

# Interdiction of Haitian Migrants on the High Seas: A Legal and Policy Analysis

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In September 1981 President Reagan announced a policy of interdiction of undocumented migrants on the high seas. The interdiction program involves boarding vessels suspected of carrying illegal migrants, questioning those aboard, and returning to their home country all persons determined to lack valid entry documents or colorable claims to refugee status. To date, the Reagan Administration has implemented the program only with respect to Haitian migrants, although the policy as announced was not limited to Haitians.

Interdiction underscores a basic ambiguity in the definition of a refugee in domestic and international law. The ambiguity centers on the point at which an individual, leaving one country and attempting to enter another, attains refugee status with its attendant protections. The announced interdiction policy is based on the premise that whatever rights people might have to leave their country, admission to another country is not a right, but a privilege, which may be granted or denied by national governments. This premise does not acknowledge the tension existing between national sovereign rights and international principles governing asylum, and thus the legal status of the interdiction policy is uncertain.

Because the United States is a leader in the development of international law, and because it so frequently is the intended destination of migrants, its policies and actions concerning immigration and refugees can have impact far beyond individual cases and strictly national concerns. They may affect the immigration policies of many other states and, ultimately, the international treatment of refugees. For this reason, it is important that the legal status of the U.S. interdiction policy be fully examined in light of existing and developing international norms.

This Article traces the history of Haitian migration to the United States in the context of political and economic conditions in Haiti. It then examines international norms and United States laws governing refugee status and treatment. The Article next describes the interdiction program and analyzes the issues it raises under international and domestic law. Finally, the Article recommends that the interdiction program

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be terminated because of its potentially negative impact on prevailing international norms and on the treatment of refugees by other states.

## I. Haitian Migration

### A. *Conditions in Haiti*

Haiti has been described as the poorest, most repressive country in the western hemisphere.<sup>1</sup> Under the regime of Francois "Papa Doc" Duvalier, who ruled the country from 1957 to 1971, there was a consistent pattern of documented human rights violations in Haiti.<sup>2</sup> Duvalier established the Tonton Macoutes — the Haitian secret police — whose members virtually rule the countryside.<sup>3</sup> His regime was marked by graft and corruption, including widespread abuses of foreign aid, and by the torture, exile, and banning of the political opposition. Most Haitian intellectuals, professionals, and others seen as political threats fled the country, were exiled, or were killed during this period.<sup>4</sup>

Duvalier's son, Jean-Claude "Baby Doc" Duvalier, assumed power upon his father's death in 1971.<sup>5</sup> Jean-Claude soon announced a "liberalization," but his promise has not been realized; Haiti remains an extremely repressive country ruled by an authoritarian government.<sup>6</sup> Although the Haitian Constitution purports to guarantee substantial protection of individual civil rights,<sup>7</sup> these freedoms are in practice effec-

1. *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 475 (S.D. Fla. 1980), *modified sub. nom. Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (quoting Jerry De Santillana, State Department Country Officer for Haiti); *see also* Taylor, *Deciding How to Stop the Haitians — And Why*, N.Y. Times, Nov. 1, 1981, at E4, col. 1.

2. *See generally Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 701, 711-16 (1981) [hereinafter cited as *Immigration Reform Hearings*] (prepared statement of Dr. Alexander Stepick, Sociology Department, Florida International University) [hereinafter cited as Stepick, *Immigration Reform Hearings*]. Haiti's political history has been turbulent, marked by "alternating periods of authoritarian rule and political instability." U.S. DEPARTMENT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1984, at 568 (1985) (report on Haiti) [hereinafter cited as 1984 STATE DEP'T COUNTRY REPORTS].

3. *See Immigration Reform Hearings, supra* note 2, at 712 (origins of Tonton Macoutes), 716 (operation), 722-23, 732-33 (terror and lawlessness of countryside). The official title for the Tonton Macoutes is Volunteers for National Security.

4. *See* 127 CONG. REC. H9330-31 (daily ed. Dec. 10, 1981) (statement by Rep. Chisholm); M. Hooper, Critique of the State Department Report on Human Rights Practices in Haiti for 1980, at 15 (May 1981) (unpublished report of the Lawyers Committee for International Human Rights [hereinafter cited as Lawyers Committee]).

5. *See* Stepick, *Immigration Reform Hearings, supra* note 2, at 717-44 (description of Haitian conditions under Jean-Claude Duvalier's rule). Jean-Claude was eighteen years old when he became President-for-Life.

6. *See* Haiti — Report of a Human Rights Mission: June 26-29, 1983 (unpublished report of the Lawyers Committee, Americas Watch, and the International League for Human Rights); 1984 STATE DEP'T COUNTRY REPORTS, *supra* note 2, at 568-69.

7. HAITIAN CONSTITUTION of 1983, title II, ch. IV, arts. 22-51.

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tively restricted by other laws. The President-for-Life has plenary powers during the nine months the legislature is not in session, and in the past frequently has dissolved the legislature and suspended the Constitution.<sup>8</sup>

Human rights abuses in Haiti persist. Members of the general populace, as well as political opponents of the Duvalier regime, face arbitrary detention without arrest procedures or due process protections.<sup>9</sup> Members of the opposition Christian Democratic Party, including its President, Sylvio Claude, have been subjected to frequent harassment, arbitrary detention, and beatings.<sup>10</sup> Persons suspected of involvement with anti-government exile organizations, and others deemed disloyal to the government, have been prosecuted.<sup>11</sup>

Returnees to Haiti also have reason to fear for their safety. Despite periodic official assertions that those returning from abroad would not be harmed, returnees frequently have been tortured or imprisoned under inhumane conditions.<sup>12</sup> Former Tonton Macoutes have testified that they were under standing orders to arrest and imprison all returnees from the United States, considered traitors for having left Haiti.<sup>13</sup>

Repression and poverty reinforce each other in Haiti, the poorest nation in the Western Hemisphere.<sup>14</sup> Three percent of the population controls the bulk of the nation's wealth.<sup>15</sup> Members of the ruling stratum use their positions for personal enrichment, through taxation and extortion of the populace and the diversion of foreign aid from its intended

8. See 1984 STATE DEP'T COUNTRY REPORTS, *supra* note 2, at 568; U.S. DEPARTMENT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1983, at 600 (1984) (report on Haiti) [hereinafter cited as 1983 STATE DEP'T COUNTRY REPORTS]; Lawyers Committee, Recent Violations of Human Rights in Haiti 10 (Feb. 1981) (unpublished report). Article 79 of the HAITIAN CONSTITUTION of 1983 provides that under "grave" circumstances the President may dissolve the legislature; however, there is no provision allowing for suspension of the Constitution itself.

9. See AMNESTY INTERNATIONAL REPORT 1984: HAITI 164-67 (1984).

10. M. Hooper, Election 1984: Duvalier Style 4 (unpublished report of Americas Watch and the Lawyers Committee on Human Rights in Haiti) (Mar. 1984). [hereinafter cited as Election 1984].

11. 1983 STATE DEP'T COUNTRY REPORTS, *supra* note 8, at 602, 606; Election 1984, *supra* note 10, at 9.

12. See Lawyers Committee, Violations of Human Rights in Haiti 45 (unpublished report to the Organization of American States) (Nov. 1980) (treatment of returnees generally); *Id.* at app. C1 (treatment of returnees from the United States); see also Stepick, *Immigration Reform Hearings*, *supra* note 2, at 734-36 (treatment of returnees from the United States).

13. See Lawyers Committee, *supra* note 12, at app. C5 (affidavit of a former Tonton Macoute); see also Stepick, *Immigration Reform Hearings*, *supra* note 2, at 735 (reporting Macoute testimony about treatment of returnees).

14. 1984 STATE DEP'T COUNTRY REPORTS, *supra* note 2, at 576. Nearly eighty percent of the rural population "exist in dire poverty." *Id.*

15. 127 CONG. REC., *supra* note 4.

uses, relying on intensified repression to retain their official positions.<sup>16</sup> Given such conditions it is hardly surprising that increasing numbers of Haitians have sought to leave their homeland for both political and economic reasons.

### B. *Haitian Migration to the United States*

Large-scale migration of poor Haitians to the United States began in 1972.<sup>17</sup> Prior to 1972, most departing Haitians migrated to the Bahamas. When the Bahamian government threatened them with deportation in the late 1960's and early 1970's, they left the Bahamas for Miami; new migrants headed by boat directly for the United States.<sup>18</sup> Beginning in 1978 the number of Haitian migrants increased dramatically. By the summer of 1981, up to one thousand were being apprehended each month;<sup>19</sup> the INS estimated that an equal number entered undetected.<sup>20</sup> Forty to fifty thousand Haitians entered the United States illegally between 1972 and the occurrence of the first interdiction in October 1981, according to these INS estimates.<sup>21</sup>

Even though Haitians constituted less than two percent of illegal immigrants to the United States,<sup>22</sup> their influx attracted considerable public attention, in part because many arrived in south Florida at the same time as the Mariel boatlift from Cuba. Between April 21 and October 10, 1980, approximately 125,000 Cubans and 25,000 Haitians were processed in south Florida.<sup>23</sup> The Carter Administration gave these Cubans and Haitians a special entrant status, which entitled them to certain

16. See Hooper, *supra* note 4, at 12, 16; Stepick, *Immigration Reform Hearings*, *supra* note 2, at 723-26; see also U.S. DEPARTMENT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1980, at 459, 461 (1981) (report on Haiti) [hereinafter cited as 1980 STATE DEP'T COUNTRY REPORTS]; Inter-American Commission on Human Rights, Organization of American States, Report on the Situation of Human Rights in Haiti 74 (Dec. 13, 1979) (O.A.S. Index OEA/Ser. I/V./11.46, doc. 66 rev. 1 [hereinafter cited as IACHR Report]) ("Under these conditions it is questionable whether badly needed foreign assistance programs effectively reach their targets.").

17. Buchanan, *Haitian Emigration: The Perspective from South Florida and Haiti* at i (unpublished report for U.S. Agency for International Development).

18. *Id.* at iv-v.

19. Taylor, *supra* note 1, at E4, col. 1.

20. *Id.*; Buchanan, *supra* note 17, at ii.

21. Taylor, *supra* note 1, at E4, cols. 2-3 (citing INS statistics).

22. *Coast Guard Oversight—Part 2: Hearings on Military Readiness and International Programs Before the Subcomm. on Coast Guard and Navigation of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 13 (1981) (testimony of David C. Hiller, Special Assistant to the Attorney General, Department of Justice) [hereinafter cited as *1981 Coast Guard Hearings*]; Office of the Attorney General, Memorandum from David Hiller to Members of the President's Task Force on Immigration and Refugee Policy 2 (May 19, 1981) [hereinafter cited as *Task Force Memorandum*].

23. Masanz, *Immigration: Undocumented Haitians 1* (Cong. Research Service, Library of Cong., Feb. 8, 1982) (24,034 Haitians processed and paroled into the United States); Masanz,

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health and social service benefits.<sup>24</sup> The combined influx put great pressure on health services, housing, and other social services in the Miami area.<sup>25</sup> The crime rate in the area rose dramatically, although observers attributed little if any of the increase to the Haitians.<sup>26</sup> Haitians also encountered problems because they spoke Creole rather than the English or Spanish spoken in Miami.<sup>27</sup> Finally, at a time of rising unemployment, some Americans perceived them as competitors for unskilled labor positions.<sup>28</sup>

For all of these reasons, the federal government sought to end the influx of Haitians, the migration of Cubans to south Florida having already stopped. In part because the Cuban government had made clear that it would not consider allowing any of its nationals to return at that time, attention focused on the Haitians. The Reagan Administration began to pressure the Haitian government to halt or at least minimize the influx of its nationals. The Reagan Administration Task Force on Immigration and Refugee Policy considered ways to expedite the return of Haitians and to deter further immigration. Since in the past the Haitian government had not made any concerted effort regarding this matter,<sup>29</sup> it ap-

Recent Haitian Immigration to the United States 2 (Cong. Research Service, Library of Cong., Feb. 9, 1981) (125,000 Cubans processed) [hereinafter cited as Recent Haitian Immigration].

24. Masanz, Recent Haitian Immigration, *supra* note 23, at 16. Later Haitian migrants, however, were not eligible for this federal assistance. Taylor, *supra* note 1, at E4, col. 1.

25. See, e.g., *Immigration Reform Hearings*, *supra* note 2, at 662-64 (testimony of Dewey Knight, Jr., Ass't County Manager, Dade County, Fla.) (absorption problems generally); *id.* at 665-68 (testimony of Linda Berkowitz, Operations and Management Consultant for Refugee Affairs, Health and Rehabilitative Services, State of Fla., District 11) (impact on social services); *id.* at 676-78 (testimony, prepared statement, and statistical cost tables of Paul W. Bell, Associate Superintendent, Bureau of Education, Dade County Public Schools, Miami, Fla.) (impact on educational services); *Coast Guard Oversight Hearings Before the Subcomm. on the Coast Guard and Navigation of the House Comm. on the Merchant Marine and Fisheries*, 97th Cong., 2d Sess. 252 (1982) (written statement of Charles Kimbrell, Miami Citizens Against Crime Organization) (destitute Haitians as burden on system) [hereinafter cited as *1982 Coast Guard Hearings*].

26. *1982 Coast Guard Hearings*, *supra* note 25, at 131 (statement of Rep. Pepper, of Florida) (drug traffickers, not Haitians, responsible for upswing in homicides); *id.* at 206 (statement of Rep. Hughes) (Haitians good citizens who had not contributed to domestic crime rate; should not link interdiction of Haitians with preventing crime); *id.* at 252 (written statement of Charles Kimbrell) (no evidence that Haitians contribute significantly to crime problem).

27. *Id.* at 252 (written statement of Charles Kimbrell) (language barrier is burden on system); N.Y. Times, Oct. 4, 1981, at 71, col. 1 (cultural and language problems make treatment of Haitians difficult; shortage of translators exists).

28. See *Refugees or Prisoners?* Newsweek, Feb. 2, 1982, 16, 24 & 29.

29. This was probably, in part, because many Haitian officials allegedly prospered from kickbacks provided by smugglers. See, e.g., A. STEPICK, HAITIAN REFUGEES IN THE U.S. 11 (Minority Rights Group, Report No. 52, 1982) [hereinafter cited as STEPICK, M.R.G. REPORT]; Interview with Michael S. Hooper, Director of Research and Director of Haiti Project, The Lawyers Committee for International Human Rights, in New York City (May 19, 1982) [hereinafter cited as Hooper Interview]; Interview with William Woodward, Staff Director of Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and

peared that absent U.S. action the Haitian influx would continue.<sup>30</sup>

Until the summer of 1981 the INS had usually released Haitians to sponsors in the community, under the government's discretionary parole authority, pending final decisions in their exclusion, deportation, or asylum proceedings.<sup>31</sup> Although few Haitian migrants had been granted political asylum in the United States,<sup>32</sup> those who reached this country often could prolong their stays for many years through lawsuits challenging INS adjudicatory procedures and through use of the appeals process.<sup>33</sup> By 1981, this had created a backlog of six to seven thousand Haitian deportation cases in the Miami office of the INS.<sup>34</sup>

The U.S. government responded with efforts to facilitate the removal of the Haitians, each of which was challenged in federal court. To expedite the return of Haitians from the United States and to deter further migration, the INS instituted a program of expedited hearings in the summer of 1981, and conducted mass exclusion hearings behind closed doors.<sup>35</sup> However, federal courts held that this procedure violated both

Fisheries, in Washington, D.C. (Mar. 17, 1982) [hereinafter cited as Woodward Interview]. Mr. Hooper is presently Executive Director of the National Coalition for Haitian Refugees. Other reasons suggested for the past inaction of the Haitian government were that (1) emigration afforded an escape valve for the country's high unemployment, and (2) the emigrants sent back significant revenue, helping the ailing Haitian economy. *See Sending Them Back to Haiti*, Time, June 22, 1981, at 21.

30. *See* Task Force Memorandum, *supra* note 22, at 2.

31. *U.S. Announces New Policy for Parole of Some Haitians*, N.Y. Times, June 15, 1982, at A24, col. 1. (new parole policy "essentially a return to the policy of a year ago," perhaps as a face-saving decision by the Administration). Those apprehended before entering the United States are subject to exclusion proceedings, while those who have effected "entry," even if illegally, face deportation hearings and are afforded more extensive procedural safeguards. *See infra* note 64 and accompanying text. Regarding asylum proceedings, *see infra* notes 60-84 and accompanying text.

32. *See* Masanz, *Immigration: Undocumented Haitians*, *supra* note 23, at 3 (while over 15,000 Haitians were processed between October 1980 and October 1981, and most requested asylum, only five were granted asylum in fiscal year 1981). It is difficult to get valid statistics on the number of Haitians granted and denied asylum since 1972. According to a report prepared by the National Council of Churches in April 1980, the INS in November 1979 stated that it rejected more than 99 percent of Haitian asylum requests. The next month the Acting INS Commissioner stated in a letter to a congressman that "only 58 Haitians had been granted asylum in the United States." NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., HAITIAN REFUGEES NEED ASYLUM: A BRIEFING PAPER 14 (April 1980) [hereinafter cited as NATIONAL COUNCIL OF CHURCHES]. *See also* Haitian Refugee Center v. Civiletti, 503 F. Supp. at 510 (all of the Haitian asylum applications processed during the "Haitian Program" challenged by that suit had been denied).

33. *See, e.g.*, Haitian Refugee Center v. Civiletti, 503 F. Supp. 442; Pierre v. United States, 547 F.2d 1281 (5th Cir. 1977), *reh'g denied*, 551 F.2d 863, *vacated and remanded*, 434 U.S. 962 (1977), *on remand* 570 F.2d 95 (1978); Sannon v. United States, 427 F. Supp. 1270 (S.D. Fla. 1977), *vacated and remanded without opinion*, 566 F.2d 104 (5th Cir. 1978), *on remand*, 460 F. Supp. 458 (S.D. Fla. 1978), *remanded with directions to vacate and dismiss*, 631 F.2d 1247 (5th Cir. 1980).

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

35. *See* N.Y. Times, June 6, 1981, at 7, col. 1 (mass deportation hearings in locked court-

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constitutional and statutory protections. Attorneys representing Haitians moved successfully to enjoin these mass hearings<sup>36</sup> and secured an emergency stay of deportation for persons tried under the expedited procedures.<sup>37</sup> The INS agreed to hold new individual hearings for these persons,<sup>38</sup> but those hearings also failed to provide the required procedural safeguards.<sup>39</sup>

The INS also instituted a policy of detaining all newly-arrived Haitians rather than releasing them to sponsors, believing that this detention policy would ensure their appearance at hearings, facilitate more rapid processing of individual cases, and deter further migration.<sup>40</sup> Lawyers successfully challenged this detention policy on both due process and equal protection grounds, only to have the decision overturned by the Eleventh Circuit in February 1984.<sup>41</sup>

In the context of these controversies over expedited procedures and

room produce complaints and inquiries). Note that the 1978 "Haitian program", in which asylum hearings had been speeded up and summary denials of asylum had been issued, was successfully challenged in *Haitian Refugee Center v. Civiletti*, 503 F.Supp. at 452, as violative of the Constitution, immigration statutes, international agreements, and INS regulations and operating procedures. In *Haitian Refugee Center*, the court ordered the detained Haitians released on parole.

36. See N.Y. Times, June 11, 1981, at 16, col. 1 (basic contentions of the attorneys in case before Judge Hastings). See also N.Y. Times, June 28, 1981, at A28, col. 3 (allegations of problems with translators); N.Y. Times, July 7, 1981, at 10, col. 1 (translation errors, e.g., after judge asked Haitian whether he wished to appeal the deportation order to a higher court, translator asked Haitian if he wished to move to a larger courtroom); Wash. Post, Oct. 19, 1981, at A1, col. 1 (translator asked Haitians if they wanted to go to an insane asylum rather than asking if they were seeking political asylum).

37. N.Y. Times, June 11, 1981, at 16, col. 1 (emergency stay). On September 9, 1981, the attorneys won a temporary restraining order, converted three weeks later into a preliminary injunction, barring deportation of Haitians detained pending exclusion proceedings and not represented by a lawyer. *Louis v. Meissner*, 530 F.Supp. 924 (S.D. Fla. 1981) (Hastings, J.). See Wash. Post, *supra* note 36, at A11, col. 4.

38. N.Y. Times, July 7, 1981, at 10, col. 1 (Justice Department said it was willing to hold new hearings).

39. Wash. Post, *supra* note 36, at A10, col. 2. For example, because hearings were scheduled simultaneously in three courtrooms, lawyers had to run from room to room seeking continuances. *Id.*

40. See N.Y. Times, *supra* note 31, at col. 3; Task Force Memorandum, *supra* note 22, at 10. See also Wash. Post, June 12, 1981, at A1 (describing Reagan Administration Task Force recommendations).

41. *Louis v. Nelson*, 544 F. Supp. 973, 997 (S.D. Fla. 1982), *modified sub nom. Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983), *rev'd* 727 F.2d 957 (11th Cir. 1984) (*en banc*), *reh'g denied*, 733 F.2d 908 (11th Cir. 1984), *cert. granted*, 105 S.Ct. 563 (1984), *Louis v. Nelson*, 544 F.Supp. 1004, 1006-09 (S.D. Fla. 1982) (final judgment of Judge Spellman ordering temporary parole release, issued eleven days after above decision). The district court focused its analysis on violations of due process; the three-judge circuit court panel also found that equal protection violations had occurred. The Eleventh Circuit, sitting *en banc*, reversed in a February 1984 decision, holding that excludable aliens have no constitutional rights with respect to applications for admission, asylum, or parole. The court noted that the interdiction policy was not at issue in that litigation. 727 F.2d at 963 n.3. See also Taylor, *supra* note 1, at E4, col. 1 (new parole policy announced in anticipation of decision in *Louis v. Nelson*).

detention, the Reagan Administration announced its policy of interdiction on the high seas.<sup>42</sup> The interdiction program prevented Haitians from reaching the United States and claiming the procedural protections afforded by the Constitution and federal statutes. It also effectively exploited the ambiguities of both international and domestic protections of refugees, while clearly violating their spirit.

## II. The Refugee Status of Haitian Migrants

### A. *International Law*

The United Nations Convention<sup>43</sup> and Protocol<sup>44</sup> Relating to the Status of Refugees define a refugee as any person who

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . . .<sup>45</sup>

The principle of *non-refoulement* protects refugees from return to a country where they would face persecution.<sup>46</sup> Article 33(1) of the Convention sets forth this principle: “[N]o Contracting State shall return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, or membership of a particular social group or political opinion.”<sup>47</sup> The United States, as a party to the Protocol, is bound

42. Indeed, the interdiction program should be seen as part of a more broadly-conceived immigration program to regain control over U.S. borders. See *Louis v. Nelson*, 544 F.Supp. at 980 n. 19 (“interdiction and detention”, one of the options developed by the Justice Department, was endorsed by most other departments).

43. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter cited as Convention]. The United States is not a party to the Convention but is a party to the Protocol, which incorporates Articles 2-34 of the Convention.

44. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) (The United States acceded on Nov. 1, 1968 with reservations). [hereinafter cited as Protocol].

45. *Id.* art. I, § 2.

46. See A. GRAHL-MADSEN, *TERRITORIAL ASYLUM* 43 (1980) for an argument that the rule of *non-refoulement* is a generally accepted principle. Other authorities, however, see as uncertain whether *non-refoulement* has yet been accepted as an obligation binding on states that have not acceded to the Protocol. See *Recent Developments, Refugees — United Nations Meeting on Refugees and Displaced Persons in South-East Asia, July 20-21, 1979*, 21 HARV. INT’L L. J. 290, 296-97 (1980) [hereinafter cited as *Recent Developments*]; *Recent Developments, Alien’s Rights — The Refugee Act of 1980 as a Response to the Protocol; The First Test*, 14 VAND. J. TRANSNAT’L L. 561, 581 (1981).

47. 189 U.N.T.S. 137, art. 33(1). The definition of a refugee and the principle of *non-refoulement* are considered so fundamental that no state may make reservations to these provisions. See Protocol, *supra* note 44, at art. VII. See also *Introductory Note by the Office of the United Nations High Commissioner for Refugees* 1, U.N. Doc. HCR/INF/29/Rev. 3 (1978).

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by the principle of *non-refoulement*.<sup>48</sup>

Asylum seekers are further protected by the principle of first asylum. This principle provides that, in cases of a large-scale influx of refugees, the state in which the refugees first seek asylum should admit them without discrimination and provide at least temporary shelter and protection, even if that state cannot admit them permanently.<sup>49</sup>

These principles do not, however, provide a clear and binding international prescription. Complexity arises from the asymmetry between the individual's right to leave his country and to seek and enjoy asylum, and the lack of corresponding state obligations to afford entry and grant asylum.

This imbalance is inherent in the concept of state sovereignty. States have traditionally claimed absolute discretion in determining admission and granting asylum.<sup>50</sup> States have no internationally-imposed duty to admit any aliens: admission of individuals remains a moral matter left to national discretion.<sup>51</sup> The right of asylum in international law is the right of a state, in its discretion, to grant asylum. While the Universal Declaration of Human Rights accords every person the right "to leave any country, including his own"<sup>52</sup> and "to seek and enjoy in other countries asylum from persecution,"<sup>53</sup> the individual's right to be granted asylum

48. See Protocol, *supra* note 44.

49. Conclusions on the International Protection of Refugees (adopted by the Exec. Comm. of the UNHCR Programme) 36 U.N. GAOR Supp. (No. 124) at 16, U.N. Doc. A/AC.96/601 (1981).

50. See G. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES* 50-57, 137-38 (1978); A. GRAHL-MADSEN, *supra* note 46, at 2. See also W. Smith, *The Refugee Crisis: Solving the Problems*, 67 A.B.A. J. 1464 (1981) (discussing the dilemma and the need for international standards for determining refugee status to ensure *non-refoulement*).

51. A. GRAHL-MADSEN, *supra* note 46, at 43 (right to gain admission belongs to moral sphere); G. GOODWIN-GILL *supra* note 50, at 20, 50-57 (national, discretionary decision; no individual right of entry).

52. Universal Declaration of Human Rights, G.A. Res. 217A (III), 3 U.N. GAOR at 71 (art. 13(2)), U.N. Doc. A/810 (1948) [hereinafter cited as Universal Declaration].

53. *Id.* art. 14(1). Arguably, the rights expressed in the Universal Declaration have become norms of customary international law. See Final Act of the International Conference on Human Rights, U.N. Doc. A/CONF. 32/41 at 4 (U.N. Publ. E.68.XIV.2) (1968) (Universal Declaration is obligatory for members of the international community); *Montreal Statement of the Assembly for Human Rights 2* (1968), reprinted in 9 J. INT'L COMMISSION OF JURISTS 94, 95 (1968) (Universal Declaration is part of customary international law). See also 2 L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS*, 549-59 (1972) (discussion of authority and impact of the Universal Declaration on decisions taken by the UN, on international treaties and conventions, and on national constitutions, municipal laws, and court decisions); K. Kalumiya, U.S. Interdiction of Haitian Boats on the High Seas 8 (Oct. 12, 1981) (unpublished interoffice memorandum of the Washington Liaison Office of UNHCR) [hereinafter cited as Kalumiya Memorandum]. But see G. GOODWIN-GILL, *supra* note 50 at 44. Judge Richey, in *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396, 1405 (D.D.C.

has not evolved into a general principle of international law.<sup>54</sup> Finally, the Universal Declaration provides an "escape clause" allowing states to impose limits on guaranteed rights for a number of reasons including protection of the "general welfare."<sup>55</sup>

Some limits on national discretion do exist, however, and have found recognition in international law. The principle of *non-refoulement* restricts this discretion by prohibiting a state from returning a bona fide refugee to a state where he or she has a well-founded fear of persecution.<sup>56</sup> The norm of non-discrimination on racial grounds also limits state discretion in immigration and asylum decisions.<sup>57</sup>

Even within these international norms for the protection of refugees, states do retain broad *procedural* discretion. While the Protocol defines a refugee, it does not specify the procedures that states must follow in determining refugee status, leaving their development to each contracting state.<sup>58</sup> However, if a state does not employ procedures that effectively determine which aliens qualify as refugees, international principles, such as *non-refoulement*, will be rendered meaningless in practice.<sup>59</sup>

## B. *United States Law*

To fulfill the United States' legal obligations under the Protocol, Congress amended the Immigration and Nationality Act (INA) in 1980 to incorporate the Protocol's definition of a refugee.<sup>60</sup> In the Refugee Act

1985), entirely ignored the idea that the Universal Declaration has become part of customary international law.

54. A. GRAHL-MADSEN, *supra* note 46, at 2, 42 (only rudimentary provisions of individual right to asylum in international law; no international obligation to grant asylum); G. GOODWIN-GILL, *supra* note 50, at 137-38 (right of state and not of refugee); Pugash, *Dilemma of the Sea Refugee: Rescue Without Refuge*, 18 HARV. INT'L L. J. 577, 586 (1977) (no right to be granted asylum due to territorial sovereignty of states). *See also* Comment, *Can the Boat People Assert a Right to Remain in Asylum?*, 4 U. PUGET SOUND L. REV. 176 (1980) (concerning Indochinese refugees).

55. Universal Declaration, *supra* note 52, art. 29(2). This is a very broad exception. *See* Norfeiger, *The Right of Migration Under the Helsinki Accords*, 1980 S. ILL. U. L. J. 395, 401 (1980).

56. G. GOODWIN-GILL, *supra* note 50, at 196.

57. *Id.* Article 3 of the Convention, *supra* note 43, provides that contracting states must apply the provisions of the Convention without discriminating on the basis of race, religion, or national origin.

58. G. GOODWIN-GILL, *supra* note 50, at 196. *See also* Declaration on Territorial Asylum, *infra* note 116, art. 1, § 3, which provides that "[i]t shall rest with the State granting asylum to evaluate the grounds for the grant of asylum." *See* notes 60-84 and accompanying text *infra*, for a discussion of procedures provided by the United States for determining refugee status in the asylum context.

59. *See* U.N. GAOR Supp. (No. 12) at 10, U.N. Doc. No. A/34/12 (1979) (recognition of the practical importance of appropriate procedures); Kalumiya Memorandum, *supra* note 53, at 2 (concern with fairness and impartiality of interdiction procedures).

60. Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 108 (1980) [hereinafter cited

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of 1980, Congress expressed concern for the treatment of refugees and a desire to determine refugee status on the merits of individual cases, not on geographical or ideological grounds as had been done previously.<sup>61</sup> In recognition of the United States' obligation under the Protocol to abide by the principle of *non-refoulement*, Congress adopted a statutory asylum procedure<sup>62</sup> and mandated that the Attorney General could not deport an alien to a country if he determined that "such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>63</sup>

The asylum provision manifests a congressional intent to treat all asylum applicants alike. Whereas other provisions of the INA treat aliens differently depending on whether they are lawfully or unlawfully in the United States and whether they are excludable or deportable,<sup>64</sup> section 208 explicitly eliminates these distinctions for purposes of asylum determinations, directing the Attorney General to establish "a procedure" for an alien to apply for asylum, "irrespective of such alien's status."<sup>65</sup> The

as Refugee Act], adding Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (Supp. V 1981) [hereinafter cited as INA]. See *INS v. Stevic*, 104 S. Ct. 2489 (1984) (while the Supreme Court reversed the Second Circuit decision, 678 F.2d 401 (1982), as to the standard of proof to avoid deportation under section 243(h), it did note that the above provision brought the domestic law definition of refugee into compliance with the Protocol).

61. See H.R. REP. NO. 608, 96th Cong., 1st Sess. 9, 13 (1979) (Committee noted that the new definition of a refugee eliminates geographical and ideological restrictions and brings U.S. statutory law into conformity with the U.N. Convention and Protocol Relating to the Status of Refugees: ". . . the plight of the refugees themselves, as opposed to national origins or political considerations, should be paramount in determining which refugees are to be admitted to the United States.").

62. Refugee Act, *supra* note 60, § 201(b), adding INA § 208(a), 8 U.S.C. § 1158(a) (Supp. V 1981).

63. *Id.* § 203(e), amending INA § 243(h)(1), 8 U.S.C. § 1253(h)(1) (Supp. V 1981). Previously, the Attorney General retained discretion concerning the withholding of deportation. See also H.R. REP. NO. 608, *supra* note 61, at 17-18 (1979) (statement of congressional purpose regarding asylum and the withholding of deportation provisions). The differences between granting asylum and withholding deportation were considered by the Supreme Court in *Stevic*, 104 S. Ct. 2489, a case in which relief was sought under section 243(h). Specifically, the court held that the "well-founded fear of persecution" standard contained in the Protocol definition of refugee (and in section 101(a)(42)(A) of the INA) did not apply to withholding of deportation under section 243(h). It noted that section 243(h), unlike other Refugee Act provisions governing *discretionary* relief, "does not refer to Section 101(a)(42)(A)."

64. Compare, e.g., INA § 106(a), 8 U.S.C. § 1105a(a)(1981) with INA § 106(b), 8 U.S.C. § 1105a(b)(1981) (judicial review of administrative determinations differs in exclusion and deportation cases. Congress may distinguish between aliens who have effected "entry" into this country, even if illegally, and those who have not, and are therefore excludable). See *Candon v. Plasencia*, 459 U.S. 21, 32 (1982); *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1957); *Jean*, 727 F.2d at 968.

65. INA § 208(a), 8 U.S.C. § 1158(a) (Supp. V 1981). The Attorney General implemented the congressional directive by establishing a single set of regulations entitled "Asylum requests in exclusion or deportation proceedings." 8 C.F.R. § 208.10 (1982).

asylum procedure is to apply to aliens "at a land border or port of entry" as well as to aliens physically present in the United States.<sup>66</sup>

United States law and accompanying administrative regulations provide several procedural protections to asylum seekers. Under section 208 of the Refugee Act, Congress created a statutory right to apply for asylum.<sup>67</sup> Arguably asylum seekers must be informed of their right to apply for asylum.<sup>68</sup> INS regulations set forth procedures under which a person seeking asylum and not yet subject to exclusion or deportation proceedings may apply in writing to the district director of the INS.<sup>69</sup> An immigration officer shall interview the applicant<sup>70</sup> and must request an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs of the Department of State before the district director makes a decision on the asylum application.<sup>71</sup>

If the district director approves the application, the alien is granted asylum status for one year;<sup>72</sup> otherwise, an alien seeking admission to the United States will be placed under exclusion proceedings<sup>73</sup> and an alien in the United States will be granted voluntary departure status or placed under deportation proceedings.<sup>74</sup> No appeal from the decision of the district director is allowed,<sup>75</sup> but the alien may renew the application for asylum before the immigration judge in exclusion or deportation

66. INA § 208(a), 8 U.S.C. § 1158(a) (Supp. V 1981).

67. *Id.* See also *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1038 (5th Cir. 1982) (congressional intent to grant aliens the right to apply for asylum and to have an opportunity to substantiate their claims for asylum).

68. 8 C.F.R. § 242.17(c) (1982) provides in pertinent part that the alien in a deportation proceeding "shall be advised that pursuant to section 243(h) of the Immigration and Nationality Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer. . . ." The district court in *Nunez v. Boldin*, 537 F. Supp. 578, 587 (S.D. Tex. 1982), *dismissed*, 692 F.2d 755 (5th Cir. 1982), issued a temporary injunction requiring prison officials to inform Salvadoran and Guatemalan prison detainees of their right to apply for asylum. *Excludable* aliens, however, apparently merit different treatment. See *Jean*, 727 F.2d at 979, 981-83 (such persons "do not have the right to be notified of the opportunity to seek asylum.").

69. 8 C.F.R. § 208.3(a) (1982).

70. 8 C.F.R. § 208.6 (1982). The interview must be made under oath, INS Operating Instructions § 208.9(a), and is to occur within 45 days of the filing of the application. *Id.*

71. 8 C.F.R. § 208.7 (1982). The applicant must be given an opportunity to inspect and explain or rebut this opinion. 8 C.F.R. § 208.8(d) (1982). See generally 8 C.F.R. § 208.8 (1982). The decision must be in writing. 8 C.F.R. § 208.8(b) (1982). The district director shall adjudicate the application without an advisory opinion if he or she has not received the advisory opinion within 45 days after the State Department (Bureau of Human Rights and Humanitarian Affairs) received the request for an opinion. INS Operating Instructions § 208.9(c).

72. 8 C.F.R. § 208.8(e)(1982).

73. 8 C.F.R. § 208.8(f) (1982).

74. 8 C.F.R. § 208.8(f)(4) (1982).

75. 8 C.F.R. § 208.8(c) (1982).

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proceedings.<sup>76</sup>

An applicant for asylum is afforded the additional procedural protections available to any alien in exclusion or deportation proceedings. The alien has a right to be represented by counsel<sup>77</sup> and is to be informed of this right.<sup>78</sup> Other protections include the right to present evidence and to rebut the INS trial attorney's evidence.<sup>79</sup> If the judge approves the asylum application, the alien is granted asylum for one year;<sup>80</sup> if the judge denies it, the exclusion or deportation proceedings are reinstated.<sup>81</sup> The INA and accompanying regulations do not provide a separate process for appeal from denial of an asylum application, but the alien may appeal the denial in the course of appealing to the Board of Immigration Appeals (BIA) from a final order of exclusion or deportation entered after the denial of asylum.<sup>82</sup> The INA provides for judicial review if the BIA affirms the immigration judge's denial of asylum and order of exclusion or deportation.<sup>83</sup>

The current immigration statute and regulations thus afford an asylum applicant significant procedural protections, even if the applicant has not effected legal "entry" and is therefore subject to exclusion hearings. These afford an opportunity for determinations based on the merits of

76. 8 C.F.R. § 208.9 (1982). An alien who did not apply to the district director for asylum may still apply to the immigration judge in the exclusion or deportation hearing. 8 C.F.R. § 208.10(a) (1982). The immigration judge may adjourn the hearing for up to thirty days to permit the application to be filed. 8 C.F.R. § 236.3(a) (1982). If there is no State Department advisory opinion on the application, the judge must adjourn the hearing for up to thirty days pending a response. 8 C.F.R. §§ 208.10(b), 236.3(a)(1) (1982). Once the advisory opinion has been received, the applicant may inspect and explain or rebut it. 8 C.F.R. § 208.10(b) (1982).

Many of these procedures would be altered significantly under the Simpson-Mazzoli legislation introduced in the last three sessions of Congress. *See* proposed section 124 of the Immigration Reform and Control Act of 1983 H.R. 1510/S. 529, 98th Cong. 1st Sess. (1983), which would effect major reforms in the asylum adjudication process.

77. INA § 292, 8 U.S.C. § 1362 (1976); 8 C.F.R. § 292.5(b) (1982); 5 U.S.C. § 555(b) (1976).

78. 8 C.F.R. § 236.2(a) (1982) (exclusion hearings); 8 C.F.R. § 242.16(a) (1982) (deportation hearings).

79. 8 C.F.R. § 236.3(a)(2) (1982) (exclusion); 8 C.F.R. § 242.16(a) (1982) (deportation).

80. 8 C.F.R. § 208.10(e) (1982). The INS may appeal the grant of asylum to the Board of Immigration Appeals (BIA) 8 C.F.R. § 236.7 (1982), and the alien will be given notice that the decision is subject to such appeal, 8 C.F.R. § 236.6 (1982). He will be notified of any appeal and have the opportunity to submit written information to the BIA in support of the decision to grant asylum. 8 C.F.R. § 236.7(c) (1982).

81. 8 C.F.R. § 208.10(f) (1982).

82. 8 C.F.R. § 236.7 (1982) (exclusion); 8 C.F.R. § 242.21 (1982) (deportation).

83. INA § 106(a), 8 U.S.C. § 1105a(a) (1981). An excludable alien is limited to judicial review in habeas corpus proceedings. INA § 106(b), 8 U.S.C. § 1105a(b) (1981). A deportable alien may obtain judicial review in the judicial circuit in which the deportation proceedings took place by bringing an action against the INS within six months of the date of the final order of deportation. INA § 106(a), 8 U.S.C. § 1105a(a) (1981). New section 123 ("judicial review") of the proposed Simpson-Mazzoli legislation would effect certain changes in this area. *See supra* note 76.

individual cases. Though they may also enable applicants to prolong the process indefinitely,<sup>84</sup> they are consistent with concepts of due process and equal protection.

### III. Description of the Haitian Migrant Interdiction Program

On September 29, 1981, President Reagan formally announced a program of interdiction of undocumented migrants on the high seas. The general provisions of this program are set forth in a presidential proclamation<sup>85</sup> and in an executive order.<sup>86</sup>

The proclamation suspends entry of undocumented aliens from the high seas as detrimental to the interests of the United States and announces that the United States will prevent their entry by the interdiction of certain vessels carrying such aliens.<sup>87</sup> The Executive Order directs the Secretary of State to enter into "cooperative arrangements with appropriate foreign governments" to prevent illegal migration to the United States by sea.<sup>88</sup> The United States to date has reached such an agreement only with the Haitian government, by way of an exchange of diplomatic notes.<sup>89</sup> The Haitian government assured the United States that interdicted Haitians will not be harmed when they are returned to Haiti.<sup>90</sup>

The executive order further compels the Coast Guard to enforce the suspension of the entry of undocumented aliens and the interdiction of vessels outside United States territorial waters. The Coast Guard may interdict vessels of the United States, those without nationality, and those of foreign nations that have consented to interdiction in agreements with the United States.<sup>91</sup>

The Coast Guard is to stop and board vessels suspected of carrying illegal aliens or of violating United States law or the law of a country that has consented to interdiction.<sup>92</sup> Pursuant to this authority, and according to guidelines defined by the INS, the commanding officer of the Coast Guard ship has the discretion to decide which vessels to stop and when

84. See *supra* notes 33-34 and accompanying text.

85. Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981), reprinted in 8 U.S.C. § 1182 app. at 820 (Supp. V. 1981) [hereinafter cited as Proclamation].

86. Exec. Order 12324, 46 Fed. Reg. 48,109 (1981), reprinted in 8 U.S.C. § 1182 app. at 819-20 (Supp. V 1981) [hereinafter cited as Exec. Order].

87. Proclamation, *supra* note 85.

88. Exec. Order, *supra* note 86, at 48,109.

89. Exchange of Letters between Ernest Preeg, U.S. Ambassador to Haiti, and Edouard Francisque, Haitian Secretary of State for Foreign Affairs (Sept. 23, 1981) [hereinafter cited as Exchange of Letters].

90. *Id.*

91. Exec. Order, *supra* note 86, at 48,109.

92. *Id.*

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and in what manner to board them.<sup>93</sup> Coast Guard personnel are to make any initial announcements to those on board the interdicted vessel regarding the purpose of boarding, separation of crew and passengers, and general procedures, including advice that the boarded vessel may be returned to the country which consented to interdiction.<sup>94</sup> The Coast Guard also determines whether it is "safe and practicable" for INS personnel to speak to persons on board.<sup>95</sup>

The INS Guidelines emphasize the responsibility of the INS officers involved in the interdiction to ensure United States compliance with its obligations not to return refugees to a country where they have a well-founded fear of persecution.<sup>96</sup> Under the Guidelines, INS employees are to watch for indications that a person may qualify as a refugee under the UN Convention and Protocol.<sup>97</sup> The duties of the INS employees are specifically limited to matters related to interviews concerning documentation for entry to the United States and possible evidence of refugee status.<sup>98</sup> Unarmed INS employees and Creole interpreters are to be members of each boarding party.<sup>99</sup> When the commanding officer of the Coast Guard vessel deems it safe and practicable, the INS employees are to speak to each person on board, through an interpreter if necessary, and to record each person's name, date of birth, nationality, home town, documents, and reasons for departure.<sup>100</sup>

If there are indications that a person may qualify as a refugee, the INS

93. INS Role in and Guidelines for Interdiction at Sea (Oct. 6, 1981) (unpublished memorandum from Doris Meissner, Acting Commissioner of INS, to all INS employees assigned to duties related to interdiction at sea) [hereinafter cited as INS Guidelines].

94. *Id.* at 2. The Coast Guard vessel also performs its other normal functions of search and rescue and interdiction of drug traffic. See 47-81 COMMANDANT'S BULLETIN 13 (Nov. 16, 1981).

95. *Id.* If the Coast Guard officers find it is "safe and practicable," they will advise the INS personnel as to the best location for interviewing those on board. Telephone interview with Willard Woodward, Staff Director, Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries (Dec. 7, 1981).

96. INS Guidelines, *supra* note 93, at 1.

97. *Id.* at 2.

98. *Id.* at 1.

99. *Id.* at 2.

100. Associate Attorney General Rudolph W. Giuliani appears to have testified before the House Coast Guard Subcommittee, on February 8, 1982, that the initial questioning of each person on board also includes inquiries concerning the reasons for the individual's desire to go to the United States and whether or not the individual fears to return to Haiti. 1982 Coast Guard Hearings, *supra* note 25, at 190 (testimony of Giuliani). When informed by Subcommittee Chairman Rep. Gerry E. Studds that these additional questions were *not* posed to persons aboard a vessel interdicted on January 10, 1982, Mr. Giuliani replied that

[w]hen these matters were first discussed, it was my view that INS should uniformly and directly ask each person if they fear returning to Haiti. My testimony before your Committee reflected both my opinion and my belief that such a question should uniformly be included. I have, therefore, asked INS to amend the written guidelines to reflect the fact that a question concerning whether there is some reason why the individual should not be

officers are to conduct individual interviews, out of the hearing of other persons, regarding possible refugee status, and are to make individual records of all such second interviews.<sup>101</sup> If necessary, INS officers may consult with Department of State officials concerning possible refugee status.<sup>102</sup> If the individual interview suggests that the interviewee may have a legitimate claim to refugee status, that individual is to be removed from the interdicted vessel and transported to the United States,<sup>103</sup> where he or she may file a formal application for asylum.<sup>104</sup>

If the INS officials determine that the persons on board the interdicted vessel are violating or attempting to violate either United States immigration laws or appropriate Haitian laws and that they do not qualify for refugee status, the Coast Guard is to return the vessel and its occupants to Haiti or transfer responsibility for their return to Haitian naval authorities.<sup>105</sup> The agreement with Haiti provides that a Haitian naval officer is to serve as a liaison on board the Coast Guard vessel that is responsible for interdiction.<sup>106</sup> Finally, in an effort to ensure that persons returned to Haiti are not persecuted there, representatives of the Department of State are to monitor the returnees periodically.<sup>107</sup>

Since the first reported interdiction on October 25, 1981,<sup>108</sup> the Coast Guard has interdicted more than 70 vessels carrying undocumented migrants.<sup>109</sup> In 1982, 152 Haitians were interdicted and returned to Haiti; in 1983, 651; and in 1984, more than 4000,<sup>110</sup> including 2050 during the

returned to Haiti should be asked during the initial questioning of all on board interdicted vessels headed for the United States.

Letter from R. Giuliani to the Honorable Gerry E. Studds, at 2 (Mar. 23, 1982).

101. INS Guidelines, *supra* note 93, at 2.

102. *Id.* This consultation may be with State Department officials on board the Coast Guard vessel if any are present, or via radio communications.

103. *Id.* The record of his on-board interview also will be sent to the United States.

104. Letter from Doris Meissner, Acting INS Commissioner, to Gary Perkins, Chief of Washington, D.C. Mission of UNHCR, at 2 (Dec. 29, 1981) [hereinafter cited as Meissner letter].

105. Exec. Order, *supra* note 86, at 48,109; 1981 Coast Guard Hearings, *supra* note 22, at 6, 10 (testimony of David Hiller).

106. Exchange of Letters, *supra* note 89, at 3. Apparently, however, no document specifies this officer's location or duties during an interdiction operation.

107. Meissner letter, *supra* note 104, at 2. *But see infra* notes 145-54 and accompanying text for a discussion of the difficulties inherent in monitoring treatment of returnees to Haiti.

108. See COMMANDANT'S BULLETIN, *supra* note 94, at 14; N.Y. Times, Oct. 29, 1981, at 1, col. 2.

109. Thomas, *Search and Interdict*, SEA POWER 35, 42 (Aug. 1984). In addition to continuing to patrol the Windward Passage off the coast of Haiti, since June 1983 the Coast Guard has interdicted vessels beyond United States territorial waters near Florida in an effort to stem the increased flow of Haitians coming to the United States by way of the Bahamas. Some of these vessels carried non-Haitian migrants as well. *Id.*

110. Miami Herald, Dec. 31, 1984, at 3A, col. 1. Statement by Alan C. Nelson, Commissioner of INS, in response to question by Rep. McCollum of Florida at Mar. 20, 1985 INS Oversight Hearings Before the Subcomm. on Immigration, Refugees, and International Law of

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last four months of the year.<sup>111</sup>

The interdiction program appears initially to have had the desired deterrent effect: the number of undocumented Haitians apprehended entering the United States dropped from approximately 1000 per month in the summer of 1981<sup>112</sup> to 134 in all of 1982.<sup>113</sup> This number, however, has increased as the number of interdictions has increased, to 333 in 1983 and over 800 in 1984.<sup>114</sup> Thus, many Haitians have not been deterred from attempting entry into the United States by the existence of the interdiction program.

### IV. Analysis of the Interdiction Program Under International Law

The Haitian migrant interdiction program poses a number of problems under international law and United States treaty obligations.

#### A. *The Principle of Non-Refoulement*

As discussed above, the principle of *non-refoulement* protects refugees from compulsory return to a country in which they will face persecution.<sup>115</sup> The question here is whether this protection extends to refugees interdicted on the high seas. Article 3 of the Declaration on Territorial Asylum prohibits rejection of a refugee at the frontier of a state as well as the return of a refugee already within the territory of a state in which asylum is sought.<sup>116</sup> The Declaration is not legally binding, however, and provides an exception for overriding reasons of national security or to safeguard the population.<sup>117</sup>

A difference of opinion exists as to whether *non-refoulement* pertains to those on the high seas, who are, by definition, outside the territory of a state. The recent district court opinion in *Haitian Refugee Center v.*

*the House of Representatives Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) [hereinafter cited as Statement by Alan C. Nelson, Commissioner of INS] (4000 Haitians were interdicted and returned at a cost of 63 million dollars in 1984).

111. USA Today, Feb. 6, 1985, at 2A, col. 3.

112. See *supra* note 19 and accompanying text.

113. Miami Herald, *supra* note 110 at 3A, col.1. See also Staff of House Comm. on Foreign Affairs, 97th Cong., 2d Sess., Report of Staff Study Mission on U.S. Refugee Policy-Caribbean 2 (Mar. 15, 1982) (unpublished) (on file with the *Yale Journal of International Law*) [hereinafter cited as Foreign Affairs Staff Report].

114. Miami Herald, *supra* note 110, at 3A, col.1. Despite this increase in the number of undocumented Haitians entering the United States, INS has recently reasserted that the program is effective in deterring migration and saving lives. Statement by Alan C. Nelson, Commissioner of INS, *supra* note 110.

115. See *supra* notes 46-47 & 56 and accompanying text.

116. Declaration on Territorial Asylum, G.A. Res. 23/2, 22 U.N. GAOR Supp. (No. 16), U.N. Doc. A/52/7 (1967), art. 3(1).

117. *Id.* at art. 3(2). The exception to "safeguard the population" may include cases of a mass influx of persons.

*Gracey*<sup>118</sup> stated that this provision of the Protocol, as implemented in the United States through the Refugee Act of 1980, did not provide any relief to aliens outside the territory of the United States. By contrast, the legal officer for the United Nations High Commission for Refugees (UNHCR) in the United States has argued that *non-refoulement* does protect refugees on the high seas.<sup>119</sup> The Reagan Administration would appear to have indicated its implicit agreement that *non-refoulement* applies on the high seas, for it has stated repeatedly that *if* a Haitian is found to be a bona fide refugee, the interdicting authorities will not return him against his will.<sup>120</sup>

The Reagan Administration's position has been that while individuals claiming they would be persecuted if returned to Haiti must be given an opportunity to substantiate their claims, the interdiction procedures do comport with the Convention and Protocol.<sup>121</sup> In reality, however, the interdiction procedures may fail to identify refugees and thus not ensure that the United States will fulfill its obligation under the Protocol not to return refugees to a country where they would face persecution.<sup>122</sup>

Recognizing the vulnerable position of most potential refugees, the UNHCR has established non-binding guidelines and basic requirements with which any procedures to determine refugee status should comply.<sup>123</sup> These stress the importance of individual interviews, in which statements are to be treated as confidential in order to encourage truthfulness.<sup>124</sup> The examiner should give the applicant guidance concerning the procedures to be followed in applying for refugee status.<sup>125</sup> Opportunities should exist for contact between UNHCR officials and asylum appli-

118. 600 F. Supp. 1396 (D.D.C. 1985).

119. See Kalumiya Memorandum, *supra* note 53, for an argument that *non-refoulement* applies to refugees outside the territory of a state that seeks to return the refugee, and that it therefore binds the United States with respect to the interdiction program.

120. See, e.g., Exec. Order No. 12324, *supra* note 86, at § 2(c)(3) ("No person who is a refugee will be returned without his consent.").

121. See T. Olson, Office of Legal Counsel, U.S. Department of Justice, Memorandum for the Attorney General Re: Proposed Interdiction of Haitian Flag Vessels 8 (Aug. 11, 1981) [hereinafter cited as Olson, Interdiction Memorandum].

122. See Kalumiya Memorandum, *supra* note 53, at 4 (U.S. policy not within spirit of *non-refoulement* principle or of the universal right to seek and enjoy asylum); Letter from American Immigration Lawyers' Association (AILA) to President Reagan (Oct. 5, 1981) (conditions for the interviews are in derogation of fundamental human rights recognized by the Protocol); N.Y. Times, Oct. 1, 1981, at A34, col. 1 (editorial denouncing interdiction procedures as "nautical kangaroo courts; walrus courts, one might call them").

123. HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 45-49, Office of the UNHCR (1959) [hereinafter cited as UNHCR HANDBOOK] (general guidelines); 32 U.N. GAOR Supp. (No. 12A) at 15, U.N. Doc. No. A/32/12/Add.1 (1977) (UNHCR Exec. Committee recommendations of basic requirements).

124. UNHCR HANDBOOK, *supra* note 123, at 10-11, 48.

125. 32 U.N. GAOR Supp. (No. 12A) at 15, U.N. Doc. No. A/32/12/Add.1 (1977).

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cants.<sup>126</sup> Finally, if the examiner denies an asylum claim, an opportunity to appeal to a judicial or administrative authority should be available.<sup>127</sup>

United States interdiction procedures do not follow these UNHCR guidelines. Migrants may in some circumstances be returned to Haiti without any interview with INS officials because the procedures require interviews only if and when the Coast Guard commanding officer deems it "safe and practicable" to hold them.<sup>128</sup> Even if interviews are held, a migrant first must give some indication of fear of persecution at the initial "interview," which is not confidential, in order to be entitled to a second interview held outside the hearing of others.<sup>129</sup> The questions asked during the initial interview are perfunctory and not designed to reveal the migrant's reasons for leaving Haiti; there is none of the fact-finding or indirect probing concerning the migrant's motivations, beliefs, and background that immigration lawyers consider essential to the development of an asylum claim.<sup>130</sup>

INS examiners are not required to give even those migrants who express a fear of persecution any guidance in applying for asylum.<sup>131</sup> Unless an examiner determines that an applicant qualifies to be taken to the United States, no provision is made for contact between UNHCR officials and the applicant.<sup>132</sup> If an examiner determines that an applicant's claim is unfounded, no appeal is available.<sup>133</sup>

The basic problem recognized by the UNHCR, of the vulnerability of many potential refugees who are questioned by foreign authorities in an unfamiliar environment, is accentuated in the Haitian interdiction con-

126. *Id.*

127. *Id.* The UNHCR recognizes another problem as well: many potential refugees are vulnerable and face serious problems in submitting their asylum claims to authorities because of language barriers, general fear of government officials, and so forth. *See* UNHCR HANDBOOK, *supra* note 123, at 15.

128. *See* INS Guidelines, *supra* note 93, at 2 (questioning will take place to the extent deemed "safe and practicable").

129. *Id.* The need for an affirmative act by the migrant at the initial interview is analogous to section 121 of the proposed Simpson-Mazzoli legislation, *supra* note 76, which would summarize exclude aliens who failed to state affirmatively that they were seeking asylum.

130. *See, e.g.,* Hooper Interview, *supra* note 29; L. Mabry, Human Rights Violations by the United States of America in the Treatment of Haitian Refugees 3 (Mar. 4, 1982) (statement on behalf of the National Council of Churches before the Inter-American Commission on Human Rights) [hereinafter cited as Mabry Statement].

131. *See* INS Guidelines, *supra* note 93. Under the UNHCR Guidelines, those who do not express a fear of persecution and a desire not to return arguably need not be informed of their right to apply for asylum. Yet U.S. procedures do not even require that such persons be informed of the right to apply for asylum when they *have* made such a representation; the INS officer is given complete discretion in conducting the second interview of such potential refugees. *Id.* at 3.

132. *Id.*

133. *Id.*

text. Haitians tend to fear authority because of their experiences with the Tonton Macoutes and other government officials at home.<sup>134</sup> Moreover, a Haitian naval officer remains on board the interdicting Coast Guard vessel.<sup>135</sup> The location of the interview also exacerbates the vulnerability: the boat may be crowded, it may be nighttime, and the migrants may be in poor physical or psychological condition. Such circumstances are not conducive to fair and effective preliminary determinations concerning refugee status.<sup>136</sup> These non-confidential interviews, lasting only a few minutes and conducted through interpreters, do not satisfy the UNHCR guidelines calling for thorough interviews to protect against the return of bona fide refugees.<sup>137</sup>

The principle of *non-refoulement* is also threatened by the unreliability of the Haitian government's assurances that it will not mistreat returnees. Coupled with the United States government's inability to monitor treatment of returnees and to enforce these assurances, this makes it probable that some returnees to Haiti will face persecution. The Haitian government will know the returnees' identities because the United States government is obliged to inform the Haitian authorities of the detention of any Haitian flag vessels and any subsequent actions taken.<sup>138</sup> Those who left Haiti because of persecution or fear of persecution but who, due

134. See *supra* notes 1-16 and accompanying text. William Woodward, who was present during the January 10, 1982 interdiction, stated that the Haitians, because they were being held by uniformed persons, assumed that they would be turned over to Haitian legal authorities for leaving Haiti without visas. Woodward Interview, *supra* note 29. Attorneys who have represented Haitian asylum applicants in the United States note that this fear of authority (and the lack of understanding of the U.S. system) makes applicants reluctant to tell even their attorneys the true reasons for their flight from Haiti. Statements of Ira Kurzban, lead counsel for the Haitian Refugee Center in Miami, and Dale F. Swartz, Executive Director of the National Immigration, Refugee, and Citizenship Forum in Washington, D.C., Workshop on Litigating Haitian cases, held at the Yale Law School (Nov. 6, 1982) (notes on file with the *Yale Journal of International Law*).

135. See Exchange of Letters, *supra* note 89, at 3 (Haitian naval officer's presence authorized and no restrictions imposed); Woodward Interview, *supra* note 29 (Haitian officer present on board January 10, 1982; Coast Guard commander used discretion to keep him away from the migrants).

136. See Kalumiya Memorandum, *supra* note 53, at 2 (concern with high seas locus of interviews).

137. See Letter from Gary Perkins, Chief of Washington, D.C. Mission of UNHCR, to Doris Meissner, Acting INS Commissioner (Oct. 27, 1981) (need for thorough interview to prevent such return) (on file with the *Yale Journal of International Law*). See also W. Woodward, Haitian Migration Interdiction Operation 17-18 (unpublished House Coast Guard Subcomm. Staff Report on Study Mission to Haiti, Jan. 7-12, 1982) [hereinafter cited as Woodward Report] (on file with the *Yale Journal of International Law*) Mr. Woodward observed the second interdiction, on Jan. 10, 1982. He reported that each interview, conducted through a Creole translator, lasted only one to two minutes. *Id.* at 19-20.

138. See Exchange of Letters, *supra* note 89, at 2. After the first two interdictions, returnees were not met by officials of the Haitian Red Cross, which has close ties to government authorities and the Duvalier family. See Woodward Report, *supra* note 137, at 21; Hooper Interview, *supra* note 29.

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to the inadequacy of hearing procedures on board the boat, are returned to Haiti, may face the persecution they sought to escape. Those who left Haiti solely or primarily for economic reasons may be persecuted by the Haitian government for insulting or embarrassing the government by leaving the country.<sup>139</sup> The United States recognizes that if economically motivated migrants, who face harsh punishment because the Haitian government treats their departure as a political act, qualify as refugees even if they did not originally leave Haiti due to a fear of persecution.<sup>140</sup> If either type of returnee is likely to be persecuted, the United States violates the principle of *non-refoulement* by returning them to Haiti.

Past experience calls into question Haitian government assurances that returnees will not be persecuted. A UNHCR official has counseled that “[p]rudence argues against UNHCR acceptance, at face value, [of] the Haitian government’s undertaking that no forcibly returned person shall be subject to persecution.”<sup>141</sup> Even if President Duvalier tempers the behavior of the national government in recognition of the fact that United States aid to Haiti may depend on respect for human rights,<sup>142</sup> this does not restrain abuses by local Tonton Macoutes officials.<sup>143</sup> Moreover, effective monitoring of abuses of returnees’ rights has proven impossible by groups within Haiti.<sup>144</sup>

The Reagan Administration defends the interdiction program, in part, by claiming that the United States monitors returnees in Haiti to ensure that they are not mistreated.<sup>145</sup> While the INS has assured the UNHCR

139. See *supra* notes 12-13 and accompanying text (persecution of returnees despite assurances that they would not be harmed; standing orders for Macoutes to arrest and imprison all returnees from the United States). See also NATIONAL COUNCIL OF CHURCHES, *supra* note 32, at 18 (disappearances of returnees).

140. See T. Olson, Office of Legal Counsel, U.S. Dep’t of Justice, Interpretation of the Refugee Act of 1980 (Aug. 24, 1981) (Memorandum for David W. Crosland, General Counsel, INS) [hereinafter cited as Olson, Refugee Act Memorandum], reprinted in *U.S. Refugee Program: Oversight Hearings Before the Subcomm. on Immigration, Refugees, and Int’l Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 24, 29 (1981) [hereinafter cited as *Refugee Program Hearings*].

141. Kalumiya Memorandum, *supra* note 53, at 3-4.

142. Under section 721 of the International Security and Development Cooperation Act of 1981, 22 U.S.C. § 2151 (1982), certain funds and credits may be expended for Haiti only if the President determines that the Haitian government is cooperating in acting against illegal emigration, and in implementing U.S. development assistance programs and “is not engaged in a pattern of gross violations” of human rights. *Id.* Duvalier appears to have recognized this, at least on occasion. See Hooper Interview, *supra* note 29 (noting Haitian government action against human rights abuses in the capital, Port-au-Prince).

143. The law in the countryside is defined by the local Tonton Macoutes, in part because of the lack of an adequate legal system in Haiti. See *supra* note 3 and accompanying text.

144. The Haitian League for Human Rights, an independent group, has in the past been a target of continued harassment and violence. See M. Hooper, Critique of the State Department Report on Human Rights Practices in Haiti for 1980, *supra* note 4.

145. 1982 Coast Guard Hearings, *supra* note 25, at 191 (testimony of Rudolph W. Giuliani,

that the State Department would monitor returnees,<sup>146</sup> the practicalities of Haitian life and geography, and the failure of the U.S. Embassy in Port-au-Prince to regard this monitoring as a priority, make effective enforcement unlikely.<sup>147</sup> Even if enforcement were a high priority, frequent monitoring would be time-consuming and difficult because most of the migrants are from small towns far from Port-au-Prince.<sup>148</sup> Furthermore, official monitoring efforts are unlikely to be effective in discovering abuses because the returnees' fear of reprisals by authorities will deter them from confiding in U.S. officials, who may be perceived as collaborating with the Haitian authorities.<sup>149</sup>

The State Department did conduct a follow-up on sixteen returnees from the first interdicted vessel and found no complaints of mistreatment.<sup>150</sup> The National Council of Churches, however, has claimed that six or seven of this group disappeared.<sup>151</sup> The Lawyers Committee for International Human Rights tried to monitor five returnees from that vessel on three separate occasions, but was unsuccessful.<sup>152</sup> Those questioned at the addresses of three of the returnees refused to admit any knowledge of them; while those at the addresses of the other two admitted knowing the returnees, they said that the returnees were not living there.<sup>153</sup> In all five cases, those questioned asserted that State Department personnel had never contacted them regarding the whereabouts or treatment of the returnees.<sup>154</sup>

U.S. legal officials acknowledge the necessity of individual determinations of refugee status, recognizing that a country may produce political refugees as well as economic migrants, and that examiners must distinguish between the two groups to comport with both international and domestic legal obligations.<sup>155</sup> Nonetheless, both the INS and the State Department have maintained the position that the Haitians as a class are economic migrants not meeting the definition of refugee under the Con-

Associate Attorney General, that he was made more comfortable in sending interdicted migrants back to Haiti by the U.S. ability to monitor returnees).

146. Meissner letter, *supra* note 104, at 2.

147. Woodward Interview, *supra* note 29 (based on conversations with U.S. Embassy staff).

148. *Id.*

149. *See supra* notes 1-6 & 134-35.

150. Mabry Statement, *supra* note 130, at 4. An expert on Haiti dismissed the State Department monitoring as ineffective but conceded that if widespread persecution of returnees were occurring, some word of it would probably have reached the State Department in Port-au-Prince. Hooper Interview, *supra* note 29.

151. Mabry, *supra* note 130, at 4.

152. Hooper Interview, *supra* note 29.

153. *Id.*

154. *Id.*

155. *See Olson*, Refugee Act Memorandum, *supra* note 140, at 30.

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vention or the INA.<sup>156</sup>

Despite U.S. claims to the contrary,<sup>157</sup> the UNHCR has denied that it ever concluded that “‘generally’ the mass of Haitians seeking asylum were economic refugees.”<sup>158</sup> A UNHCR official, discussing United States assurances that bona fide refugees would not be returned to Haiti from an interdicted vessel, stated that “[t]hese assurances, however, can hardly be viewed as convincing when one considers that, in spite of the fact of persistent and continuing reports of gross violations of human rights in Haiti, only a handful of Haitians, during the past few years have so far been granted asylum in the U.S.”<sup>159</sup>

The administration’s position that the Haitians are economic migrants not qualifying for refugee status ignores the considerable difficulty in distinguishing economics from politics in Haiti.<sup>160</sup> This makes it likely that some interdicted Haitians who are bona fide refugees will be returned to Haiti in violation of the Protocol.

### B. *The Principle of First Asylum*

In the past the United States has been a leader in promoting the international principle of first asylum to ensure the protection of individual human rights.<sup>161</sup> The principle of first asylum provides that where there is a large-scale influx into a neighboring state,<sup>162</sup> as in the Haitian case, the migrants should be admitted without discrimination and provided at least temporary shelter and protection, even if the neighboring state can-

156. See McHugh & Masanz, *Interdiction of Haitian Vessels on the High Seas 4* (Cong. Research Service, Library of Cong., Nov. 2, 1981); Foreign Affairs Staff Report, *supra* note 113, at 1; N.Y. Times, Oct. 1, 1981, at A14, col. 1. See also *Haitian Refugee Center v. Smith*, 676 F.2d at 1030-31 (describing 1978 “Haitian Program,” states that INS “advised in absolute terms that the Haitians were ‘economic’ and not ‘political refugees;’ in accordance with that position, the tally sheet for recording asylum determinations had no column for applications granted”).

157. See Foreign Affairs Staff Report, *supra* note 113.

158. Letter from Klaus Feldman of UNHCR to Ira Gollobin (Nov. 29, 1979), *quoted in NATIONAL COUNCIL OF CHURCHES*, *supra* note 32, at 13. UNHCR support for a determination of refugee status on a *class* basis is unlikely given its stress on *individual* determinations. See UNHCR HANDBOOK, *supra* note 123.

159. Kalumiya Memorandum, *supra* note 53, at 9.

160. See, e.g., N.Y. Times, Oct. 5, 1981, at B11, col. 1 (“To Haitians, there is no line between economics and politics.”).

161. See, e.g., DEP’T ST. BULL., Sept. 1979, at 38-39 (former Secretary of State Vance’s statement and news conference stressing “my government’s strong support for the internationally recognized principle of temporary shelter and asylum” and stating that first asylum “is a fundamental principle, a principle which I have said many times, that we deeply believe in, and it will continue to be part of our policy.”) [hereinafter cited as Vance Statement].

162. Indeed, most persons seeking asylum do flee to neighboring states. For example, many Vietnamese boat people fled to ASEAN states, China, and Hong Kong, many Kampuchean fled across the border into Thailand, and most Africans generally seek asylum within the African continent. A. GRAHL-MADSEN, *supra* note 46, at 103-05, 107.

not admit them on a permanent basis.<sup>163</sup> While first asylum is not a customary legal norm, and no international obligation to afford it exists, it remains important for the United States to uphold the principle both to encourage its broader acceptance and to demonstrate the U.S. commitment to human rights.<sup>164</sup>

Interdiction directly contravenes the principle of first asylum, impairing the effectiveness of U.S. efforts to promote observance of individual human rights by other nations and impeding the development of first asylum as an international legal norm.<sup>165</sup>

## V. Analysis of the Interdiction Program Under United States Law

### A. *Due Process*

Congress enjoys plenary power in the area of immigration.<sup>166</sup> Accordingly, the Protocol is not a source of rights under United States law except insofar as Congress implements it.<sup>167</sup> In the Refugee Act of 1980, Congress implemented the provision on *non-refoulement* of the Convention (Article 33) and the definition of "refugee" in the Protocol.<sup>168</sup>

163. See *supra* note 49 and accompanying text for a definition of the principle of first asylum.

164. The Task Force which first proposed interdiction as part of an immigration program did note its potential adverse impact both on the worldwide refugee situation and on U.S. "credibility" as a promoter of human rights. *Task Force Memorandum, supra* note 22, at 6, 9 (possible adverse reaction at home and abroad; interdiction "could set an international precedent for turning away 'boat people' seeking asylum in, e.g., Southeast Asia." See also Wash. Post, July 31, 1981, at A1 (statement of civil rights attorney Dale F. Swartz that interdiction would "give a green light" to Asian countries to turn away Indochinese boat people). Only slightly more than a year before the interdiction program began, the Carter Administration had condemned such a practice and exhorted the ASEAN states to respect first asylum and provide temporary refuge, despite the major problems this could cause for these countries. Vance Statement, *supra* note 161, at 35. See e.g., A. GRAHL-MADSEN, *supra* note 46, at 104 for a description of the impact of a refugee influx on social services, community, etc. in Malaysia.

165. See *Immigration Reform Hearings, supra* note 2, at 694 (testimony of Bishop Anthony J. Bevilacqua, Chairman, Ad Hoc Comm. on Migration and Tourism, National Conference of Catholic Bishops, expressing fears of adverse impact of U.S. interdiction policy, particularly regarding countries of first asylum in Southeast Asia). See also *id.* at 593-95 (questions and statements by Rep. Frank, quoting the Bevilacqua statement and expressing concern about the negative example for Southeast Asia and damage to the U.S. image as protector of human rights). A UNHCR official also expressed concern that the interdiction program sets a negative precedent for "other refugee-intake countries, especially those confronted with large influxes of refugees but, unlike the U.S., with weak economies and fragile political structures." Kalumiya Memorandum, *supra* note 53, at 2. See also N.Y. Times, Oct. 1, 1981, at A34, col. 1 (editorial noting deleterious effect of interdiction policy on U.S. reputation).

166. For modern Supreme Court affirmations of this power, see *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).

167. See *Bertrand v. Sava*, 684 F.2d 204, 218-19 (2d Cir. 1982) (Protocol affords no rights not provided under domestic law).

168. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 108 (1980). See H.R. CONF. REP. No. 781, 96th Cong., 2d Sess. 20 (1980) (INA § 243(h) amended in accordance with language

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By amending the INA in 1980, Congress provided both excludable and deportable aliens a statutory right to apply for asylum at a meaningful time and place.<sup>169</sup> Although Congress is empowered to distinguish among aliens on the basis of race or national origin<sup>170</sup> and between excludable and deportable aliens,<sup>171</sup> it explicitly chose not to do so in its asylum procedures.

The executive branch cannot ignore a statutory directive mandating a single asylum procedure by implementing different procedures for excludable and deportable aliens or for aliens of different nationalities or races.<sup>172</sup> The procedures provided by Congress constitute due process for the alien seeking admission to the United States.<sup>173</sup> The procedures established pursuant to section 208(a) of the INA therefore comprise the process due an excludable alien applying for asylum, and the procedures established pursuant to section 236 of the INA constitute due process for the denial of admission to the United States. By failing to provide counsel, the right of appeal, and other procedures established pursuant to section 208, the interdiction program does not comply with the due process provided by Congress for the handling of exclusion and asylum claims.<sup>174</sup>

of Protocol and to be construed consistently therewith); H.R. REP. NO. 608, *supra* note 61, at 17 (Refugee Act conforms U.S. statutory law to obligations under Protocol in provisions on asylum, INA § 208, and withholding of deportation, INA § 243(h)).

169. *See Haitian Refugee Center v. Smith*, 676 F.2d at 1039-40. This case dealt with deportable aliens, holding that the INS Haitian Program denied Haitian asylum applicants due process of law, but its conclusion logically applies as well to excludable aliens because Congress instructed the Attorney General to provide a single application procedure for both categories of alien.

170. *See Bertrand*, 684 F.2d at 212 n. 12.

171. *See supra* note 64 and accompanying text. The premise of non-discrimination is at the core of the Refugee Act of 1980. *See* H.R. REP. NO. 608, *supra* note 61, at 13.

172. *See Washington v. Davis*, 426 U.S. 229, 241 (1976) (neutral statute must not be applied to discriminate on the basis of race), *citing* *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Bertrand*, 684 F.2d at 212 n. 12 (in the absence of legislative policy, an immigration officer is not permitted to apply neutral regulations to discriminate on the basis of race or national origin).

173. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953), *quoting* *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (applying this analysis to *restrict* rights of aliens).

174. Non-compliance with due process must, of course, be assessed in light of the recent decisions in *Jean*, 727 F.2d 957 and *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), which held that the excludable aliens were entitled to no Fifth Amendment protections. The author views these cases as having been wrongly decided, and as ignoring the purposes of the Refugee Act of 1980. In *Gracey* Judge Richey purports to find a clear concurrence between the executive and legislative branches on the subject of interdiction, citing (1) the grant of statutory authority under 8 U.S.C. §§ 1182(f), 1185(a)(7) (permitting suspension of entry of aliens if the President finds it "would be detrimental to the interests" of the United States), (2) approval of the interdiction program by the Senate Committee on Appropriations (which provided funding), and (3) the conditioning of foreign aid credits on cooperation "in halting illegal emigration." *Id.* at 1399-1400. The *Gracey* decision further rests on the finding that due process analysis is inapplicable in the interdiction context. Absent this conclusion,

One administration response to criticism of the interdiction program might be that the only Haitians returned are those who failed to express a basis for asylum or a desire to apply for asylum, and that, therefore, the provisions of section 208(a) do not apply to them. This argument has two flaws. First, the conditions of the interview on board the boat probably would deter most Haitians with bona fide asylum claims from asserting them.<sup>175</sup> Second, potential asylees should be informed of their right to apply for asylum. The Supreme Court has ruled that failure to provide notice of the existence of a right constitutes a violation of that right, particularly when the intended beneficiaries are too uneducated or inexperienced to inform themselves.<sup>176</sup> This suggests that the INS's failure to inform interdicted Haitians of their right to apply for asylum violates that right.<sup>177</sup>

Another difficult issue for those challenging the legality of the interdiction procedures is whether Haitians on the high seas qualify for section 208 protection even though they are neither "physically present" nor "at a land border or port of entry."<sup>178</sup> If section 208 does not apply, the executive branch is technically free to follow whatever procedures it deems appropriate for determining refugee status in the context of an interdiction. The Reagan Administration accordingly has argued against the applicability of the INA exclusion and asylum provisions on the ground that interdiction takes place on the high seas.<sup>179</sup>

In enacting the Refugee Act, Congress arguably intended either that no determinations of exclusion or asylum be made on the high seas or that such determinations be made in conformity with INA procedures. The Act evidences an intent to treat all asylum applicants equally, basing asylum determinations on individual merit rather than national origin or other political considerations.<sup>180</sup> One federal court, in discussing the purpose of the Refugee Act, stated: "[w]e believe Congress' sympathy to the plight of refugees such as the 'boat people' is relevant. The general

which has been challenged elsewhere in this Article, interdiction would have to conform with the requirements of § 208.

175. See *supra* notes 128-137 and accompanying text.

176. *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 14-15 n.15 (1978).

177. While *Nunez v. Boldsin*, 537 F. Supp. 578, 587 (S.D. Tex. 1978) *dismissed*, 692 F.2d 755 (5th Cir. 1978), referred to such a right, *excludable* aliens were held to lack such a right in *Jean*, 727 F.2d 957. The Supreme Court's decision in *Jean* is likely to clarify this matter.

178. See INA § 208(a), 8 U.S.C. § 1158(a) (Supp. V 1981).

179. See Olson, Interdiction Memorandum, *supra* note 121, at 2. Judge Richey accepted this contention in dismissing *Gracey*, 600 F. Supp. at 1406, for failure to state a claim upon which relief could be granted because, "the interdiction program complained of occurs on the high seas, outside the United States. . .".

180. H.R. REP. NO. 608, *supra* note 61, at 13.

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purpose of the Act is to regularize, not hinder, their entry.”<sup>181</sup> This statement suggests that Congress did not intend to allow the executive branch to circumvent a uniform asylum procedure by interdicting aliens on the high seas and preventing them from reaching the border where the congressionally-mandated procedures would apply.<sup>182</sup>

Furthermore, the regulations implementing section 207 of the INA demonstrate that the Act is intended to apply to refugee applicants in other countries, not on the high seas.<sup>183</sup> If section 208 procedures are inapplicable, then no provision exists for an asylum application procedure on the high seas. Congress, however, intended to implement the Protocol, which requires the establishment of effective procedures for refugee determinations.<sup>184</sup> This reasoning suggests either that Congress intended that there be no asylum determinations on the high seas or that the procedures under section 208 be employed.

The administration’s response to these arguments is that Congress authorized the executive branch to order interdiction on the high seas and to develop its own procedures for exclusion and asylum under section 212(f) of the INA and, therefore, that the interdiction program implements rather than circumvents the INA.<sup>185</sup> The administration further asserts that, at least where Congress has not acted, the executive has inherent authority to exclude aliens as a fundamental act of sovereignty.<sup>186</sup>

Several arguments counter the administration’s claim of authority under section 212(f). First, although the Reagan Administration now bases its authority for the interdiction program on existing law, the President’s Task Force on Immigration and Refugee Policy, which first proposed an interdiction policy, apparently believed that new enabling

181. *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), *rev’d on other grounds*, 104 S.Ct. 2489 (1984).

182. While the arguments for congressional toleration of interdiction put forward in *Gracey*, 600 F. Supp. at 1399-1400, are significant, *see supra* note 174, they do not show actual legislative approval of the program.

183. *See* 8 C.F.R. § 207 (1982). § 207.1(a), for example, provides that an alien may apply for admission as a refugee by filing a form with the overseas INS officer responsible for the area where the applicant is located.

184. *See supra* notes 58-59 and accompanying text for an argument that the Protocol, while leaving the particular procedure up to individual states, requires states to adopt some effective procedure, and *see supra* notes 129-37 and accompanying text, for an argument that the U.S. interdiction procedures are ineffective in separating out bona fide refugees.

185. *See Olson*, Interdiction Memorandum, *supra* note 121, for a discussion of the Reagan Administration claims of authority under the INA. Judge Richey’s recent decision in *Gracey*, 600 F. Supp. at 1399, emphasized this legislative authorization under § 212(f), 8 U.S.C. § 1182(f), citing it as proof of Congress’s approval of the interdiction program.

186. *Id.* at 4. *Shaughnessy*, 338 U.S. at 542-43 (1950), and subsequent cases support this claim of executive discretion *absent* any legislative action.

legislation was necessary to authorize interdiction.<sup>187</sup> The administration implemented the interdiction policy and subsequently introduced legislation that would have amended the INA to provide explicit authority for the President to order the interdiction of undocumented aliens on the high seas.<sup>188</sup>

Authority under section 212(f) to suspend entry of aliens as immigrants or non-immigrants may not apply to refugees. Refugees were not defined in the 1952 Act in which 212(f) first appeared;<sup>189</sup> Congress's special treatment of refugees in the Refugee Act of 1980 suggests an intent to establish a third class, separate from the classes of immigrants and non-immigrants as defined in section 101(a)(15) of the INA.<sup>190</sup>

The Reagan Administration itself admitted that, to the best of its knowledge, no other President had ever invoked section 212(f).<sup>191</sup> This suggests that Congress may not have considered the possible use of section 212(f) in an interdiction context when it amended the INA in 1980. Earlier sections of the INA must be construed consistently with provisions adopted at a later date. Congress provided for implementation of the Protocol in section 208; a construction of section 212(f) consistent with section 208 would preclude use of the former to avoid the section 208 procedures.

Furthermore, it is unclear whether authority to "suspend the entry of" aliens<sup>192</sup> necessarily includes authority to return aliens to the country from which they came. As used in the INA, "entry" generally means

187. In describing a proposed policy of interdiction at sea, the Final Report of the President's Task Force stated that "the Administration would seek legislation to authorize the President to direct the Coast Guard to assist foreign governments that request such assistance to interdict on the high seas their flag vessels suspected of attempting to violate U.S. law." Final Report of the President's Task Force on Immigration and Refugee Policy 7 [hereinafter cited as Task Force Report], *accompanying* Office of the Attorney General, Memorandum for the President from the Attorney General (June 26, 1981).

188. H.R. 4832/S. 1765, 97th Cong., 1st Sess. (1981), Title X (the Emergency Interdiction Act). This part of the immigration program was not included in the legislation introduced by Sen. Simpson and Rep. Mazzoli in the next three sessions.

189. The definition of refugee in INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (Supp. V 1981) was added by the Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 108 (1980).

190. In addition to adding the definition of a refugee, *see id.*, Congress in 1980 added new sections to the INA for refugee admissions and application for asylum independent of the existing provisions for dealing with excludable and deportable aliens, normal immigrant admissions, and admissions of the special classes of non-immigrants listed in INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1981). Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 108 (1980), *adding* INA §§ 207, 208, 8 U.S.C. §§ 1157, 1158 (Supp. V 1981). All of these aided in bringing the United States into greater conformity with the Protocol, which entered into force for this country in 1968.

191. Olson, Interdiction Memorandum, *supra* note 121, at 3 n. 5 ("Neither this Office nor INS is aware of any time when the power granted by this section, added in 1952, has been used.").

192. INA § 212(f), 8 U.S.C. § 1182(f) (1981).

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legal entry rather than mere physical entry. An alien may be physically present in the United States, either in INS detention or on parole pending exclusion or asylum proceedings, without having made "entry" or being present in the legal sense.<sup>193</sup> Section 212(f) could be read to allow the President to suspend legal entry without being able to circumvent the exclusion and asylum procedures of the INA by suspending physical entry and returning the aliens.<sup>194</sup>

Finally, the Reagan Administration's implementation of the interdiction program under procedures that do not comply with the procedures established pursuant to section 208 conflicts with the congressional intent to provide a single, uniform asylum procedure for all applicants. The administration has argued that when Congress established asylum procedures under the Refugee Act, it did not anticipate the impending influx of asylum seekers from Cuba in the Mariel boatlift or that the multiple layers of appeals provided by the Act would cripple the asylum determination system.<sup>195</sup> Accordingly, the administration introduced legislation to reform asylum adjudication by expediting asylum and exclusion proceedings.<sup>196</sup> Whatever the shortcomings of such legislation, requesting Congress to amend these procedures was at least a proper means to effect change.

Given the political imperatives of the situation,<sup>197</sup> however, the administration chose not to wait for Congress to change the exclusion and asylum procedures, and implemented the interdiction program with procedures substantially different from those provided under the INA. The Supreme Court has recognized that the political branches need to be able to respond flexibly to changing international conditions with revised immigration policies,<sup>198</sup> and that this might justify the executive branch's authorization of procedures that differ from those provided by Congress, especially if a particular situation is not explicitly covered by INA provi-

193. Comment, *supra* note 54, at 196-99 (aliens paroled into the United States are not legally present and have not entered).

194. It might be responded that section 212(f) does allow suspension of *physical* entry (and the subsequent return of the aliens), consistent with the exclusion and asylum provisions of the INA, if this is necessary because parole or detention proved insufficient to protect against the detrimental effects of mass entry.

195. See *Immigration Reform Hearings*, *supra* note 2, at 579 (prepared statement of Alan C. Nelson, Deputy Commissioner, INS); *1981 Coast Guard Hearings*, *supra* note 22, at 13-14 (testimony of David C. Hiller, Special Assistant to the Attorney General, Dep't of Justice).

196. H.R. 4832/S.1765, *supra* note 188.

197. See Task Force Memorandum, *supra* note 22, at 7, describing the political urgency of the situation in Florida: "Continuing arrivals of Haitians without rapid deportation is viewed by Florida as a non-enforcement policy that causes serious adverse impact. Governor Graham appears prepared to capitalize on the circumstances. Senator Hawkins is placed in a difficult situation."

198. *Matthews v. Diaz*, 426 U.S. 67, 81 (1976).

sions. However, the substantive policies should still be reasonably calculated to satisfy U.S. obligations under the Protocol, as incorporated by domestic legislation.

The interdiction procedures, by providing inadequate means of screening out bona fide refugees, do not comport with U.S. obligations and the Haitians' right to apply for asylum. At a minimum, the interdiction program circumvents congressionally-mandated procedures and the legislative intent to provide a uniform asylum procedure. It also violates the spirit of the Refugee Act, which calls for determinations of refugee status on the basis of individual merit. For these reasons, the Reagan Administration should suspend the interdiction program pending explicit legislative authorization.<sup>199</sup>

### B. *Extradition Law*

The Executive Order and the Exchange of Letters contemplate the interdiction and return of vessels engaged in violating "appropriate" Haitian laws, which probably means Haitian emigration laws.<sup>200</sup> At least in the early interdictions of Haitian vessels, the Coast Guard claimed to be acting under its authority to enforce appropriate Haitian, not U.S. laws.<sup>201</sup>

The President's power to enforce Haitian laws by extraditing Haitian refugees under the Executive Order and the Exchange of Letters is, however, of questionable legality. As precedent for its claimed authority to enforce the laws of a foreign country the administration has cited an 1891 agreement between the United States and Great Britain.<sup>202</sup> This agreement prohibited seal killing in a section of the Behring Sea and au-

199. Congress shows no sign of providing such explicit authority. No version of the Administration's Emergency Interdiction Act, Title X of H.R. 4832 and S.1765, 97th Cong., 1st Sess. (1981), was included in the substitute legislation introduced by Sen. Simpson and Rep. Mazzoli. H.R. 5872/S. 2222, 97th Cong., 2d Sess. (1982); H.R. 1510/S.529, 98th Cong, 1st Sess. (1983). The fact that Congress has not so acted would appear to undermine Judge Richey's analysis of legislative approval in *Gracey*, 600 F. Supp. at 1399-1400, *see supra* note 174. At the same time, the fact that Simpson-Mazzoli has not yet become law indicates the inherent problems in seeking explicit statutory authority for specific items such as interdiction through a comprehensive immigration bill.

200. Exec. Order, *supra* note 86, at 48, 109; Exchange of Letters, *supra* note 89, at 2. The only specific references that the author found concerning what Haitian laws qualify as "appropriate" were references to "travel laws" and "emigration laws." *See also* Olson, Interdiction Memorandum, *supra* note 121.

201. *See* Woodward Report, *supra* note 137, at 19.

202. *Modus Vivendi Respecting the Fur-Seal Fisheries in Behring Sea (1891)*, 1 W. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS 1176-1909, at 743 (1910); *see* Olson, Interdiction Memorandum, *supra* note 121, at 7 (discussing this and other executive agreements).

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thorized United States and British officials to apprehend violators from either country outside the territorial limits of the United States and to turn them over to their own government.

The 1891 agreement is a questionable precedent for enforcing Haitian emigration laws through interdiction for several reasons. That agreement was more limited in scope than the interdiction agreement and was adopted for different purposes. Moreover, it created the prohibition which it then authorized the countries to enforce, whereas Haitian emigration laws predated the United States-Haiti interdiction agreement.<sup>203</sup> The proscribed killing of seals took place on the high seas, whereas the violation of Haitian emigration laws actually occurs as Haitians set sail from Haiti, within the territory of the country whose law is being enforced. United States extradition laws are more clearly applicable to crimes occurring in foreign territory.<sup>204</sup> Most important, the 1891 agreement was adopted before the Supreme Court interpreted extradition law to require explicit treaty or statutory authorization for the Executive to return a person wanted for foreign crimes to a foreign country.<sup>205</sup>

The Supreme Court discussed United States extradition law at length in *Valentine v. United States ex. rel. Neidecker*, concluding that “albeit a national power . . . [extradition power] is not confided to the Executive in the absence of treaty or legislative provisions”<sup>206</sup> and that this rule

rests upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.<sup>207</sup>

203. Furthermore, the Fur-Seal agreement was designed to last less than a year, whereas the interdiction program's duration is indefinite; the former was adopted as a stop-gap measure, pending agreement on a congressionally-ratified arbitration convention (adopted eight months later), to avoid clashes between U.S. and British seal fishers claiming conflicting rights in the Behring Sea. 1 W. MALLOY, *supra* note 202, at 743.

204. See 18 U.S.C. § 3181 (1981) (chapter concerning extradition relates to “surrender of persons who have committed crimes in foreign countries.”).

205. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936).

206. *Id.* at 9.

207. *Id.* Although *Valentine* involved a request for surrender of an American citizen, the Court made clear that its rule applies to any person, not only to a citizen. *Id.* at 10. See also *Williams v. Rogers*, 449 F.2d 513, 520 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972) (recognizing and following the rule in *Valentine*); *Argento v. Horn*, 241 F.2d 258, 259 (6th Cir. 1957), *cert. denied*, 355 U.S. 818 (1957) (Executive is without inherent extradition power, citing *Valentine*). See generally *Blakesley, Practice of Extradition from Antiquity to Modern France and United States: A Brief History*, 4 B.C. INT'L & COMP. L. REV. 39 (1981) (discuss-

The Reagan Administration, therefore, may lawfully return Haitians for suspected violations of Haitian law only if Congress has authorized such action in a specific statute or treaty.

Congress has not approved either the Executive Order or the Exchange of Letters. The United States is a party to a duly ratified bilateral treaty of extradition with Haiti,<sup>208</sup> which authorizes extradition only for specific enumerated crimes.<sup>209</sup> Violation of emigration laws is not one of the specific crimes listed. The treaty also provides that extradition is not authorized for offenses of a "political character."<sup>210</sup> The extradition treaty therefore does not authorize the Reagan Administration to return bona fide political refugees for violating Haitian emigration laws.<sup>211</sup>

President Reagan has also claimed the authority to assist Haiti in the enforcement of its emigration laws under his foreign relations power, and under the power delegated by Congress to the President (through the Attorney General) to guard U.S. borders against the illegal entry of aliens.<sup>212</sup> It is doubtful that this statutory grant of authority is sufficient to satisfy the requirement of statutory authorization for extradition, since enforcement of Haitian laws would not seem to be necessary to fulfill this duty.

## VI. Conclusions and Proposals for Change

As formulated and applied, the interdiction program violates international and domestic law, sets a negative precedent for world-wide refugee protection, and does not provide an effective solution to United States immigration problems. It should, therefore, be terminated.

ing development of extradition law and practice in United States and France and analyzing the issue of whether or not extradition is permitted in the absence of a treaty obligation).

208. Extradition Treaty, Aug. 9, 1904, United States—Haiti, T.S. No. 447, 34 Stat. 2858, reprinted in 1 EXTRADITION LAWS AND TREATIES—UNITED STATES 360.1 (I. Kavass & A. Sprudz eds. 1979).

209. *Id.* at arts. I, II. See also 18 U.S.C. § 3184 (1981) (extradition authorized only for crimes provided in specific treaty). U.S. extradition statutes also specify several procedures that the government must satisfy before extraditing any person. These include a hearing before a magistrate or judge, held publicly and on land. 18 U.S.C. §§ 3184, 3189 (1981). The interdiction procedures satisfy none of these.

210. Extradition Treaty, *supra* note 208, at art. VII.

211. See Blakesley, *supra* note 207, at 57 (quoting note to Turkish Ambassador from U.S. Secretary of State Herter in 1959 that the government "may not extradite an individual to a foreign country in the absence of such an [extradition] agreement or in a case not coming within the terms of such agreement."). Of course, it may be argued that the extradition treaty and the statute do not provide relief because they are inapplicable to activities on the high seas, as Judge Richey held in *Gracey*, 600 F. Supp. at 1406. For a response to this contention, see *supra* notes 178-84 and accompanying text.

212. INA § 103(a), 8 U.S.C. § 1103(a) (1981); see also Olson, Interdiction Memorandum, *supra* note 121, at 6.

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An appropriate response to the breakdown in the system of processing asylum applications is to reform the system to expedite the process while still ensuring fairness for all applicants. To date, proposed reforms included in the Simpson-Mazzoli immigration legislation have gained support in both houses of Congress but have not been enacted into law.<sup>213</sup> The Simpson-Mazzoli legislation is comprehensive but does not address interdiction.<sup>214</sup> Whatever the merits of particular aspects of the proposed legislation, as a congressional determination of how to deal with the perceived administrative backlog it is preferable to interdiction ordered solely by the President.<sup>215</sup>

In addition to reforming procedures governing asylum applications, the United States should punish those who smuggle refugees into the country rather than penalize the refugees themselves.<sup>216</sup> Despite agreement in the Exchange of Letters and in public pledges to act against smugglers,<sup>217</sup> actual U.S. and Haitian efforts in this regard have been minimal, enabling smugglers to operate with impunity in both countries.<sup>218</sup>

The interdiction program discards the entire congressionally-mandated process for one group of potential asylum applicants, the Haitians, and replaces it with procedures that are both unlawful and unwise. The interdiction program evades procedural protections under domestic law and exploits ambiguities in the definition of a refugee under international

213. Simpson-Mazzoli, the Immigration Reform and Control Act of 1983, H.R. 1510/S.529, 98th Cong., 1st Sess. passed the Senate in May 1983 and the House in June 1984, but the legislation died in conference when Congress adjourned October 11, 1984.

214. See *supra* note 188 and accompanying text.

215. See *supra* notes 187-96 and 205-07 and accompanying text.

216. The United States has the authority and the duty under current law to prosecute smugglers of undocumented aliens. See INA § 215(a)(2), 8 U.S.C. § 1185(a)(2) (1981) (illegal to transport persons into United States with knowledge that their entry is illegal); INA § 273, 8 U.S.C. § 1323 (1981) (\$1000 fine for bringing visaless alien to the United States), INA §§ 274, 275, 8 U.S.C. §§ 1324, 1325 (1981) (felony and misdemeanor to bring in and harbor illegal aliens); INA § 279, 8 U.S.C. § 1329 (1981) (jurisdiction of federal district court; Attorney General's duty to prosecute).

217. See Exchange of Letters, *supra* note 89, at 2-3, for the agreement to act against smugglers.

218. See N.Y. Times, Oct. 1, 1981, at A14, col. 1 (traffickers as targets of interdiction program). The owner of the *Exoribe*, the first vessel interdicted carrying migrants, apparently boarded a plane in Haiti the day after the interdiction and flew to Miami, where he disembarked with a valid visa, despite the Haitian government's knowledge that he was a major smuggler; he apparently has not been prosecuted in either country. Woodward Interview, *supra* note 29; while there has been some U.S. action, see N.Y. Times, Oct. 24, 1981, at A7, col. 6 (U.S. indictment of Haitian smugglers in case involving murder and privation of Haitian migrants who died on board boat en route to United States in July 1981), the Haitian government has done little. See N.Y. Times, Oct. 1, 1981, at A14, col. 1 (reporting statement of U.S. Ambassador Preeg, that Haitian government had taken no action against smugglers in the past).

law. Although those interdicted on the high seas might best be characterized within a separate category of "would-be" refugees, their return nevertheless conflicts with the international principle of *non-refoulement*.

The Reagan Administration should abandon the interdiction program. Instead it should focus its efforts on developing ways to resolve the refugee crisis that are consistent with U.S. and international law<sup>219</sup> while remaining sensitive to the United States' leadership role in the development of international protections for refugees.

219. These efforts might include, but certainly would not be limited to, requiring improvements in the Haitian human rights record in exchange for U.S. aid (i.e. genuinely enforcing existing conditions on aid, *see supra* note 142), improving efforts to stop smuggling operations, and supporting legislation that would streamline immigration procedures without discriminating against any single nationality.