and Naturalization Service ("INS"), as well as Justice and State Department officials devised specific policies to expedite the exclusion and deportation of undocumented Haitians.²⁰ Aggressive measures to deport undocumented Haitians already in the U.S. and to stop new arrivals were adopted. Consequently, by the middle of 1979 thousands of undocumented Haitians had been apprehended by the INS and were undergoing various INS proceedings.²¹

18. In late 1977, the Bahamian government undertook a program of expulsion of Haitians residing in the country. An agreement was reached with the Haitian Government for the return of a set number of Haitians to Haiti on a regular basis. Because of the stringent residency requirements in the Bahamas, even those Haitians who had lived in the Bahamas for a long time were subject to expulsion. Although in the initial period, several hundred Haitians were returned, the Haitian Government soon reneged on the agreement and it was gradually discontinued. Nonetheless, harassment and mistreatment of Haitians in the Bahamas continued until late 1978. *See* N.Y. Times, July 18, 1978, at 1, col. 2.

19. The exodus in Haitian immigration from the Bahamas may be seen in the number of recorded Haitian boats arriving in Miami. In 1977, 8 boats carrying 278 Haitians were registered by the INS. In 1978, during the Bahamian expulsion, 84 boats and 1860 Haitians were registered. Sixty of these boats were registered as having originated in the Bahamas. In 1979, there was a precipitous drop in Haitian boat arrivals from the Bahamas. Out of the 95 boats carrying 2606 Haitians, only 15 had originated from the Bahamas. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, MONTHLY STATISTICS—LIST OF HAITIAN BOAT CASES (1977-1980).

20. The special policy aimed at expediting the deportation of undocumented Haitians was outlined in Memorandum from Mario Noto, Deputy INS Commissioner, to Michael Egan, Associate Attorney General (August 25, 1978) [hereinafter Noto Memorandum].

21. The total distribution of Haitian cases in various proceedings and different stages of processing as of July 30, 1979, is displayed in Table 1. At that time, there were a total of 9,871 Haitians in exclusion and deportation proceedings. There were 2,713 Haitians in exclusion proceedings, among which 525 individuals reportedly left the country voluntarily. Table 1 further shows that there were 84 exclusion hearings with immigration judges, with one-half of the cases completed and the other one-half pending. There were 7,093 Haitians in deportation proceedings of which 798 cases had been disposed of by means of voluntary departure. In terms of applications for political asylum, 1,048 Haitians who were in exclusion proceedings had applied; and 635 of these applications were denied while 381 were pending. Only 32 applications were approved. Among those Haitians in deportations proceedings, 4,147 had applied for asylum and 3,737 were denied while 384 were pending. Only 26 applications were approved. *See also* Table 1.

Table 1
Distribution of Total INS Workload as of July 30, 1979

	Exclu- sion Proceed- ings	Depor- tation Proceed- ings	Cases Received Previous Week	Total
TOTAL	2,713	7,093	65	9,871
EXAMINATIONS				
1. No. of Arrivals	2,672		62	2,734
(a) Withdrawals	525		47	572
(b) Excl. Proc.	2,147		15	216
ENFORCEMENT				
1. No. of Apprehensions		7,093	3	7,096
(a) OSC Issued		7,064	3	5,067
(b) V/D Prior to Hear		798	—	798
(c) Other - OSC Not Issued		1,241	—	1,241

STATUS OF WORKLOAD = SUMMARY

TOTAL WORKLOAD DISTRIBUTION

1. IJ Hearings	84	4,398	—	4,482
(a) Pending	42	3,920	—7	3,955
(b) Completed	42	478	+7	527
(1) Terminated	—	20	+1	21
(2) V/D. Dep/Exc.	42	458	+6	506
(3) Adm. Relief grated	—	—	—	—
2. Political Asylum	1,048	4,147	—	5,195
(a) Granted	32	26	—	58
(b) Denied	635	3,737	—	4,372
(c) Pending	381	384	—	765
3. Current Status of Special Interest Items				
(a) Abscondees	35	1,918	—2	1,951
(b) Abscondees Apprehended	—	993	2	995
(c) Total Detained	114	1	(+63-67)	111
(d) Litigation	1,785	2,504	—	4,289
(e) Administrative Relief Prior to OSC/Hearing	19	147	1	167
(f) Total Cases Pend- ing This Period	2,016	6,193	(+64-49)	8,225

Source: Immigration and Naturalization Service, Miami, Florida

^aTable is reproduction of actual INS workload statistics as prepared by the Miami INS office. Table includes all files since 1970.

By the Spring of 1978, the number of Haitians arriving in South Florida reached crisis proportions. By the middle of 1978, nearly 3,000 undocumented Haitians had been registered by the INS. In late 1978, and throughout 1979, there were several hundred arrivals per month. This trend continued with the arrival of nearly 25,000 undocumented Haitians in 1980.²²

B. *Undocumented Haitians: Fleeing Persecution or Seeking Opportunities?*

Since the early 1970's, U.S. officials have considered Haitians who come illegally to the U.S. to be economic migrants in search of better standards of living rather than individuals fleeing political persecution. Officials have continuously emphasized the role of economic factors in motivating undocumented Haitian immigration to the U.S.²³ This offi-

22. According to the Cuban-Haitian Task Force, by the end of April, 1981, a total of 38,536 Haitians had been registered by the INS, including those classified as EPI (Entered and Processed Immediately) arrivals and EWI (Entered Without Inspection) entrants. This figure also includes 2,184 pre-1976 entrants. The Task Force data showed that in 1980 alone, the INS had documented 24,259 Haitian entrants. Moreover, Task Force destination and resettlement data show that over 92 percent of the Haitian entrants had resettled in Florida, with the largest group of entrants (80%) located in Miami and the Lake Okeechobee areas. Fewer than 8 percent of the entrants had relocated in other states, mainly northeastern states. See A. G. Mariam, *The Economic Status and Labor Force Integration of Recent Undocumented Haitian Immigrants*, Report to the U.S. Department of Labor (Dec. 1982). For a comprehensive analysis of recent trends in undocumented Haitian immigration, see Mariam, *id.*, ch.V.

23. Long before Haitian immigration became a problem for the U.S., Amnesty International in 1973 reported:

Haiti's prisons are still filled with people who have spent years in detention without ever being charged or brought to trial. . . . The variety of torture is incredible: clubbing to death, maiming the genitals, food deprivation to the point of starvation, and insertion of red-hot poker into the back passage. In fact, these prisons are death traps and find a parallel with the Nazi concentration camps of the past but have no present-day equivalent.

Stepick, *Haitian Boat People*, *supra* note 12 (citing Church World Service, *Haitian Refugees Need Asylum: A Briefing Paper* 3 (Apr. 9, 1980)).

The official U.S. position on undocumented Haitian immigration has been articulated by various high level U.S. officials. According to former Assistant Secretary for Congressional Relations, Richard Fairbanks:

The average Haitian asylum applicant arriving in the U.S. today is from a rural area (many are fishermen or farmers) and demonstrates very little if any political awareness nor does he or she indicate any past political involvement. In their initial interview most cite: (1) lack of adequate economic opportunity in Haiti and (2) their hopes to be better able to support family members here or those remaining in Haiti through employment in the U.S. as reasons for leaving.

Letter from Assistant Secretary Richard Fairbanks, Department of State, to Congressman Romano Mazoli (Nov. 10, 1981).

Former Associate Attorney General Rudolph Giuliani made a similar assertion on the causes of Haitian migration. He observed: "The information we have received leads

cial view is based on the characteristics of the undocumented Haitian

us to conclude that most of the Haitians who have recently come to the U.S. have done so in search of economic betterment and do not have a well founded fear that they will be personally persecuted if they return." Letter from Associate Attorney General Rudolph Giuliani to Richard Posner (May 19, 1982).

Statements similar to Giuliani's reflecting U.S. policy have been documented in news reports since the mid 1970's. INS and State Department officials from the highest to the lowest officially espouse the economic definition of Haitian immigration. In 1979, Rick Swartz of the Washington Lawyers Committee summarized for Congressman Walter Fauntroy his discussion with Gene Eidenberg, Deputy Assistant to the President for Intergovernmental Affairs and Henry Owen of the National Security Agency. Swartz reported:

At his request, I discussed this plan (federal funds to South Florida) last week with Gene Eidenberg. . . and Henry Owen of the National Security Agency. The positions Eidenberg and Owen articulated were that they have not changed their view that Haitians are fleeing for economic rather than political reasons, that arriving Haitians were subjecting the greater community to communicable disease and the administration has decided to attempt to provide some Federal funding to deal with the health problems during the pending litigation. My response to this plan was that Haitians are ineligible for Federal benefits unless they are granted refugee status, that any solution short of refugee status is politically unacceptable. Memorandum, Rick Swartz, Lawyers Committee for International Human Rights, to Congressman Walter Fauntroy, Re: Status of Haitian Refugee Issue Politically, Legally and in Terms of Human Suffering ((N.D.) 1979).

The policy implication of the view that the Haitians were economic migrants is that despite the repressive character of the Haitian regime and the rampant violations of human rights in Haiti, the controlling factor in asylum determinations was going to be the economic profile and background of the Haitians. The underlying logic in this view is that the Haitians as economic migrants left their homeland voluntarily while political refugees are forced to leave their countries because of some form of persecution. In sum, by determining that the Haitians were economic refugees, policy-makers were concluding that the Haitians were not fleeing the repressive Duvalier regime but rather poverty and economic privations. In this context, former Deputy Assistant Secretary for Refugee and Migration Affairs, James Carlin observed:

Haiti is a very poor country, and almost inevitably, we have found it necessary to reject a substantial number of Haitians as economic refugees seeking to immigrate to the United States through the device of seeking political asylum. The mere fact that a person is from a country that is considered to have human rights problems does not necessarily imply that person would be singled out for persecution. It is the responsibility of the asylum applicant to establish a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion upon return to his country of nationality or habitual residence.

Letter from James L. Carlin, Deputy Assistant Secretary for Refugee and Migration Affairs to the Ad Hoc Committee of Haitian Organizations of Miami (September 11, 1978).

The basic contradiction in U.S. policy towards undocumented Haitians was summarized by Lichtenberg:

immigrants and the prevalent socioeconomic conditions in Haiti. The vast majority of the undocumented Haitians came from relatively impoverished socioeconomic backgrounds with limited education, skills or income.²⁴ And Haiti, the poorest country in the Western hemisphere, is a developing country with limited natural resources, a rapidly growing population and diminishing economic opportunities.²⁵

Although these factors tend to promote migration for economic reasons, there remain severe political problems in Haiti that could form the basis for legitimate political migration. Nevertheless, U.S. officials seem to blindly adhere to the contention that undocumented Haitians coming to the U.S. are fleeing poverty and economic hardship rather than political persecution. As a result, there has been a great deal of concerted effort on the part of the U.S. to return undocumented Haitians back to Haiti or prevent them from entering the U.S. Thus, over the past decade, undocumented Haitians have been subjected to a variety of measures, including interdiction to prevent their permanent migration to the U.S.²⁶

two Caribbean islands with allegedly repressive regimes; two mass emigrations to the allegedly friendlier shores of the United States. Yet the vast majority of those fleeing Castro's Cuba have been peacefully and successfully settled in their new land, while those fleeing Duvalier's Haiti are intercepted at sea or incarcerated by the thousands in massive detainment camps. Of the 125,000 Cubans who emigrated during the "Freedom Flotilla" of 1980, an estimated 98 percent have been admitted to legal resident status in a relatively quiet and orderly fashion. Yet the Immigration and Naturalization Service has launched a campaign to turn back Haitian vessels enroute to Florida and forcibly send away Haitians whose tiny boats survive the 600 miles of open sea. A grudging welcome is extended to the one group, but not the Haitians, who are recognized as refugees.

Id.

24. For a comprehensive analysis of the economic and labor force characteristics of undocumented Haitian entrants in the U.S., see Mariam, *supra* note 22.

25. The official view that Haitians come to the U.S. for economic reasons exacerbated by problems of underdevelopment is a cornerstone of U.S. policy towards Haitian entrants. The most recent AID Development Strategy Statement capsulizes:

Poverty in Haiti is not simply a distributional problem. Although distribution of income is extremely inequitable, even a radical redistribution of existing wealth would not result in widespread "middle class" living conditions. Nevertheless, a significant redistribution of existing wealth would go a measurable way toward providing income to meet the basic needs of the population and eliminating the egregiously substandard living conditions of the large majority of Haiti's people. . . .

AGENCY FOR INTERNATIONAL DEVELOPMENT, COUNTRY DEVELOPMENT STRATEGY, HAITI 4-8 (Jan. 1982) [hereinafter COUNTRY DEVELOPMENT STRATEGY].

26. Since 1964, Haitians fleeing the "dynastic" regimes of the Duvaliers have litigated in U.S. Courts to vindicate various rights and protections under U.S. law. The

III. LEGAL BASIS OF INTERDICTION AUTHORITY

A. *Interdiction in International Law*

Interdiction as a legal concept does not have a precise and exclu-

legal actions in which Haitians have been involved may be conveniently classified in terms of substantive issues. Thus, legal actions involving Haitian asylum issues include: *U.S. ex. rel. Mercer v. Esperdy*, 234 F. Supp. 611 (S. D. N.Y. 1964). (the relevance of materials on conditions in Haiti); *Hyppolite v. Sweeney*, 382 F.2d 98 (7th Cir. 1967) (taking judicial notice of human rights violations under the Haitian regime); *Gena v. Immigration and Naturalization Service*, 424 F.2d 227 (5th Cir. 1970) (denial of motion to reopen did not constitute abuse of discretion when asylum applicant did not produce new facts); *Coriolan v. Immigration and Naturalization Service*, 559 F.2d 993 (5th Cir. 1977) (Amnesty International Reports appropriate in Haitian Asylum Cases); *Fleurinor v. Immigration and Naturalization Service*, 585 F.2d 129 (5th Cir. 1978) (Applicant for 243(h) must establish that he specifically will be subject to persecution in the event of deportation); *Sannon v. U.S.*, 460 F. Supp. 458 (S. D. Fla. 1978) (INS regulations determining asylum claims must be promulgated in accordance with Administrative Procedure Act or are otherwise void); months); *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S. D. Fla. 1980) (Haitian plaintiffs proved variety of defects in the INS processing of Haitian asylum claims); *Sannon v. U.S.*, 631 F.2d 1247 (5th Cir. 1980) (that named petitioners received the relief sought and that class-wide relief was constitutionally impermissible under the facts); *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (right of alien to seek political asylum sufficient to invoke guarantee of due process); *Augustin v. Sava*, 735 F.2d 32 (2d Cir. 1984) (absence of adequate translation of political asylum proceedings denied plaintiff procedural rights). The issue of Haitian detention has also produced a modicum of litigation. These include: *Marquez-Colon v. Reagan*, 668 F.2d 611 (1st Cir. 1981) (injunction vacated on understanding that the federal government would comply with consent agreement with Puerto Rico); *Jean v. Meissner*, 90 F.R.D. 658 (S. D. Fla. 1981) (permissive joinder of parties and their claims appropriate with respect to Haitian refugees held without parole); *Louis v. Nelson*, 544 F. Supp. 973 (S. D. Fla. 1982) (the policy of placing excludable aliens in detention without parole was not discriminatorily applied against Haitians). *rev'd*, 711 F.2d 1455 (11th Cir. 1983) (determination that there was no discrimination against Haitian detainees was erroneous). Haitian legal efforts involving exclusion and deportation proceedings include: *Louis v. Meissner*, 532 F. Supp. 881 (S. D. Fla. 1982) (no causal relationship established between putatively illegal conduct by INS and injury to Haitian plaintiffs). *Desting-Estime v. Immigration and Naturalization Service*, 804 F.2d 1439 (9th Cir. 1986) (no abuse of discretion to refuse to allow aliens to redesignate country of deportation). Over the past couple of years, the question of interdicting potential Haitian entrants has been litigated in *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396 (D.C. Cir. 1985) (interdiction program is based on constitutional and statutory authority and does not violate Haitians' rights); *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987) (plaintiffs lacked standing to challenge interdiction program). Haitian plaintiffs have also sued to recover attorneys' fees from the government. *See, e.g., Louis v. Nelson*, 624 F. Supp. 836 (S. D., Fla., 1985) (Haitian plaintiffs entitled to attorney's fees under Equal Access to Justice Act but the fees must be adjusted downward for failure to prevail) *Louis*

sive definition.²⁷ There is a dearth of precedent and legal scholarship defining the exercise of express interdiction authority by states.²⁸ Generally, the concept of interdiction has been used to describe a state's use of naval forces to prevent another state from free access to navigation on the high seas. Although states have only sparingly used interdiction authority, its use is recognized in international law under certain circumstances.²⁹ Historically, however, states have exercised in-

v. Nelson, 646 F. Supp. 1300 (S. D., Fla. 1986) (Haitian attorneys entitled to reimbursement for costs and expenses).

27. The term "interdiction" has been employed differently in various legal traditions and historical periods. In civil law, the term has been used to signify suspension or exclusion from an office or privilege. BLACK'S LAW DICTIONARY 728-29 (5th ed. 1979). The term has also been used to describe a judicial process and decree by which a person is deprived of the exercise of his civil rights, *id.* particularly when a defendant is adjudicated to be insane. *See, e.g.,* Vance v. Ellerbee, 90 So. 735, 740, 150 La. 388 (1922). In an international commercial context, the term has been used to signify "[a]n 'interdiction of commercial intercourse' between two countries [involving] a governmental prohibition of commercial intercourse, intended to bring about an entire cessation for the time being of all trade whatever." The Edward, 1 Wheat. 261, 272 (1816).

28. Interdiction is generally viewed to be a hostile act directed by one nation against another and may presage the escalation of hostility under certain circumstances. In times of war, for instance, "interdiction" may be expressed in the form of an embargo prohibiting certain vessels from entry or exit from certain ports or general prohibition of commercial dealings. Such "interdiction" may be exercised as a reprisal for hostile acts by another nation. Under U.S. law, for instance, penalties of an embargo statute may involve the forfeiture of the guilty vessel, *U.S. v. The Good Friends*, 25 F. Cas. 1355 (D.C. od. 1812) (No. 15, 227), or confiscation of the prohibited goods, *The Rose*, 20 F. Cas. 1176 (C.C.D. Mass. 1812 (No. 12,044, 1 Gall. 211)). For a legal and policy analysis of the Haitian interdiction program, see Gutenkunst, *Interdiction of Haitian Migrants on the High Seas: A Legal and Policy analysis*, 10 YALE J. OF INT'L L., 151-184 (1984).

29. Article 22 of the Geneva Convention on the High Seas provides:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(a) That the ship is engaged in piracy; or

(b) That the ship is engaged in the slave trade; or

(c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (a), (b), and (c) above the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

terdictory authority narrowly to protect legitimate state interests.³⁰

The limitation on the use of interdiction as an instrument of national policy may be attributed to the fact that it directly limits the freedom of navigation. Therefore, it indirectly confers de facto sovereignty over the interdicted state. Since international law prohibits states from exercising such authority over other states, few states have used interdiction. However, Article 24 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone ("Geneva Convention"), allows for the use of interdictory authority by coastal states in such areas as customs, fiscal matters, immigration and sanitation.³¹ Violators of Article 24 may be penalized to the extent of their offenses by the interdicting coastal state.³² Nonetheless, the Geneva Convention provides no authority for the Haitian interdiction operation.

Although the Geneva Convention allows interdiction under limited circumstances, it fails to clearly define the kinds of measures which a state may take.³³ In addition, the Geneva Convention tends to be retro-

30. See, e.g., *The Edward*, 1 Wheat 261 (1816).

31. The 1958 Geneva Convention on The Territorial Sea and the Contiguous Zone to which both the U.S. and Haiti are parties, grants states limited interdictory authority. Article 24 provides:

1. In a zone of the high seas contiguous to its territorial sea, the coastal state may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

Geneva Convention on the Territorial Seas and the Contiguous Zone, 1958, 15 U.S.T. 1606 [hereinafter Geneva Convention on the Territorial Sea].

32. Fitzmaurice, who was one of the drafters of the Convention, for instance, suggests that "foreign vessels in the Contiguous Zone are not basically *subject* to the laws of the coastal State, or bound to conform to them, as they would be if it were the territorial sea." Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea*, 8 INT'L. & COMP. L.Q. 73, 112 (1959).

33. For instance, according to Fitzmaurice, arrest of a vessel in the Contiguous Zone on suspicion of criminal violation of a coastal state's laws cannot be effected "even if well founded. . . while it might justify her arrest on suspicion once she had come within the territorial sea [this] could not. . . justify her arrest in the contiguous zone. Otherwise, the whole effect of those limitations [imposed by the Convention] on the coastal State's power would be rendered nugatory." *Id.* at 115.

Oda, however, while accepting Fitzmaurice's interpretation, differs by observing that Fitzmaurice's formulation "does not necessarily conform to past developments, either in doctrine or practice, of this regime of the seas. It is submitted that there is no reasonable policy consideration why the contiguous zone should be interpreted in such a restrictive way." Oda, *The Concept of the Contiguous Zone*, 11 INT'L. & COMP. L.Q.

spective in terms of its authoritative prescriptions. For example, under subsection 1(b) of Article 24, action by a coastal state is permitted for those offenses that have already taken place and thus does not address prospective occurrences of misconduct.

Moreover, it is arguable that action permitted by the Geneva Convention is limited to a circumscribed range of measures which are not excessively intrusive.³⁴ For example, under Article 24 drastic state actions such as arrest, seizure or forced direction may not be permissible; whereas inquiry, investigation and surveillance are well within the range of permissible actions.³⁵ This position is supported by the doctrine that no state can exercise sovereignty on the high seas, a fundamental principle of international law which would be violated if coastal states were permitted to interdict on the high seas contiguous to their territorial sea.³⁶

Under international law, the high seas are available to any ship engaged in the ordinary course of lawful navigation and maritime activity. Vessels traveling the high seas remain within the exclusive jurisdiction of the flag state except as may be provided for in treaties.³⁷ Interference on the high seas beyond the contiguous zone may occur only in certain circumstances as specified in subsections 1(a), (b) and (c) of Article 22 of the Geneva Convention.³⁸ In this context, therefore, the exercise of interdiction authority on the high seas beyond the contiguous zone for purposes of immigration control is arguably inconsistent with the scope of authority conferred by Article 22 of the Geneva Convention and the Protocol Relating to the Status of Refugees ("Protocol"). This is true particularly with respect to such drastic measures as seizure, arrest and forced direction of passengers and vessels to unscheduled destinations.

131,153 (1962).

34. Fitzmaurice, *supra* note 32, at 114-115.

35. Geneva Convention on the High Seas, *supra* note 9.

36. *Id.* art. 6.

37. *Id.* art. 22.

38. A distinction between express and implied interdiction authority is made in this discussion. Express interdiction refers to statutes explicitly authorizing interdiction authority or precedent directly involving the exercise of such authority. Implied interdiction authority refers to the use of authority in the nature of interdiction without explicit statutory provisions but as a derivative of law enforcement requirements of certain statutes with maritime applications. *See, e.g.*, Tariff Act, ch. 356, 42 stat. 858 (1922) (codified as amended at 19 U.S.C. § 121 (1982)).

B. *Interdiction under U.S. Law*

Express interdiction authority as an instrument of U.S. policy may be found in only a few instances.³⁹ The U.S. has used such authority only for brief periods and with due regard for international law. However, the use of interdiction authority by the U.S. as an instrument of immigration law enforcement does not have any historical precedents. The policy has been employed only in limited instances and for brief periods to avert perceived threats to U.S. commercial interests or national security.⁴⁰

The use of express interdiction under U.S. law was first provided for in an Act passed by Congress in 1809. The Act's purpose was "to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies. . . ."⁴¹ This legislation was enacted to counter French and British interference in U.S. commercial activities. The Act forbade the importation of manufactured goods from these countries. The Act also provided for forfeiture of articles imported after enactment of the prohibition and stated that "every collector, [and] naval officer. . . shall have the like power and authority to seize goods. . . ."⁴² While this Act sanctioned the use of interdictory authority, the term was not defined until the Supreme Court decided *The Edward*.⁴³ In that case, the Supreme Court stated that interdiction meant "an entire cessation, for the time being, of all trade whatever."⁴⁴

39. There are actually three instances involving interdiction authority in the commercial and national security contexts. See *An Act to Interdict the Commercial Intercourse Between the United States and Great Britain and France*, 2 Stat. 528 (March 1, 1809); *The Edward*, 1 Wheat 261 (1816); *Interdiction of the Delivery of Offensive Weapons to Cuba*, Proclamation No. 3507, 27 Fed. Reg. 10401 (1962).

40. The Interdiction Act of 1809 sought to impose retaliatory countermeasures against violations of neutral American commerce by Great Britain and France during the Napoleonic Wars. The Act provided that British vessels seeking entry into U.S. harbors or waters be "interdicted." While Congress did not clarify the interdiction action, the application of the act would clearly have involved the boarding of French and British vessels in United States waters and the conduct of search and seizure activities to enforce compliance. See, *Act to Interdict the Commercial Intercourse between the United States and Great Britain and France*, 2 Stat. 528 (March 1, 1809). The Supreme Court in 1816 further defined interdiction to mean a cessation of all trade for the time being. *The Edward*, 1 Wheat at 272.

41. *Act to Interdict the Commercial Intercourse between the United States and Great Britain*, *supra* note 40, at 530.

42. *Id.*

43. *The Edward*, 1 Wheat 261.

44. *Id.* at 272.

The only other use of express interdiction occurred during the Cuban missile crisis, when President Kennedy ordered the interdiction of vessels delivering offensive weapons to Cuba. The interdiction order authorized the Secretary of Defense to "intercept, board and examine the cargo, equipments and other items on any vessel within a reasonable distance to Cuba" or vessels proceeding towards Cuba in certain prescribed routes.⁴⁵ Vessels failing to comply were to be escorted into U.S. ports for further action.

The exercise of implied interdiction authority however, is supported by more abundant precedent. In 1805, the Supreme Court declared that a state may exert its "power to secure itself from injury. . . beyond the limits of its territory. . . ."⁴⁶ Over a century later, in the Tariff Act of 1922, Congress authorized customs and Coast Guard officials to board vessels within a certain distance from the U.S. coast for purposes of inspection and examination.⁴⁷ Similarly, the Anti-Smuggling Act of 1935 provided for boarding, searching and arrest of offending vessels within a certain distance from U.S. shores.⁴⁸ More recently, the U.S. has asserted jurisdiction beyond its territorial waters for purposes of fisheries management and conservation.⁴⁹ These examples are illustrative of the exercise of implied interdictory authority by the U.S. to detect and apprehend violators of its exclusive economic zone.⁵⁰

In understanding both implied and express interdiction authority, careful attention must be given to judicial interpretation of interna-

45. For the complete text of the interdiction order, see Proclamation No. 3507, *supra* note 39.

46. *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 234 (1804).

47. The Tariff Act of 1922, for instance, provided the authority for to Customs and Coast Guard officials to:

[g]o on board of any vessel. . . within four leagues of the coast of the United States. . . to examine the manifest and to inspect, search, and examine the vessel. . . and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop each vessel. . . if underway, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel. . . or the merchandise, or any part thereof. . . is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, and to arrest. . . any person engaged in such breach or violation.

Tariff Act, *supra* note 38, at 42 Stat. 979.

48. Anti-Smuggling Act of 1935, 49 Stat. 517, 518.

49. *See* Fisheries Conservation and Management Act of 1976, 16 U.S.C. § 1801.

50. *U.S. v. F/V Taiyo Maru*, 395 F. Supp. 413 (S.D. Me. 1975) (seizure of Japanese fishing vessel on the high seas following hot pursuit by the U.S. Coast Guard from contiguous U.S. fishing zone not a violation of the Convention on the High Seas)

tional law and the relative salience of international law in U.S. municipal law. As stated by the Supreme Court, "[i]nternational law is part of our law, and must be ascertained and administered by the courts. . . as often as questions of right depending upon it are duly presented for determination."⁵¹

While international law is recognized as part of U.S. law, the prescriptions of international law may be superseded by express Acts of Congress.⁵² The federal courts are bound to apply these Acts even where they are inconsistent with international law.⁵³ In addition, the U.S. Constitution and applicable treaty obligations supersede the principles of international law.⁵⁴ However, statutes passed by Congress relating to international matters are to be construed consistently with international usage.⁵⁵ Thus, in interpreting domestic U.S. laws consistency with international law is favored.⁵⁶

For example, in determining that the breadth of the Contiguous Zone should be 12 nautical miles from the baseline of the territorial seas, U.S. courts consider the requirements of international law and the Geneva Convention.⁵⁷ While recognizing the freedom of the high seas from any particular sovereign control, U.S. courts have also held that the exercise of national authority must comport with U.S. treaty obligations.⁵⁸ Thus, the U.S. is entitled to exercise national authority in the contiguous zone to prevent violation of its revenue, customs, immigration or sanitary laws or for defensive purposes where hostile ships may be located off the territorial sea.⁵⁹ However, U.S. courts have taken a somewhat restrictive view of the national exercise of authority on the high seas in the enforcement of customs and safety regulations unless agreed upon by treaty with contracting states.⁶⁰ The general principle

51. *The Paquete Habana*, 175 U.S. 677, 700 (1899); *See also Skiriotes v. State of Florida*, 313 U.S. 69, 72-73 (1941).

52. *Banco Nacional de Cuba v. First Nat. City Bank of New York*, 270 F. Supp. 1004, 1008 (S. D. N.Y. 1967). *rev'd on other grounds* 431 F.2d 394 (1970).

53. *Id.*

54. *Farmer v. Rountree*, 149 F. Supp. 327, 339 (M.D. Tenn. 1956), *aff'd* 252 F.2d 490 (6th Cir. 1958).

55. *Bowater S.S. Co. v. Patterson*, 303 F.2d 369 (2d Cir. 1962).

56. Restatement (Second) Foreign Relations Law of United States § 3 (1965).

57. *Id.* § 21.

58. *U.S. v. Rubies* 612 F.2d 397 (9th Cir. 1980) *cert denied* 446 U.S. 940 (1981). Article 2 of the Convention on the High Seas, provides: "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty." *See supra* note 9.

59. Geneva Convention on the High Seas, *supra* note 9; Olson Memorandum *supra* note 9.

60. *U.S. v. Rubies*, 612 F.2d at 398.

that in the absence of consent one nation may not exercise jurisdiction on the high seas or take enforcement action within the territorial limits of another independent state still remains valid.⁶¹

U.S. laws have no force in foreign territories and all enforcement actions in such circumstances must be governed by international treaties.⁶² Similarly, a nation cannot infringe upon the sovereignty of another nation by dictating to that nation the procedures to be followed in exercising jurisdiction over violations of its criminal laws.⁶³ In those instances where the U.S. has attempted such action, the courts have held that the authority exercised was invalid.⁶⁴

The U.S. may validly exercise jurisdiction on the high seas when in hot pursuit of offending vessels.⁶⁵ Similarly, the U.S. can enact statutes and laws with respect to the protection of its interests on the high seas provided such actions are consistent with international law and U.S. treaty obligations.⁶⁶ It is an established principle in international law that vessels on the high seas are protected from unlawful search and seizure by the power of the sovereign whose flag they fly.⁶⁷ Consistent with the Geneva Convention, U.S. courts have upheld the principle that a foreign merchant ship on the high seas may be boarded only when there is reasonable grounds for suspecting that the ship is engaged in piracy, slave trade, or where the ship is flying a foreign flag while actually being of the same nationality as the boarding ship.⁶⁸

U.S. courts have also allowed the boarding of a ship on the high seas to determine nationality after a finding of statelessness.⁶⁹ Thus, the U.S. Coast Guard may board a vessel on the high seas and determine whether the vessel is of U.S. registry if, after initial inquiry, there is a genuine question in that regard.⁷⁰ The U.S. Coast Guard may also

61. U.S. v. Mitchell, 553 F.2d 996, 1004 (5th Cir. 1977); See, Restatement, *supra* note 56, § 20.

62. U.S. v. Curtiss. Wright Export Corp. 299 U.S. 304, 318 (1936).

63. Smallwood v. Clifford, 286 F. Supp. 97, 101 (D.D.C. 1968).

64. U.S. v. Archer, 51 F. Supp. 708 (S. D. Cal. 1943); Casement v. Squier, 46 F. Supp. 296, 297 (W.D. Wash. 1942).

65. U.S. v. F/V Taiyo Maru, 395 F. Supp. 413 (seizure of Japanese vessel on high seas following hot pursuit by the Coast Guard did not violate the Convention on the High Seas and Contiguous Zone). See Restatement, *supra* note 56, § 2.2

66. U.S. v. Cadena, 585 F.2d 1252 (5th Cir. 1978). See Restatement, *supra* note 52, § 34.

67. U.S. v. Cortes, 588 F.2d 106, 107 (5th Cir. 1979).

68. U.S. v. Postal, 589 F.2d 862 (5th Cir. 1979) *cert. denied* 444 U.S. 832 (1979); U.S. v. Cadena, *supra* note 62.

69. U.S. v. Petrulla, 457 F. Supp. 1367, 1372 (M.D. Fla. 1978).

70. *Id.*

board a vessel of undetermined nationality if it has probable cause to believe that the vessel or crew is violating U.S. laws.⁷¹

IV. THE HAITIAN INTERDICTION PROGRAM

A. *The Legal Basis of the Haitian Interdiction Program*

The Justice Department has stated that the President's interdiction order does not conflict with the provisions of the Immigration and Naturalization Act or any U.S. treaty obligations. In a memorandum to Attorney General Smith, Assistant Attorney General Theodore Olson stated:

The interdiction will not be affected by the provisions of the INA. Aliens are entitled to exclusion proceedings only when they arrive by water or by air at any port within the United States. . . . They are entitled to deportation proceedings only if they are "within the United States. . . ." Asylum claims may only be filed by those "physically present" in the United States or at a land border or port of entry. . . . Since the interdiction will take place on the high seas, which is not part of the United States, none of the [INA] provisions will apply.⁷²

According to the Justice Department there are both statutory and constitutional bases for the Presidential exercise of interdictory authority in the area of immigration control.⁷³ However, Olson opines that "[i]mplied Constitutional power is less clear" in the exercise of plenary power by the Executive in the area of immigration.⁷⁴ Nonetheless, such

71. *Id.*

72. Olson Memorandum, *supra* note 9, at 2.

73. According to Olson Memorandum, the appropriate statutory authority is found in 8 U.S.C. § 1182(f) and 1185(a)(1). *Id.* at 3. Under § 1182(f): "Whenever the President finds that the entry of any aliens. . . [is] detrimental to the interests of the United States, he may by proclamation. . . suspend the entry of all aliens. . . or impose. . . any restrictions. . . ."

The Olson Memorandum expresses doubt that "[n]either this Office nor INS is aware of any time when the power granted by this section, added in 1952, has been used." Olson Memorandum, *supra* note 9, at 3 n.5. In *Haitian Refugee Center v Gracey*, 600 F. Supp. 1396, 1399 (D. D.C. 1985), the Court held that the President has constitutional and statutory basis to interdict vessels carrying U.S.-bound Haitians on the high seas. This authority is held to be supported both by the President's broad discretion regarding the regulation of alien immigration, and in the Haitian case, through the budget appropriations made for the interdiction program by Congress.

74. Olson Memorandum, *supra* note 9, at 4. While the Justice Department does not invoke direct constitutional authority, it argues, citing *United States ex rel. Knauff*

power is said to be "inherent in the executive power to control the foreign affairs of the nation."⁷⁶ It is also proposed that the "exercise of this inherent authority, would be acting to protect the United States from massive illegal immigration."⁷⁶

The President's authority to enter into agreements with foreign nations, according to the Justice Department, is said to arise from "that control of foreign relations which the Constitution vests in the President as part of the executive function."⁷⁷ Thus, such authority may even be exercised where the U.S. would, by agreement, be helping another country enforce its own domestic laws. Consequently, the "arrest of Haitian citizens as an aid to Haiti's enforcement of its immigration will enable the President to curtail the flow of Haitians in the furtherance of his 'power and duty' to control and guard the border against the illegal entry of aliens."⁷⁸

The agreement with Haiti for the interdiction of Haitian citizens fleeing Haiti is not viewed as a violation of U.S. treaty obligations or international law by the Justice Department. Therefore, even though the Haitians subject to interdiction could potentially be political refugees, any agreement with the Haitian government presumably does not to violate U.S. obligations under Article 33 of the Protocol, which prescribes that "[i]ndividuals who claim that they will be persecuted. . . must be given an opportunity to substantiate their claims."⁷⁹

v. Shaughnessy, 338 U.S. 537 (1950), that "[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is *inherent in the executive power* to control the foreign affairs of the nation." Additional authority cited includes *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893).

75. Olson Memorandum, *supra* note 9, at 3-4.

76. *Id.* at 5.

77. Olson Memorandum, *supra* note 9 at 6 (quoting 39 Op. Att'y Gen. 484, 486-7 (1941)). See *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396, 1399 (D.C. Cir. 1985).

78. *Id.* at 6d. In support of this position, Assistant Attorney General Olson cites *Modus Vivendi Respecting the Fur-Seal Fisheries in Behring Sea*, 1 W. Mallory, *Treaties Conventions International Acts, Protocols and Agreements*, 743 (1910). Various executive agreements entered by the U.S. with the Dominican Republic, Liberia and Haiti also cited. *Id.* at 7.

79. *Id.* at 8 (citing 19 U.S.T. 6223, T.I.A.S. No. 2545). It is interesting to compare the Justice Department's position with the findings of Judge Ritchey in *Haitian Refugee Center v. Gracey*, 600 F. Supp. at 1405. The Court there observed: "[T]he plaintiffs claim that the program of interdiction violates the non-refoulement obligations of the United Nations Protocol. However, it has long been established that for a treaty to provide rights enforceable in a United States Court, the treaty must be one which is self-executing. . . ." The Court further citing *Bertrand v. Sava*, 684 F.2d

B. *The Haitian Migrant Interdiction Operation*

Interdiction is an entirely novel and unprecedented instrument for the enforcement of U.S. immigration laws. Due to the controversial nature of the interdiction policy it was the subject of two Congressional hearings held within months of each other.⁸⁰ The Reagan Administration has publicly stated that interdiction, when implemented in conjunction with other policies such as detention, will ultimately stop the flow of undocumented aliens from entering the U.S.⁸¹ The Administration views interdiction as a means of increasing the effectiveness of U.S. immigration laws and preventing undocumented aliens from ever reaching the U.S.⁸² Associate Attorney General Rudolph Giuliani, testifying on the Haitian interdiction program, stated:

We must teach those of the world who seek to cross our borders illegally that we have laws and regular procedures which must be followed. The gate crashers [Haitians] must not, in fairness to the people of our country and those in other lands who seek to come here lawfully, be allowed to succeed in thwarting our laws.⁸³

While the Reagan Administration fashioned its interdiction policy with some support from Florida's Congressional delegation and other local officials,⁸⁴ the legal basis of the policy remains highly controver-

204, 218-19 (2nd Cir. 1982), stated:

[T]he Protocol's provisions were not themselves a source of rights under our law unless and until Congress implemented them by appropriate legislation. . . . Congress has implemented the Protocol, at least in part, through the Refugee Act of 1980. . . . However, that statute does not provide any rights to aliens outside the United States.

80. Because of the controversy surrounding the Haitian interdiction issue two Congressional hearings, one in September, 1981 and another in January, 1982 were held. COAST GUARD OVERSIGHT HEARINGS BEFORE THE SUBCOMMITTEE ON THE COAST GUARD AND NAVIGATION OF THE HOUSE COMMITTEE ON THE MERCHANT MARINE AND FISHERIES, 97th Cong., 2nd Sess., 182 (1982) (testimony of Associate Attorney General Rudolph Guilliani) [hereinafter 1982 Coast Guard Hearings]; COAST GUARD OVERSIGHT HEARINGS-PART 2: HEARINGS ON MILITARY READINESS AND INTERNATIONAL PROGRAMS BEFORE THE SUBCOMMITTEE ON COAST GUARD AND NAVIGATION OF THE HOUSE COMMITTEE ON THE INDICIARY, 97th Cong. 1st Sess. (1981) [hereinafter 1981 Coast Guard Hearings].

81. 1982 COAST GUARD HEARINGS, *supra* note 80, at 186.

82. *Id.* at 192.

83. *Id.* at 123.

84. The interdiction program was supported by some local officials in Miami and Dade county. Detailed statements supporting interdiction were prepared and submitted in testimony before the Subcommittee on Coast Guard and Navigation by Marcia Back,

sial. The controversy and debate surrounding the Haitian interdiction policy is partly due to the lack of clear statutory authority for such an undertaking. The Justice Department sought to base the interdiction policy on the President's broad statutory authority to forbid the entry of certain classes of aliens thought to threaten U.S. interests.⁸⁵ In testimony before Congress, the Special Assistant to the Attorney General, David Hiller, could point only to the President's general authority to guard the borders under the Immigration and Naturalization Act, as well as the President's authority in the field of foreign relations as support for the policy.⁸⁶

The agreement between the U.S. and Haiti for the interdiction of undocumented Haitians resulted in the establishment of the Haitian Migrant Interdiction Operation ("HMIO") in late 1981. The Coast Guard was given the primary responsibility of locating and interdicting vessels carrying suspected illegal Haitian immigrants. According to Associate Attorney General Giuliani:

When suspicious vessels are located, a Coast Guard boarding party is dispatched to establish the registry, conditions and destination of the vessel. Specially trained INS personnel—two officers and two Creole interpreters are responsible for determining the status of people on board interdicted vessels and whether there is any basis for a claim of refugee status. Immigration officers ask each adult and unaccompanied minor several questions designed to elicit information upon which claim to refugee status might be based. If there is an indication of a colorable claim of refugee status, the individual is to be brought to the United States where a formal application for asylum would be filed.⁸⁷

Chairman, Broward County Commission, Stephen Clark, Mayor, Metropolitan Dade County and Robert Graham, Governor of Florida. For written statements *see id.* at 157-167, 176-179.

Congressman Clay Shaw of Florida, echoing the Administration's position declared: "Interdiction at sea is a very real way to stop those people who are literally cutting in front of the long line of people patiently waiting to enter our country legally." *Id.* at 159.

85. The statutory basis for the Haitian interdiction program is said to be present in the Immigration and Naturalization Act, the President's implied powers under Article II of the U.S. Constitution, and the President's authority to guard the borders of the U.S. *See* Olson Memorandum, *supra* note 9. The specific statutory authority for the HMIO has been identified by the Justice Department to be present under 8 U.S.C. § 1182(f). *Id.*

86. 1981 COAST GUARD HEARINGS, *supra* note 80, at 5.

87. 1982 COAST GUARD HEARINGS, *supra* note 80, at 6. A more detailed presenta-

The Coast Guard Commander, Admiral Gracey was also clear on the HMIO implementation procedures.⁸⁸

tion on implementation procedures was made to Congress during the planning stages of the HMIO in September, 1981. David Hiller, Special Assistant to the Attorney General outlined the implementation process of the HMIO:

The Coast Guard will have the major interdiction role. Coast Guard vessels stationed in the Windward Passage will have the authority to stop Haitian flag vessels, and board them. The Coast Guard will determine whether Haitian nationals on board are being irregularly transported in violation of United States or Haitian laws and whether they have the requisite entry documents for the country of destination.

Persons found in violation of such laws and without such documents will be returned to Haiti. Other persons will be allowed to continue their journey to the United States as appropriate.

Immigration and Naturalization Service (INS) officers will also be on board the Coast Guard vessel. All initial questioning will be handled by the Coast Guard through a Creole interpreter.

However, experienced INS officers will be present to pose questions regarding the validity of immigration documents and to monitor Coast Guard questioning of aliens regarding asylum claims.

When an alien alleges a documentary or other claim of entitlement to enter the United States—for example, passport, visa, or claim to U.S. citizenship—or in the event of an extempore, unsolicited claim to asylum, INS officers will examine the documents or claims. Should the documents or claims—to U.S. citizenship—appear valid or based on reasonable facts, the alien or aliens will be cleared by INS officers for entry to the United States.

The INS officers will interview Haitian nationals who indicate that they fear return to Haiti because they may be persecuted there. If the claim of persecution appears to have some validity, the INS officer will authorize the parole of the individual into the United States, where the claim can be further examined. This interview and parole procedure will insure that the United States meets its obligations under the United Nations Convention and Protocol Relating to the Status of Refugees. The State Department will provide advisory opinions on the merits of the persecution claims.

The proposed interdiction procedure will therefore divide responsibility between the Coast Guard and the Immigration and Naturalization Service. The Coast Guard will enforce the immigration laws as directed by the President. The Immigration and Naturalization Service will provide advice on the enforcement of the immigration laws and will interview persons to determine whether they may be subject to persecution, or have a well-founded fear of persecution.

1981 COAST GUARD HEARINGS, *supra* note 80, at 6.

88. Admiral Gracey, Commandant of the Coast Guard, in responding to a Congressional inquiry provided a similar understanding of the HMIO implementation procedures. Admiral Gracey stated:

Standard operating procedure for these forces require a Coast Guard boarding party to be dispatched to determine the registry, condition and destination of those detected vessels which are considered suspicious. Immigration and Naturalization Service personnel, assisted by U.S. Creole interpreters, augment each boarding

The Departments of Justice, State and Transportation act cooperatively in implementing the program, although actual field implementation is left to the Coast Guard in the Seventh District.⁸⁹ The Haitian Navy participates in the surveillance, detection, and apprehension activities,⁹⁰ as well as providing additional support by patrolling the Haitian coastline for suspicious vessels and assisting in processing interdictees upon return to Haiti.⁹¹ Moreover, a Haitian Navy officer is assigned to the Coast Guard vessel in liaison capacity. Eventually, the Haitian Navy is expected to take over the entire operation.⁹²

The focal area of the HMIO is a sixty-mile route known as the Windward Passage.⁹³ The passage separates the islands of Hispaniola and Cuba and is frequently used by undocumented Haitians bound for the U.S. In the Windward Passage, the Coast Guard surveillance operation initially consisted of daily overflights by a C-130 transport plane and two flights daily by two helicopters, one stationed at Guantanamo Bay and another based on a Coast Guard cutter.⁹⁴

C. *Field Implementation of the HMIO*

In order to ensure the orderly implementation of the HMIO, an operational directive entitled "INS Role and Guidelines for Interdic-

party to aid in determining the status of those on board the intercepted vessels. If the information gathered were to suggest that certain individuals might have a claim to refugee status, those individuals would be removed to the U.S. for further consideration of their claims. Illegal migrants from Haiti who do not have the requisite documents for entry into the country of destination are returned to Haiti with Haitian Government assurances that they face no threats of prosecution or persecution.

Letter from Admiral J. S. Gracey, Commandant, U.S. Coast Guard, to Congressman Gerry Studds, Chairman, House Subcommittee on Coast Guard and Navigation, (Jan. 11, 1983) (M9-A185730).

89. 1982 COAST GUARD HEARINGS, *supra* note 80, at 196-201.

90. B. Woodward, Haitian Migrant Interdiction Operation 6, (unpublished House Subcommittee Staff Report on Study Mission to Haiti, (Jan. 7-12, 1982) [hereinafter Woodward Report].

91. *Id.* at 7.

92. *Id.* at 5-6.

93. 1981 COAST GUARD HEARINGS, *supra* note 80, at 6.

94. In addition to patrolling the Windward Passage, the Coast Guard also patrolled three other Caribbean "choke points" widely regarded as drug traffic routes including the Mona Passage, the Anegoda Passage and the notorious Yucatan Channel through which an estimated 70% of drug traffic from South America is said to pass to destinations in the U.S. Due to the lack of equipment and other revenues, the Coast Guard can reportedly patrol these passages 5%-10% of the time. 1982 COAST GUARD HEARINGS, *supra* note 80, at 127.

tion at Sea" ("Guidelines") was issued by the INS.⁹⁵ The central aim of the Guidelines was to "ensure that the United States is in compliance with obligations regarding actions towards its refugees."⁹⁶ Although the interdiction directive suggests concern for the safety and rights of interdicted passengers, the specific provisions of the Guidelines set extremely abbreviated procedures for the Coast Guard and the INS to follow in the interdiction of vessels carrying suspected illegal Haitian immigrants.

An important feature of the Guidelines concerns the discretion of the Coast Guard commanding officer.⁹⁷ Coast Guard personnel are charged with the duty of "[a]ll initial announcements to the master, crew and passengers. . . as to . . . boarding, separation of crew and passengers, and general procedures [including advice that the boarded vessel may be returned to Haiti]. . . ."⁹⁸ The Guidelines also assign specific tasks to the INS officers, including the maintenance of a "log record" concerning the interview of each interdicted person.⁹⁹ INS officers are also advised to be "constantly watchful for any indication that . . . persons on board . . . may qualify as refugees under the Protocol."¹⁰⁰ If the INS officers have "any indication of possible [asylum] qualification," they are to separate that individual for further more intensive interviews.¹⁰¹ Moreover, the Guidelines provide for the conduct of interviews outside the hearing of other persons, consultations with the Department of State if necessary and the transportation of interdicted passengers eligible for refugee status to the U.S. for further processing.¹⁰²

It was presumably in accordance with these Guidelines that the Coast Guard interdicted 23 Haitian boats and 828 passengers between October, 1981, and November, 1983. None of the 828 interdicted passengers qualified for asylum and all were returned to Haiti without exception.¹⁰³

95. Memorandum from Andrew J. Carmichael, Jr., Associate Commissioner Examinations, to all INS Employees Assigned to Duties Related to Interdiction at Sea Re: INS Role in and Guidelines for Interdiction at Sea, (Sept. 24, 1982) [hereinafter INS Guidelines].

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. Woodward Report, *supra* note 90, at 18. See Table 2.

Table 2

Monthly Distribution of Haitian Interdictions,
October, 1981 - November 1983^a

	Year					
	1981		1982		1983	
	Boats	People	Boats	People	Boats	People
January			1	106	0	0
February			0	0	1	5
March			1	3	0	0
April			0	0	2	44
May			1	13	3	35
June			0	0	3	153
July			1	8	3	90
August			0	0	1	6
September			0	0	2	27 ^b
October	1	56	0	0	5	149 ^b
November	1	8	0	0	3	103
December	0	0	2	22	N/A	N/A
N	2	64	6	152	23	612 ^c

^aTable reproduced from an INS monthly statistical table on interdictions, Statistical Analysis of Haitian Interdictions, November 11, 1983. Author's note: Original table was edited for style.

^bIncludes 4 Jamaicans and 7 Colombians in three separate interdictions.

^cIncludes Haitians, Colombians, Ugandans, Peruvians, Cubans, Indians, Jamaicans and a Bangladeshi. Exact count for non-Haitians not available but estimated at a very small fraction.

D. Irregularities in Field Implementation of the HMIO

The interdictions that occurred between October, 1981, and November, 1983, indicate that the interdicted Haitians were treated in a haphazard and irregular manner. The first vessel interdicted by the Coast Guard was the GRACE A DIEU. This vessel had departed Haiti before the U.S.-Haiti agreement.¹⁰⁴ While at sea, the vessel developed leaks and was forced to land in Maisi, Cuba. When the Coast Guard interdicted the vessel in January, 1982, the Haitians had aborted their journey to the U.S. and had set sail for La Gonave Island on the western coast of Haiti. Although the vessel was not bound for the U.S., the Coast Guard nonetheless interdicted it and returned the passengers to the Haitian authorities. A Congressional staff member, who was aboard the Coast Guard cutter as an observer during the interdiction,

104. *Id.* at 19.

stated in his report:

Although the GRACE A DIEU was not headed for the United States, Captain Leaky determined that it was still covered by the agreement between the U.S. and Haiti. . . . Given the approach of darkness and the overloading of the sailboat, the decision was made to take the would-be migrants aboard. . . .¹⁰⁵

This Report for the first time revealed the superficial procedures used to interview the interdicted Haitians after they were aboard the Coast Guard cutter. The Report stated:

I observed the INS questioning process for approximately one hour. The questioning was done rapidly, and rarely extended beyond a minute or two per person. . . . The migrants were extremely quiet, almost docile in attitude. They appeared exhausted, but not fearful. . . . No claims for political asylum or refugee status-according to the INS officials-were made. . . . They fully expected to be turned over to legal authorities upon their return, and probably sent to jail.¹⁰⁶

In a follow-up on the Report, Congressman Studds, Chairman of the House Subcommittee on the Coast Guard and Navigation, requested an explanation of the GRACE A DIEU incident from Associate Attorney General Rudolph Giuliani. Mr. Giuliani's reply was somewhat cryptic. He explained that "[t]he vessel, the GRACE A DIEU was returning to Haiti at the time of the interdiction. . . . Due to this fact, the INS officials present, correctly in my view, decided that it was not necessary to ask whether [the Haitians] were in fear of returning to Haiti.¹⁰⁷ It is unclear why the Coast Guard would even interdict a vessel which was admittedly heading towards Haitian territory. There is no provision in the HMIO to intercept vessels transporting Haitians to Haiti.

The haphazard and cursory nature of both the interdiction of the Haitian vessels and interview of the passengers did not appear to be limited to the GRACE A DIEU incident.¹⁰⁸ While similar direct eye-

105. *Id.* at 19-20.

106. *Id.*

107. Letter to Congressman Gerry Studds, Chairman, Subcommittee on Coast Guard and Navigation, from Associate Attorney General Rudolph Giuliani (Mar. 23, 1982).

108. According to Coast Guard summary logs, in seven interdictions passengers

witness testimony was not readily available, the HMIO Coast Guard summary logs reveal a pattern of Coast Guard interdiction and INS interviews of passengers characterized by superficial application of the operational guidelines in processing interdictees.¹⁰⁹

were "interviewed. . . and none were found to have reasonable claim to refugee status." In another seven incidents of interdiction, the summary logs indicate that all were returned to Haiti. There is no indication whether the interdicted passengers sought political asylum or refugee status. On one instance, an interdicted "vessel was towed to Haiti and transferred to the custody of the Haitian Government for appropriate action." In another case, interdicted passengers "acknowledged they were enroute to Miami, [and none] were found to have any reasonable claim to refugee status." In an interdiction incident following the GRACE A DIEU, the summary logs indicate that the "migrants were returned to Port-Au-Prince after none were found to have reasonable claims to refugee status."

In three other incidents, similarly haphazard applications of the Guidelines are evident. In the first incident, the summary logs indicate that "none were found to have a valid claim to refugee status, and the vessel and crew/ passengers were subsequently returned to Port-au-Prince." In a subsequent incident the summary logs report "[s]ince none of these people claimed asylum, and no one aboard had valid papers the vessel was escorted back to Port-au-Prince." In the third incident, the summary logs report that when the Coast Guard vessel "arrived on [the] scene it was determined that [the Haitian vessel]. . . was enroute to Miami. . . . The people on board. . . explained they were going to Miami because they could not find jobs/food in Haiti. . . [and] all were returned to Haiti." U.S. Coast Guard Haitian Migrant Interdiction Operation (HMXO) Interdiction Incidents (May 31, 1983) [hereinafter Coast Guard Logs]. See Table 3.

109. *Id.* See items identified in o, p, q, r, s, t, u.

Table 3
 Monthly Distribution of US Coast Guard Interdiction of Haitian
 Vessels by Type of Action Taken

Interdiction Incident Date	Vessel	Coast Guard Action
10/25/81	Exoride	Returned to Port-Au-Prince
11/01/81	M/V Sacre Coeur	Turned over to Haitian Authorities
01/10/82	Grace A Dieu	Returned to Port-Au-Prince
03/29/82	Melia	Turned over to Haitian Authorities
05/10/82	Rio Yaque	Returned to Port-Au-Prince
07/09/82	St. Anne	Returned to Port-Au-Prince
12/06/82	Unknown vessel	Turned over to Haitian Authorities
12/19/82	Apredieu Ni	Returned to Port-Au-Prince
02/05/83	M/V Ste Anne	Returned to Port-Au-Prince
04/19/83	S/V Dieu Tout Fuissant	Returned to Port-Au-Prince
04/22/83	S/V Jala	Returned to Port-Au-Prince
04/30/83	Lucky Lady	Returned to Port-Au-Prince
05/17/83	Unknown vessel	Returned to Port-Au-Prince
05/28/83	Carmene	Returned to Port-Au-Prince
06/12/83	Aventi	Returned to Port-Au-Prince
07/12/83	Unknown vessel	Returned to Port-Au-Prince
07/18/83	Dieu Seul Maitre	Returned to Port-Au-Prince
07/21/83	Dieum Inocentstyves	Returned to Port-Au-Prince
08/19/83	Merci Miracle	Returned to Port-Au-Prince

These inconsistent and cryptic summary log reports raise some basic questions about the conduct of the Coast Guard and the INS officials in carrying out the Guidelines' procedures. In a significant number of interdictions, particularly those occurring between June, 1983, and August, 1983, there is no indication that individual "interviews" were undertaken. In addition, on several occasions, it appears from the logs that a determination was made on the general impression that they were "economic migrants" or "enroute to Miami" rather than con-

ducting probing individual interviews. The logs in these instances, unlike the other interdiction incidents, do not indicate whether the passengers were individually interviewed, sought asylum or refugee status or made any protestations about their involuntary return to Haiti.

E. *Coercive Aspects of the HMIO*

In assessing the legal validity of the HMIO, the central concern is whether the interdiction program was in principle consistent with U.S. obligations under the Protocol. This issue involves the question of whether the U.S. entered into an agreement with Haiti to return Haitian citizens who may be refugees fleeing the Haitian regime.

The Haitian Government has never acknowledged persecution of its political opponents or the existence of domestic repression. Consistent with Haiti's denials that it suppresses its citizens, the Haitian Government regards those citizens who leave the country illegally to be economic migrants.¹¹⁰ The U.S. acknowledges the existence of only limited political repression in Haiti.¹¹¹ Therefore, U.S. officials also think that most people leaving Haiti are economic migrants rather than political refugees. This belief is illustrated by the fact that the State Department and the INS granted only 58 asylum applications out of 9,871 between 1970 and 1979.¹¹² Moreover, none of the over 800 Haitians interdicted in 1981 and 1982 were found to be eligible for asylum.¹¹³

The extent to which the interdiction policy undermines U.S. obligations under international law and the Protocol cannot be fully appreciated without examining the official treatment of undocumented Haitians in the years immediately preceding the HMIO. In 1978 the INS established a separate decision-making structure to deal with undocumented Haitians.¹¹⁴ This structure generated certain policies exclu-

110. See note 21 and accompanying text.

111. COUNTRY HUMAN RIGHTS REPORTS, *supra* note 15.

112. See Table 1.

113. See Table 2.

114. By the summer of 1978, and especially after the sudden influx of Haitians in the spring of that year, INS officials began to perceive that the lack of effective deportation activity was encouraging the flow of new entrants from Haiti. The confusion surrounding the promulgation of new regulations and guidelines for asylum as well as administrative delays produced in the deportation process, pending litigations, postponement, etc., were believed to provide a sure signal to Haitian entrants that they could come to the U.S. with impunity. The perceived relationship between INS administrative inaction and the influx of new Haitian entrants was recapitulated by Circuit Court Judge James Hill in *Haitian Refugee Center v. Smith*:

It is highly likely that INS inaction provided the greatest inducement to the ulti-

sively applicable to Haitians seeking political asylum in the U.S.¹¹⁵ While the vast majority of non-Haitian undocumented aliens underwent routine INS processing, an official program was devised to exclude, deport and deny asylum to Haitians on a mass basis.¹¹⁶ This

mate swollen tide of incoming, undocumented Haitians. Record material suggests that a large percentage of the the aliens bought passage to the United States from promoters in Haiti whose best sales pitch was the large number of countrymen who, without visas or other documents, had reached Florida and were residing there undisturbed. Protestations by INS of the illegality of such operations could hardly be expected to prevail against the proprietary reasoning that Haitians who reached southern Florida were living, working and earning in the United States. "The proof of the pudding" was surely seen as being in the eating; those deciding whether or not to make the trip were not dissuaded by witnessing the return of earlier emigres.

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

The reasons for the delays and the backlog in processing was attributed to several factors by Richard Gullage who became Deputy District Director (later served as acting Director on a number of occasions). Among the reasons offered by Gullage, included anticipated changes in asylum regulations which created uncertain confusion about the effects of new regulations on reopening of cases, certain actions by Haitians which discouraged INS trail attorneys from actively pursuing deportation cases, actions by Haitian counsel to enjoin exclusion proceedings against Haitians which also focused attention from Washington on the Miami INS office. *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 512 (S.D. Fla., 1980).

115. The planning process for mass expulsion of Haitian entrants was directed by Mario Noto, Deputy Commissioner of INS. Armand Salturelli, INS Regional Commissioner prepared and submitted the recommendations for the expulsion and Michael Egan, Associate Attorney General, was in charge. Other direct participants were INS Commissioner Lionel Castillo, Noto, Sava Mack, Rebsanmen, Crossland, Bertness, Redinger, Day, Gibson, Turnage, Salturelli, Powell, Young, Fodolny and Grotenrath—all high level officials of the INS. From the State Department, Doris Meissner (later INS Commissioner) and Green were present. See Memorandum of Conference, INS, RE: Haitian Undocumented Aliens (July 17, 1978) [hereinafter as Memorandum of Conference].

116. Memorandum, Mario Noto, Deputy INS Commissioner, to Michael Egan, Associate Attorney General, Department of Justice (Aug. 25, 1978) [hereinafter Noto Memorandum]. The Noto Memorandum contained an extraordinary directive. It sought the placement of "4,340 Haitians (approximately 50% of known Haitians) under INS deportation proceedings." (parentheses in original). This was to be accomplished by directing the "Miami INS to issue at least 100 orders to show cause daily to bring the situation current. This move by INS is designed to bring the [Haitian] aliens under administrative jurisdiction and control for eventual expulsion." Moreover, any new undocumented Haitians apprehended after reaching U.S. shores should "immediately be brought under INS control for exclusion process." The Noto Memorandum essentially had three components. One component dealt with exclusion, another involved deportation and a third component was concerned with the processing of asylum applications. The exclusion component of the directive sought the processing of groups of Haitians. Thus, there were to be issued mass Orders to Show Cause to all appre-

discriminatory treatment of undocumented Haitians represented a first

hended and registered Haitians who were not already in deportation proceedings. After the show cause orders had been issued, the Haitians were to be brought in groups before immigration judges and required to show why they should not be excluded. The exclusion hearings were not expected to be consequential and in fact proved to be superficial. There was little concern for the Haitians' rights to be represented by counsel or to inform them of the availability of free legal services or right to file for asylum and to dispense with basic procedural requirements which the Haitians were entitled to receive and to move cases through the system.

Similarly, the deportation component of the Program was also not concerned with individual cases but rather with large-scale expulsion. According to the terms of the Haitian Program "deportation hearings [were to be scheduled] at the rate of 70 per day." On the other hand, orders to show cause, placing Haitians under deportation process were to be issued by the INS at 100 daily. Additionally, proposals to "consolidate deportation hearings to accelerate multiple hearings on identical issues by immigration judges" were to be considered. In order to facilitate the program, "two immigration judges were to be detailed to Miami to work exclusively on Haitian cases" and the "productivity of immigration judges was [to be] tripled from 5 hearings per day for each judge to 15 hearings per day for each judge." In accordance with the plan, immigration judges were to be made part of the overall expulsion program and aid in the attainment of the mass expulsion objective by accelerating the deportation process while denying the Haitians their rights to asylum and due process wholesale. The role to be played by the immigration judges was particularly significant due to the expectation that they could manipulate the process by reaching findings of deportability, provide for an abbreviated asylum review, and then, when the Haitians failed to meet the abbreviated deadlines issue deportation would be automatically entered.

The asylum policy to be pursued against the Haitian asylum applicants equally sought to deny the Haitians any meaningful legal protection. The asylum policy was most notable both for the extent to which it undermined the Haitians' rights under the law as well as for its disregard of the law altogether. The first step to be taken in the asylum component of the Haitian program was for the "INS to establish guidelines and standards for District Directors' decisions on asylum claims since none are now available. . . ." Establishing such standards "will refute charges of arbitrariness and lack of uniform standards and proper basis for District Director determinations."

Accordingly, the INS was to actively "consider revision that would eliminate the current requirement that a claim for asylum made during deportation hearings be first processed by the district director, and when denied, to be reviewed by an immigration judge." Such a procedure would eliminate any appeals efforts by the Haitians and makes their deportation certain and instantaneous. Further, to expedite the asylum process even more, the "applicable procedures for adjudicating Haitian claims for political asylum were to be imposed to elicit comprehensive and detailed pedigree (*sic*) and other data necessary to facilitate decision by INS and State Department and [eliminate chances of] return for insufficient data."

The effort to curtail and limit meaningful asylum consideration went even further. Accordingly, the "Department of State shall consider revision of its policies and elimination of its current procedure of forwarding to UNCHE each asylum case referred to it." Regardless of the circumstances, however, "State shall process at least 40 asylum cases weekly, and unless it is advised to the contrary within 30 days, INS will conclude

in immigration law. It also marked an important departure from constitutional, statutory and regulatory requirements governing immigration.

The decision-making group in question involved officials at the highest levels of the U.S. Government.¹¹⁷ Such high level involvement was particularly unusual since the procedures pertaining to the processing of undocumented aliens were well-established.

In addition, undocumented Haitians, unlike other undocumented aliens, were prevented from undergoing routine exclusion, deportation and asylum proceedings.¹¹⁸ While other undocumented aliens were receiving these procedural protections, undocumented Haitians were denied individual consideration of their cases.¹¹⁹ Rather, special regulations were formulated which afforded them only pro forma due process considerations.¹²⁰ The special policies and regulations implemented against the Haitians were unprecedented and arguably illegal. These policies were seemingly adopted merely to facilitate the mass expulsion of undocumented Haitians.¹²¹

Since these policies affected only Haitians, they were clearly arbitrary and discriminatory. Additionally, these policies made it impossible to address individual Haitian cases. Rather, all Haitians were treated as a single group of undocumented aliens.¹²² Accordingly, even

that the INS decision is sound and confirmed. Finally, to facilitate the summary asylum process, the "Department of State shall assign an officer to INS Miami to review asylum cases which would have been referred to Washington, D.C. State and the Haitian Desk officer will also delegate his authority to permit onsite approvals. . . [and] only doubtful cases would be referred by the State Officer in Miami to State, D.C." *Id.*

117. Memorandum of Conference, *supra* note 115.

118. The four recommendations were submitted to Sava by Noto. These recommendations anticipated the beginning of a wholesale program of deportation to resolve the Haitian "problem." The Haitians were deemed to be both collectively and individually ineligible for asylum and that any means would be justifiable in their removal and/or prevention from entry. Therefore, no consideration ought to be given to due process requirements.

The underlying thrust in the recommendation was presumably deterrence. Thus, if Haitians who are already in the U.S. were systematically harassed, this might serve a lesson to would-be entrants from Haiti. This notion of deterrence appears to be behind Sava's draconian measure to deny work permits wholesale and mass deportation of Haitians despite their pending asylum applications. *Haitian Refugee Center v. Civiletti*, 503 F. Supp. at 514.

119. Noto Memorandum, *supra* note 116.

120. *Id.*

121. *Id.*

122. *Id.*

meritorious Haitian asylum applications were rejected.¹²³ As a result, hundreds of Haitians were placed in an accelerated program of exclusion and deportation.

V. THE HMIO AND POSSIBLE VIOLATIONS OF THE PROTOCOL AND REFUGEE ACT OF 1980

As the HMIO is implemented, it appears to violate the rights of the Haitian refugees granted by the Protocol and the Refugee Act of 1980. The Protocol defines a refugee as any person unwilling to return to his country due to "a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. . . ."¹²⁴ Anyone qualifying as a refugee should not be returned "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened."¹²⁵

While the U.S. has the right to set its refugee and asylum policy as it sees fit, exercise of this right should not be made in derogation of its obligations under the Protocol.¹²⁶ Although the language of the HMIO appears to uphold the principles of the Protocol, in reality, it merely presents the illusion of compliance.

The Executive Order authorizing the interdiction of Haitians contained the misleading statement that it was consistent with the Protocol to the extent "that no person who is a refugee will be returned without his consent."¹²⁷ In addition, the policy was to be carried out in "strict observance of our international obligations concerning those who genuinely flee persecution in their homeland."¹²⁸ However, the implementation of the policy does not support its stated goals. The Guidelines merely require the INS officer to ask eight terse questions, five of which are not substantive in nature.¹²⁹ Only the last three questions concern the individuals' purpose for leaving Haiti and the reasons why they cannot return.¹³⁰ The problem is that these questions are not likely to elicit the kind of information that is useful in determining refugee status.

In assessing the reasons why the policy of interdiction is inconsistent with U.S. obligations under the Protocol, one must understand the

123. Haitian Refugee Center v. Civiletti, 503 F. Supp. at 519.

124. Protocol, *supra* note 7.

125. *Id.*

126. *Id.*

127. Proclamation No. 4865, *supra* note 2.

128. *Id.*

129. INS Guidelines, *supra* note 95.

130. *Id.*

physical and psychological state of the Haitians at the time of interdiction. The interdicted vessels and passengers are often in extraordinarily precarious circumstances at sea.¹³¹ As the Coast Guard logs indicate, many of the interdicted vessels had structural problems.¹³² In most of the interdicted vessels, the passengers have been tightly packed with little food or fresh water. Some have been ill or extremely exhausted from many days at sea.¹³³ Thus, as the boarding party begins its "interview," the passengers are frequently unable to articulate reasons for seeking political asylum. As in the case of the GRACE A DIEU, it would be impossible to make a case for asylum where the questioning "rarely extended beyond a minute or two per person."¹³⁴

Furthermore, when passengers aboard a wooden boat are confronted by an imposing Coast Guard vessel and helicopter, they are not likely to volunteer any incriminating information. When the Coast Guard boarding party arrives, the passengers are likely to believe that they are going to be arrested rather than interviewed. The interviewees are likely to agree with whatever leading question may be suggested to them by the interviewer. In addition, there may be individuals eligible for political asylum or refugee status but who lack the language skills to articulate their cases. Lastly, the interviewee is unlikely to disclose anti-government activity for fear of being turned over to Haitian authorities. Given these circumstances, the interviewee is likely to remain "extremely quiet, almost docile in attitude."¹³⁵

The HMIO has been characterized as a "walrus court," due to its similarity to the land-based kangaroo court.¹³⁶ In fact, the manner in which the interdicted Haitians are processed and determined to be economic migrants is characterized by gross procedural irregularities. Yet, this process is assumed to be rigorous enough to insure that potential refugees who have a legitimate fear of persecution will not be returned to Haiti. The problem, however, is that the protection of potential refugees is subordinated to the goal of stopping immigration from Haiti.

The superficiality of the Guidelines is evident when compared to the United Nations High Commissioner for Refugees ("UNHCR") Guidelines on the determination of refugee status.¹³⁷ The UNHCR

131. Coast Guard Logs, *supra* note 108.

132. *Id.*

133. *Id.*

134. Woodward Report, *supra* note 89, at 19.

135. *Id.* at 20.

136. N.Y. Times, July 16, 1981, at A22, col. 1.

137. *See, e.g.*, OFFICE OF THE UNITED NATIONS COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (Of-

Guidelines place special emphasis on the administration of thorough interviews in an unimpaired and confidential manner. Conversely, under the INS Guidelines, interviews are conducted to the extent that it is "safe and practicable."¹³⁸

Despite assurances by the Haitian Government, there is cause for concern over the status of returned interdictees. The testimony of a former Tonton Macoute in *Haitian Refugee Center v. Civiletti*, suggests the existence of a dual policy on Haitian returnees. In that case, the court summarizing the testimony, observed:

. . . a former member of the Tonton Macoute said that everyone entering Haiti illegally was to be arrested and sent to Fort Dimanche. . . . [M]oreover he stated that those who had claimed asylum while abroad were treated worse than returnees. They were guilty of insulting the Duvalier family. The Tonton Macoute received orders from their local commanders, communicated through the echelons from the President, to arrest everyone from foreign countries. This order came secretly, while the government simultaneously announced over the radio that Haitians abroad were free to return.¹³⁹

A returnee follow-up program administered by the Haitian Red Cross and funded by the U.S. which presumably serves to monitor the status of the interdicted Haitians after their return, further reveals the inadequacy of protections afforded returnees. Under this arrangement, returnees are provided with "simple medical attentions, a box of toiletries, some clothes, \$20, and a bus trip home. . . ."¹⁴⁰ In addition, "[t]hose who have skills in fishing or agriculture are given the tools and nets necessary. . . .merchants are given \$100 to \$150. . . .to begin a new business."¹⁴¹ As part of this program, the Haitian Red Cross is expected to undertake a three month follow-up of returnees to determine whether they had faced persecution.¹⁴²

office of UNHCR), 45-59 (1959).

138. INS Guidelines, *supra* note 95.

139. *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 512, 477 (S.D. Fla., 1980).

140. Woodward Report *supra* note 90, at 21. *See also* Memorandum from Sue Waldron and Duncan Smith, Committee Staff, to Congressman Walter B. Jones, Chairman, Merchant Marine and Fisheries Committee, RE: Trip Report Visit to Haiti and Guantanamo Bay, Cuba, Nov. 29 -Dec. 3, 1982 [hereinafter Waldron-Smith Memorandum].

141. *Id.* at 11.

142. *Id.* at 12.

Table 4

U.S. Embassy Haitian Returnee Follow-Up Program, 1981-83

	1981 ^a	1982	1983 ^b	Total
Number of Boats Returned	1	6	18	25
Political Asylees Aboard	0	0	0	0
Interdictees Returned	57	152	508	717
Interdictees Sought	N/A ^c	N/A ^c	N/A ^c	268 ^d
Interdictees Interviewed	N/A ^c	N/A ^c	N/A ^c	161 ^e
Other Migrants Returned ^f	N/A ^c	N/A ^c	N/A ^c	442
Other Migrants Sought	N/A ^c	N/A ^c	N/A ^c	380 ^g
Other Migrants Interviewed	N/A ^c	N/A ^c	N/A ^c	124 ^h

^aSince October 1981 when the HMIO was implemented.

^bIncludes returnees upto 11/11/83

^cBreakdown by year not available.

^dRepresents 37 percent of all interdictees.

^eRepresents 22 percent of all interdictees.

^fIncludes deportees, excludées and persons who have withdrawn their applications for admission into the U.S.

^gRepresents 86 percent of all other returnees.

^hRepresents 28 percent of all other returnees.

Source: U.S. Embassy, Amembassy Port Au Prince's Returnee Follow-up Program, November 11, 1983.

According to the U.S. Embassy in Haiti, a total of 717 interdictees were returned during the period between the commencement of the HMIO and November, 1983.¹⁴³ Thirty-seven percent of the total returnees were sought for a follow-up interview. However, only 22 percent were reportedly interviewed. Additionally, there were 442 other non-interdicted returnees during the same period. Eighty-six percent of these returnees were sought for interview. However, only 28 percent were reportedly interviewed.¹⁴⁴

The limited success of the U.S. Embassy effort to follow-up on returned interdictees is somewhat disconcerting. The U.S. Embassy was able to follow-up on only 22 percent of the returnees although it sought out 37 percent. Since the vast majority of the returnees would

143. See Table 4.

144. *Id.*

be expected to return to their home,¹⁴⁵ this suggests that some returnees may have been arrested by Haitian authorities.

The extent to which the Haitian Government will arrest or interrogate returnees is not known. However, during the interdiction of the *GRACE A DIEU*, the "male returnees were separated by the military for interrogation concerning the time they spent in Cuba."¹⁴⁶ Involvement of the military in the interdiction process may also have a generally negative effect on the behavior and treatment of the returnees. The presence of the Haitian Naval officer aboard the Coast Guard interdicting vessels could easily intimidate the interdictees.¹⁴⁷ For example, during the interdiction of the *GRACE A DIEU*, the Haitian Navy refueled nearby and the interdicted passengers were "made uneasy by the sight of Haitian Navy boats approaching with lights flashing, [but] were re-assured by INS officials that they were not to be transferred. . . ."¹⁴⁸

VI. INCONSISTENCIES BETWEEN U.S. INTERDICTION POLICY AND THE HMIO

The inconsistency in the U.S. position that the HMIO maximizes protection of the rights of Haitians fleeing the Duvalier regime is further illustrated by the U.S. behavior toward political opponents of the Duvalier regime. During the early phase of the HMIO program, there was an attempt to overthrow the Duvalier regime by a handful of exiles. The attempt was unsuccessful, but the interaction between Haitian authorities, the U.S. Embassy and the Coast Guard is somewhat unsettling. According to the Congressional Staff member who served as an observer aboard the Coast Guard cutter:

. . . the Coast Guard was besieged with requests from the Haitian Navy for assistance of various types in helping defend against the invasion. The U.S. Embassy in Port-au-Prince played a role in defining the Coast Guard's response. It was readily apparent that no prior U.S.-Haitian understanding was in existence concerning the limits on the Coast Guard's role in Haiti. It is essential that the U.S. Embassy make these limits clear. . . . Given the nature of the present Government in Haiti, it is clear that no such assistance should be provided absent a period of full and open (public)

145. Waldron-Smith Memorandum, *supra* note 140, at 10.

146. Woodward Report, *supra* note 90, at 21.

147. Waldron-Smith Memorandum, *supra* note 140, at 10.

148. Woodward Report, *supra* note 90, at 20.

debate.¹⁴⁹

The HMIO procedures evidence a lack of concern for the rights of Haitians on the part of top U.S. officials. For example, there are no official efforts to inform interdicted passengers of their rights under U.S. law or eligibility requirements for refugee status. At most, passengers are asked questions which "are meant to elicit facts."¹⁵⁰ Providing additional information or asking probing questions is equated with "suggest[ing] what their answers to those facts should be."¹⁵¹ In theory it may be "sufficient to ask someone why you are leaving, let them explain it, and if the explanation is ambiguous to ask follow-up questions."¹⁵² However, in practice the INS interviewers only go through a cursory interview lasting a couple of minutes. As the GRACE A DIEU incident illustrates, it is impossible for any interdicted passenger to answer all the questions through a translator and also offer additional explanation. Officials should have provided for a more intensive interview process to clearly establish an individual's eligibility for refugee status consistent with U.S. international obligations.

The contention by the U.S. that the interdiction agreement serves to promote enforcement of Haitian immigration laws is somewhat dubious. According to the official U.S. view, the interdicted Haitians are not prosecuted for their illegal departure. Therefore, under this reasoning, the interdiction program lacks a penal effect. In fact, since the returnees are given several hundred dollars and some tools under the Haitian Red Cross program, the policy may even promote departure.¹⁵³

The agreement between the U.S. and Haiti is somewhat cryptic concerning the prosecution of the interdictees. According to the specific language of the agreement, an interdictee returned to Haiti may not be prosecuted for "illegal departure."¹⁵⁴ However, this does not mean that the returned interdictee may not be prosecuted for other reasons. One such possibility pertains to smugglers of undocumented aliens and drug traffickers. In addition, there is nothing in the agreement to prevent the Haitian Government from prosecuting returned interdictees for criminal offenses committed before departure.¹⁵⁵ The danger this presents is that the returned interdictees could be prosecuted for the political of-

149. *Id.* at 25-26.

150. 1982 COAST GUARD HEARINGS, *supra* note 80, at 209.

151. *Id.*

152. *Id.*

153. Waldron-Smith Memorandum, *supra* note 140, at 11.

154. U.S.-Haiti Agreement, *supra* note 5.

155. *Id.*

fense of defaming the President and the Duvalier family.¹⁵⁶

The agreement is also unclear in reference to interdicted Haitians who may contend that they are not going to the U.S. Assistant Attorney General Olson anticipated this problem, stating that "[a]lthough experience suggests that two-thirds of the vessels [in the Windward Passage] are headed toward the United States, it is possible that, as the interdiction continues, an ever increasing number will claim they are going to the Bahamas."¹⁵⁷

The Haitian interdiction policy appears to be inconsistent with the Refugee Act of 1980.¹⁵⁸ The primary objective of the Refugee Act is to provide "permanent and systematic" procedures for the admission of refugees into the U.S. and to "provide comprehensive and uniform procedures for the effective resettlement and absorption of these refugees who are admitted."¹⁵⁹ Most importantly, the Refugee Act explicitly recognizes political refugees as a special category of immigrants to which the U.S. has humanitarian obligations.¹⁶⁰

Unlike the HMIO, the procedures in the Refugee Act seek to strengthen existing asylum laws as well as harmonize U.S. refugee policy with provisions of the Protocol. In addition, it seeks to provide uniform protections to refugees and asylum applicants without regard to their national origin or the political system from which they are fleeing. In the past, U.S. asylum policy emphasized national origin and type of political system in approving asylum applications. Thus applicants from the communist countries had a much higher rate of approval than those who came from non-communist backgrounds. However, the Refugee Act of 1980 made it possible for any person to apply for entry as a refugee or seek asylum without reference to national origin or political system. The Refugee Act even provided for individuals under deportation and exclusion proceedings, as well as those who have been served final orders of exclusion and deportation, to reopen their cases on the basis of an asylum request. The HMIO contradicts the provisions of the Refugee Act of 1980 by utilizing a makeshift political asylum re-

156. For instance, Article 22 of the Haitian Press Law prohibits statements "offending the Chief of State or the First Lady of the Republic." Under the Anti-Communist Law of 1969, the Haitian Government has wide discretionary authority to arrest persons for alleged crimes against the security of the state. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, A REPORT TO THE ORGANIZATION OF AMERICAN STATES, VIOLATIONS OF HUMAN RIGHTS IN HAITI, 44-45 (Nov. 1982).

157. Olson Memorandum, *supra* note 9, at 1.

158. The Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102 (1980).

159. *Id.* § 310(b).

160. *Id.*

view process on the high seas.

In contrast to the Guidelines, the Refugee Act provides for individuals seeking refugee status and asylum to present their cases in writing and under oath.¹⁶¹ Applicants are also entitled to a hearing before an immigration judge and an interview with an INS officer, who must seek a State Department opinion before issuance of a decision by the district director.¹⁶² The applicant is also entitled to challenge the State Department opinion.¹⁶³

The HMIO and the Guidelines are clearly inconsistent with the Refugee Act of 1980. The Guidelines uniformly deny interdicted Haitians minimum procedural protections to make out claims for political asylum or refugee status. The Guidelines direct INS officials to make determinations of eligibility for asylum or refugee status based on a few perfunctory questions.

Under the HMIO, the INS is instructed to investigate asylum claims if the suspected Haitian entrants make indications of such claims.¹⁶⁴ However, contrary to the spirit of the Refugee Act, the questions asked of Haitians can not possibly elicit asylum claims since these questions are broad and general. In addition, the Guidelines make no provisions for Haitians to seek or retain counsel to assist them in making their claims under U.S. law before being returned to Haiti. The HMIO effectively denies the interdicted Haitians any real opportunity to establish a claim for political asylum or refugee status.

VII. NATIONAL AND INTERNATIONAL IMPLICATIONS OF U.S. INTERDICTION POLICY

The Haitian interdiction policy has several far reaching implications. In initiating the HMIO, the Reagan Administration believed that interdicting "illegal aliens" before their arrival in the U.S. was an effective measure which would serve to stop both undocumented Haitian immigration at the source and deter the influx of new undocumented immigrants into the U.S.¹⁶⁵ The policy was also viewed as a declaration that the U.S. Government would pursue strict enforcement of its immigration laws to stop illegal immigration.¹⁶⁶ In addition, by stopping un-

161. 8 C.F.R. § 207.1(a) (1982).

162. 8 C.F.R. § 208.7 (1982).

163. 8 C.F.R. § 208.8(d) (1982).

164. See INS Guidelines, *supra* note 95.

165. See generally testimony of Associate Attorney General Giuliani in 1981 and 1982 COAST GUARD HEARINGS, *supra* note 80.

166. *Id.*

documented immigration at the source, the Administration believed that there would be fewer opportunities for undocumented aliens who enter the U.S. to litigate in the courts and thereby create delays leading to complicated administrative problems and reduced effectiveness of immigration law enforcement efforts.¹⁶⁷

Unfortunately, the Administration's view is rather simplistic. It rests on the somewhat uncertain assumption that people from countries such as Haiti come to the U.S. because it is relatively easy for them to do so and because they believe that they can attain quick economic prosperity upon arrival. This assumption overlooks important trends in recent immigration and the salience of certain economic and political factors. The empirical and theoretical literature on undocumented immigration to the U.S. offers divergent explanations as to the factors underlying undocumented immigration.¹⁶⁸ In addition to economic rea-

167. *Id.*

168. There are at least three scholarly traditions which have sought to offer an analysis of the phenomena of undocumented immigration. A dominant tradition in the literature suggests that the phenomenon of undocumented immigration may best be explained and understood within the framework of "push-pull" theory of migration examining economic conditions in the sending countries and in the U.S. Thus, undocumented immigration to the U.S. from Mexico and other developing countries is said to be governed by the presence of two dynamic economic forces. On the one hand, it is said that there exist widespread inimical economic conditions in the developing countries that "push" out or force groups of individuals and families to leave their countries and attempt to enter the U.S. seeking opportunities of employment and economic betterment. On the other hand, it is said that the prospects and perceptions of economic prosperity in the U.S. serve to "pull" or attract undocumented immigrants.

Two somewhat distinct orientations are evident in this perspective. Some scholars stress the view that undocumented immigration results from a combination of economic factors prevalent in the sending countries and less from economic conditions in the U.S. Thus, the major economic determinants assumed to be responsible for such immigration from the Third World countries are said to include both the broader issues of disparities in growth between the developed and developing countries as well as specific economic and social problems internal to the developing societies. See, e.g., Chaney, *The World Economy and Contemporary Migration*, 13 INT'L MIGRATION REVIEW, (1979). For studies which focus upon internal economic conditions in explaining undocumented immigration, see, e.g., Bradshaw, *Potential Labor Force Supply, Replacement and Migration of Mexican American and other Males in the Texas-Mexico Border Region*, 10 INT'L MIGRATION REVIEW (1970); Frisbie *Illegal Migration from Mexico to the United States*, 9 International Migration Review (1975); Cornelieus, *Mexican Migration and the U.S.*, in CAUSES, CONSEQUENCES AND U.S. RESPONSES (1976).

On the other hand, a competing view in the "push-pull" framework emphasizes certain economic "pull" factors inherent in the American economy, to explain the flow of undocumented Mexican immigrants to the U.S. Scholars in this view consider the historical demand for cheap immigrant labor by American agribusiness concerns com-

sons, many recent immigrants have sought to come to the U.S. to escape political persecution by authoritarian or totalitarian regimes.¹⁶⁹ In such a context, the classifications of "economic migrants" and political refugees conceal some important underlying factors in countries such as Haiti.

The search for an individual who can conclusively prove political persecution in the Haitian context is likely to prove fruitless since few have been able to meet the standard of "clear probability of persecution."¹⁷⁰ However, the problem of proving such a claim is not necessarily the result of the inability of the Haitian asylum applicants to sustain their burden of proof. It is largely a result of a policy determination not to acknowledge the validity of most of the Haitian asylum claims.¹⁷¹ It cannot be overemphasized that the basic U.S. pol-

lined with the maintenance of certain immigration laws to be responsible for the perpetuation of undocumented Mexican immigration. For instance, Mexican immigration to the U.S. is said to have been promoted through the active encouragement of many of the same economic concerns that currently crusade against the expulsion of illegal aliens. Similarly, undocumented Mexican immigration to the U.S. is said to be affected by changes in the U.S. economy, fluctuations in the demand for cheap labor and particular relationships between Mexican workers and certain U.S. employers. It has even been suggested that evolution of an American immigration policy may best be understood as an extensive farm labor program. *See, e.g.,* Cardenas, *U.S. Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. R. (1975); J. SAMORA, *LOS MOJADOS: THE WETBACK STORY* (1975).

An alternative to the "push-pull" framework views undocumented immigration resulting from certain structural requirements of capitalist production. Scholars in this tradition argue that undocumented immigration does play an important role in the operation of American capitalism by primarily helping to maintain a high rate of profit in non-monopoly sectors of the economy, particularly in agriculture, and by increasing productivity at a low cost of labor. In this perspective, a complementarity of interest between certain economic interests and the American State is assumed. The State is said to employ the legal system and certain policies not only to regulate the flow of undocumented immigrants but also to accelerate the exploitation of undocumented immigrant labor by criminalizing their immigration status. Thus, it is argued that the interrelationship between business and State to a large extent accounts for the persistence of undocumented immigration, especially from Mexico. *See, e.g.,* Bach, *Mexican Immigration and the American State*. 12 INT'L MIGRATION REVIEW, 536 (1978); Castells, *Immigrant Workers and Class Struggle in Advanced Capitalism*, POLITICS AND SOCIETY (1975).

169. The tens of thousand of Vietnamese and Cubans who came to the U.S. fleeing communist persecution are one example. A similar trend may be observed for recent arrivals from Central America who have left their countries to avoid persecution by totalitarian regimes or right-wing death squads.

170. *See, e.g.,* *Fleurinor v. Ins.*, 585 F.2d 129, 133 (5th Cir. 1978).

171. *See generally* 1981 COAST GUARD HEARINGS, *supra* note 80 (statement of Assistant Secretary Hillen).

icy on undocumented Haitians has always been that they are "economic migrants." For nearly nine years, the U.S. has granted fewer than one hundred asylum applicants out of thousands.¹⁷²

The U.S. does not officially recognize the existence of any significant repressive conditions in Haiti. In addition, local opposition to the Haitian regime is not likely to continue for much longer.¹⁷³ As many opposition leaders have learned, even minimal opposition to the Duvalier regime is likely to result in prolonged residence at the notorious Fort Dimanche Prison.¹⁷⁴ For an individual Haitian to be eligible for asylum in the U.S., that individual must be able to prove involvement in anti-government activities.¹⁷⁵ However, anyone engaging in direct action against the government is likely to be promptly arrested and taken out of circulation.¹⁷⁶ Thus, many individuals who are likely to challenge the regime openly will be unable to seek asylum in the U.S. Even if one can "quietly" oppose the regime, that individual dares not to reveal his opposition to the government since the government does not make fine distinctions between "quiet" and other forms of opposition. Furthermore, even if that individual is not immediately arrested for "quietly" opposing the regime, it is unlikely that the individual will be able to obtain an exit visa to leave the country since the government is unlikely to allow an opponent to leave the country and join the opposition abroad. Thus, a more sophisticated view must replace the static and mechanical definition of asylum eligibility in evaluating an individual Haitian's claim for political asylum.

The U.S. policy also presupposes that the primary goal of illegal immigrants is to come to the U.S. and achieve economic prosperity. The assumption that the Haitians would gladly risk seven hundred miles of ocean in rickety boats just to come to America is overly simplistic.¹⁷⁷ Haitians are aware that life in the U.S. is not easy, particu-

172. See Table 1.

173. See COUNTRY REPORTS, *supra* note 15.

174. *Id.*

175. See, e.g., *Pierre v. United States*, 547 F.2d 1281, 1289 (5th Cir. 1975); *Gena v. INS*, 424 F.2d 277, 233 (5th Cir., 1970).

176. See COUNTRY REPORTS, *supra* note 15.

177. A random survey of undocumented Haitians in 1980 suggested that the Haitians interviewed were well informed about economic conditions and the problems associated with getting jobs in the U.S. Many respondents while acknowledging that they expected improved economic conditions in the U.S. further expressed the view that they would return if there were positive political changes in Haiti. See, e.g., *Mariam*, *supra* note 22; See also, A. STEPICK, *HAITIANS RELEASED FROM KROME: THEIR PROSPECTS FOR ADAPTATION AND INTEGRATION IN SOUTH FLORIDA* (1984).

larly when one has no readily transferable skills.¹⁷⁸ The vast majority are also aware that they have years of hard work ahead of them to achieve even minimal economic security and prosperity. In fact, by the time they undertake their journey, most are not even sure that they will reach U.S. shores safely. Most are equally aware of the risk of INS apprehension.¹⁷⁹ Thus, to maintain that the singular objective of these Haitians is come to the U.S. so that they can be economically prosperous conceals some very significant facts about the motivation and expectations of the Haitians coming to the U.S.

A second major assumption, which is not explicitly stated in U.S. policy, is that poor persons cannot be subjected to persecution. In fact, the various policy declarations by top Administration officials that undocumented Haitians are largely poor farmers seeking a better life is a reflection of an underlying attitude that poor Haitians cannot be sophisticated enough to politically oppose the regime.¹⁸⁰ This assumption suggests that such individuals are more concerned with daily survival than with political matters. This assumption, while appealing in its simplicity, is misguided.

The U.S. must reevaluate this misguided assumption and recognize that elites, particularly those chosen or supported by the U.S., are not the only sources of political opposition in the developing countries. Events over the past decade have shown that political leadership can emerge from mass movements, frequently with great unpredictability. In such situations, those individuals who have been in the lower socioeconomic strata have become leaders at the local and national levels. Iran and Ethiopia are appropriate examples in this regard. Thus, U.S. asylum policy should not discriminate against applicants solely on the basis of modest socioeconomic background.

The Haitian interdiction policy may indicate the direction of U.S. immigration policy and set the precedent for future immigration control measures. If the U.S. can enforce immigration laws across several hundred miles of ocean, it is not unrealistic to suppose that it could equally undertake similar measures against immigrants seeking entry from neighboring nations. For example, the policy could be applied to stop the large influx of "illegal immigration" from Mexico.

The interdiction of Haitians on the high seas and the general immigration laws used to control the daily influx of undocumented Mexi-

178. *Id.*

179. *Id.*

180. For instance, the views expressed by Assistant Secretary of State Fairbanks and Associate Attorney General Giuliani clearly imply that farmers and others with lower educational levels cannot claim political persecution; *see supra* notes 23 and 80.

can immigration are too disparate immigration control measures not easily reconciled. The implication is that the executive branch can choose to apply different laws for equally situated groups of aliens based upon such factors as political expediency and ideological orientation. Despite the fact that the problem of undocumented Mexican immigration to the U.S. is among the top immigration law enforcement issues, the U.S. seeks a total cessation in undocumented Haitian immigration through interdiction on the high seas while only "guarding" the U.S.-Mexico border to apprehend undocumented Mexicans seeking entry.

Another major policy implication resulting from the Haitian interdiction policy is that it is characterized by haphazard implementation. The Guidelines merely afford the illusion of proper legal process. In future circumstances, other abbreviated immigration procedures could be developed to facilitate law enforcement objectives deemed to be important. In effect, in situations similar to the HMIO, the executive agencies involved will serve as judge, jury, counsel and prosecution in enforcing U.S. immigration laws.

The international implications of the Haitian interdiction program cannot be underestimated. A little over a decade ago the U.S. urged various Asian nations not to turn back Indochinese refugees escaping the communist regimes. The U.S. even offered aid and assistance in rescuing many boatloads of these refugees and in finding sanctuary in the region. Yet, with the Haitian interdiction policy, the U.S. reverses itself and institutes a makeshift asylum process and returns every boatload of Haitians to Haiti. Other nations with refugee problems are likely to follow the U.S. example and turn back refugees. In view of the Haitian interdiction policy, the U.S. is likely to have problems convincing other nations to accept refugees.

These factors could lead to a deterioration in the status and treatment of refugees throughout the world. As other nations begin to exercise measures similar to interdiction, the protections afforded refugees will increasingly become ineffective. Totalitarian and repressive authoritarian regimes will be able to violently suppress their populations while those under the yoke of oppression will be unable to resist or flee their conditions of persecution.

The Haitian interdiction program has another disturbing aspect. In the past, the U.S. Government has pursued tough immigration control laws against non-white immigrant groups. For instance, in the late 1800's there existed racist and xenophobic sentiment directed toward

the Chinese which led to the Chinese Exclusion Acts.¹⁸¹ Haitians are currently undergoing similarly harsh measures. The issue remains as to whether U.S. immigration policy to some extent reflects the social prejudice and bias that exists in American society. While this question cannot be fully addressed here, there does appear to be a pattern in U.S. immigration law enforcement which suggests harsher treatment against non-white immigrant groups. While the charge that U.S. policy towards the undocumented Haitians is racially motivated is a commonplace one, it would be analytically inadequate to examine the Haitian situation outside the broader issue of the differential treatment of alien groups by race and nationality.

VIII. CONCLUSION

Undocumented immigration to the U.S. represents a major problem with important law enforcement and social implications. Undoubtedly, it is vitally important for the U.S. to have proper control of its borders and prevent illegal entry into the country. However, in insuring that borders are secure from illegal immigration, the standard of enforcement conduct should be one established by the immigration laws. While harsh measures may produce short-term results, it is naive to think such measures will result in a permanent solution to the problem of undocumented immigration. The U.S. must look beyond the short-term control measures and undertake efforts to promote both political and economic democratization in countries such as Haiti. Only then can a permanent solution to the problem be found.

181. Beginning in 1882, a number of bills were passed by Congress to exclude Chinese from entering the U.S. while immigration for the U.S. was free and even encouraged until the mid-1800s, by 1875 there was growing unemployment and economic problems, racist and xenophobic sentiment had been directed toward the Chinese leading to the passage of the first Chinese exclusion bill in 1883. *See*, ch. 126, 22 Stat. 58 (1882); ch. 220, 33 Stat. 115 (1884); ch. 1064, 25 Stat. 504 (1888). For a discussion of Chinese exclusion, *see*, Henkin, *The Constitution and the United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853-886 (1986).

