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Bill Frelick

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Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection**

The U.S. policy of interdicting and summarily returning Haitian asylum seekers without a hearing legitimately raises the specter of *refoulement*—the forced return of genuine refugees. Given the clear prohibition of *refoulement* in international law, it might seem odd, at first, to devote an article to the impact of this policy on the question of preserving first asylum, a concept upon which less international legal consensus rests. Nevertheless, this Article will focus on the damage done to the concept of first asylum by the U.S. government's policy on Haitian asylum seekers. It will further argue that this damage seriously undermines fundamental refugee rights principles. More particularly, this Article will examine the notion of first asylum, and the special obligations for States with mass refugee flow.

While common sense would seem to link the idea of asylum to the principle of *non-refoulement*—after all, a refugee who is not returned to the country where he faces persecution must be permitted to reside somewhere—international and domestic law have kept the two concepts distinct. *Non-refoulement* is mandated by Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention), which provides that “[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, or membership of a particular social group or political opinion.”¹ *Refoulement* is similarly prohibited in section 243(h) of the U.S. Immigration and Nationality Act (INA): “The Attorney General shall not deport or return any alien . . . to a country

* Senior Policy Analyst, U.S. Committee for Refugees.

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1. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, art. 33.1 [hereinafter “Convention”].

. . . [where] such alien's life or freedom would be threatened"²

Asylum, however, is mandated neither by the Refugee Convention, nor by U.S. law. Section 208 of the INA clearly makes the granting of asylum discretionary. It provides that ". . . the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee"³ Likewise, the operative clauses of the Refugee Convention are silent with regard to asylum. However, the Preamble mentions the word "asylum," and, in particular, addresses the importance of preserving first asylum. The Preamble also addresses the issue of burden-sharing as an essential means of maintaining first asylum: "*Considering* that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation."⁴ Despite this promising start, however, the States drafting the Refugee Convention seemed intent on reserving what they viewed as a sovereign right to decide who should be granted asylum.

The Universal Declaration of Human Rights⁵ has more generous language on asylum, but it is nonbinding. Article 14(1) states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."⁶ While the language is helpful, the meaning of "to enjoy" is somewhat vague. Governments grant asylum; individuals "enjoy" it. An individual's right to enjoy asylum is therefore limited by the willingness of the government to proffer it.

The original draft of Article 14(1) provided that "[e]veryone has the right to seek *and be granted* in other countries asylum from persecution."⁷ That draft, however, was opposed by the delegates from the United Kingdom, Australia, and Saudi Arabia, on the grounds that it would limit state sovereignty.⁸

In 1967, the United Nations General Assembly unanimously adopted the Declaration on Territorial Asylum,⁹ which reiterated the principle of *non-refoulement* and clarified that it included non-rejection at the frontier.¹⁰ The Declaration also called on all states to share the bur-

2. Immigration and Nationality Act § 243(h)(1), 8 U.S.C. § 1253(h) (1988).

3. *Id.* § 208(a), 8 U.S.C. § 1158 (1988).

4. Convention, *supra* note 1, pmbl. (emphasis in original).

5. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948).

6. *Id.* art. 14(1).

7. U.N. Doc. A/C 3/285 Rev. 1 (1948) (emphasis added).

8. RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 219 (1972).

9. Declaration on Territorial Asylum, G.A. Res. 2312, 22 U.N. GAOR, 22d Sess., Supp. No. 16 at 81, U.N. Doc. A/6912 (1967) [hereinafter Declaration on Territorial Asylum]. The text can also be found in ATLE GRAHL-MADSEN, TERRITORIAL ASYLUM 162, app. EE (1980).

10. *Id.* art. 3(1): "No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."

den imposed on first asylum countries. It stated, "[w]here a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State."¹¹

States were not willing, however, to impose on themselves the requirement to grant asylum to a refugee. A United Nations conference that was convened to draft a Convention on Territorial Asylum in 1977 ended in failure.¹² Although unsuccessful in coming up with a Convention, the Committee of the Whole at the United Nations Conference on Territorial Asylum did declare that States "shall endeavor" to grant asylum to eligible persons, a declaration that the leading authority on the Conference, Grahl-Madsen, termed an "unsatisfactory formulation."¹³

The Executive Committee ("ExCom") of the United Nations High Commissioner for Refugees ("UNHCR") provides important guidance on the standards of State practice. It adopts formal Conclusions that help to establish customary international understanding concerning the norms for the protection of refugees and asylum seekers. On the question of protection of asylum seekers in situations of large-scale influx, the ExCom formally concluded that:

asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection In all cases the fundamental principle of *non-refoulement*—including non-rejection at the frontier—must be scrupulously observed.¹⁴

The focus of the two major court challenges to the Haitian refugee policy, *Haitian Refugee Center v. Baker*¹⁵ and *Sale v. Haitian Centers Council*¹⁶ has not been on the right of entry or the concept of asylum at all, but on the principle of *non-refoulement*, particularly whether it is applicable extraterritorially. For example, the *amicus curiae* brief submitted by the UNHCR in *Haitian Refugee Center* stated,

Although international guidelines and State practice support at least the temporary admission of 'boat people' and asylum seekers in situations of mass influx, *this case is not about admission or asylum* It is about the obligation of States not to *return* refugees to a place where their lives or

11. Declaration on Territorial Asylum, *supra* note 9, at 81.

12. GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 111 (1983). Goodwin-Gill called the Conference "an abject failure." *Id.* at vii. Atle Grahl-Madsen called the Conference "highly politicized, indeed catastrophic." *Id.*

13. GRAHL-MADSEN, *supra* note 9, at 50.

14. *Protection of Asylum Seekers in Situations of Large-Scale Influx*, Conclusion No. 22 (XXXII) 1981, UNHCR CONCLUSIONS ON THE INTERNATIONAL PROTECTION OF REFUGEES 49 (1991) [hereinafter CONCLUSIONS].

15. 789 F. Supp. 1552 (S.D. Fla. 1991), *rev'd*, 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992).

16. *Sale v. Haitian Centers Council*, 807 F. Supp. 928 (E.D.N.Y. 1992), *cert. granted*, 113 S. Ct. 52 (1992).

freedom would be threatened by persecution.¹⁷

The legal issue is narrowly drawn. Limiting the question to the legality of forced summary return from the high seas has a political benefit as well; it begs the question of *where* refugees who ought not to be returned ought to be permitted to stay. As it stands, a favorable outcome to the plaintiffs could still leave open the question of where to put and how to treat the refugees, even if the principle of *nonrefoulement* were to be respected.

Critics of U.S. policy, including this author, have suggested alternative models of temporary safe haven in the region, including the use of the U.S. naval base at Guantánamo Bay, Cuba. This would preserve the principle of *non-refoulement*, while at the same time averting a mass influx of Haitians into the United States.¹⁸ For refugee rights advocates, the draconian measures taken by the United States have changed the parameters of what is considered acceptable. We have become minimalist in our demands, not because we are any less committed to advocating for a range of rights and benefits for refugees and asylum seekers, but because the violations committed by our government deny even minimum standards of refugee protection that we had thought were no longer open to question.

I. Political Context: Fear of Mass Haitian Influx to the United States

The development of the United States repatriation policy on the political front is noteworthy. The Bush Administration's policies towards the Haitian refugees evolved by fits and starts, and was influenced by election-year politics, court challenges, and a growing number of asylum seekers. On November 20, after the U.S. Coast Guard forcibly repatriated the first boatload of "screened out" Haitians since the September 30 coup in Haiti, President George Bush declared, "[i]t is a fair policy."¹⁹ The policy, he said, "does make a distinction between economic refugees and political refugees."²⁰

Barred off and on from returning the Haitians by several court injunctions, the Bush Administration was engaged in a debate in the courts and in Congress from late November through late May over whether, in fact, the screening was fair. But throughout that period the parameters of the debate were set by Bush's own statement that his

17. Brief for *Amicus Curiae*, Office of the United Nations High Commissioner for Refugees, in Support of Appellees at 3-4, *Haitian Refugee Center*, 789 F. Supp. 1552 (S.D. Fla. 1991), *rev'd*, 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992). Emphasis added on first italics; italics in the original on the word "return."

18. See Bill Frelick, *Clinton and Haiti: No More Bush Policy*, PHILA. INQUIRER, Jan. 19, 1993, at A11; Bill Frelick, *Haitian Exodus: The Refugees Deserve Temporary Protection, Not Forced Repatriation*, WASH. POST, May 24, 1992, at C7; Bill Frelick, *The Haitian Boat People*, CHRISTIAN SCI. MONITOR, Nov. 20, 1991, at 18.

19. Al Kamen, *Bush Defends Policy on Return of Haitians*, WASH. POST, Nov. 21, 1991, at A36.

20. *Id.*

Administration's policy made a distinction between economic and political refugees. The debate revolved around the adequacy of the policy's screening procedure—whether people were being screened out as economic migrants who, in fact, might have been refugees—not the denial of screening for refugee status altogether.

Bush was reiterating the parameters of the debate set earlier by President Ronald Reagan's Executive Order No. 12,324, which created the Haitian interdiction operation.²¹ That order authorized the U.S. Coast Guard to stop and board vessels "of foreign nations with whom we have arrangements," and to "return the vessel and its passengers to the country from which it came, when there is reason to believe that an offense is being committed against the United States immigration laws . . . provided that no person who is a refugee will be returned without his consent."²²

In the first legal challenge, *Haitian Refugee Center*,²³ the plaintiffs charged that due to the flaws in the screening procedures, refugees were being returned to Haiti in violation of the principle of *non-refoulement*. District Judge C. Clyde Atkins evaluated the adequacy of the screening procedures and issued a preliminary injunction preventing the government from repatriating interdicted Haitians until it could show how it would "implement and follow procedures . . . to ensure that Haitians with bona fide political asylum claims are not forced to return to Haiti" ²⁴

However, the parameters of the debate quickly shifted. What had been the central issue—the adequacy and legitimacy of pre-asylum screening—became a peripheral, if not irrelevant issue. The Bush Administration argued that "Article 33(1) [of the Convention] is simply inapplicable in this case," and staked out a position that Article 33(1) did not prohibit forcible repatriation even of those Haitians determined to be refugees with legitimate fears for their lives and freedom.²⁵ First, the government argued that the Protocol was not "self-executing." Consequently, unless and until Congress implements the Protocol's provisions in domestic law, the Protocol itself cannot be interpreted as a source of rights.²⁶ Second, the government argued that Article 33(1) only applies to refugees "within the territory of a contracting State."²⁷

21. Exec. Order-No. 12,324, 46 Fed. Reg. 48, 109, (1981), *reprinted in* 8 U.S.C. § 1182 (Supp. V. 1981).

22. *Id.* (emphasis added).

23. 789 F. Supp. 1552 (S.D. Fla. 1991), *rev'd*, 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992).

24. Order Granting Preliminary Injunctive Relief and Supporting Memorandum Opinion, at 62, *id.*

25. Brief for the Respondents in Opposition to the Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit, in the Supreme Court of the United States at 10-11, *id.*

26. *Id.*

27. *Id.*

Because the Haitians were interdicted in international waters, it could not be said they were returned from the United States.

It appeared at the time that U.S. policy was being driven by the fear of an influx of refugees into Florida, a critical State in President Bush's reelection bid. Florida looked susceptible to inroads from challengers Pat Buchanan and former Ku Klux Klansman David Duke, who both took strong anti-immigrant stances in the Republican primaries. Even in Bush's first public statement on the policy on November 21, when he claimed to respect the distinction between political refugees and economic migrants, Bush tipped his hand saying, "I don't want to have a policy that acts as a magnet to risk these people's lives."²⁸ He could have added: or that acts as a magnet that would bring them to the United States.

During the campaign, Buchanan declared:

There are flood tides of new immigrants coming into the country and I think these . . . contribute to some of the social problems we've got in America [I]f present trends hold, white Americans will be a minority by 2050 What happened to make America so vulgar and coarse, so uncivil and angry? Is it a coincidence that racial and ethnic conflicts pervade our media when the racial and ethnic character of the U.S. has changed more in four decades than in the previous twenty?²⁹

The anti-immigrant "America First" stand was also used effectively by a Democrat, Senator Harris Wofford, to win a special election on November 5, defeating a prominent member of the Bush cabinet, Attorney General Dick Thornburgh, in the race to fill the Senate seat of the deceased Senator John Heinz. Wofford's victory was widely touted as a referendum on the Bush Administration's neglect of the "domestic agenda."³⁰ The "America First" movement took on a particularly xenophobic cast, with a rise in Japan-bashing, the failure of Congress to enact a foreign aid bill in October, and the Governor of California, Pete Wilson, blaming immigrants for a "taxpayer squeeze."³¹

An organized anti-immigrant lobby was quick to sound the alarm about the potential of a Haitian mass influx, particularly attempting to play on fears in Florida. The executive director of the largest anti-immigrant advocacy group, the Federation for American Immigration Reform ("FAIR"), declared:

We've got another Mariel Boatlift in the making in Haiti. It's almost like *deja vu*. The similarities between Cuba 1980 and Haiti 1991 are eerie.

28. Kamen, *supra* note 19, at A36.

29. Pat Buchanan, quoted by BOSTON GLOBE, Feb. 23, 1992, and cited by Frank Sharry, executive director, National Immigration, Refugee and Citizenship Forum, *Background for Advocates: Why We Want Your Help in Fighting Nativism*, Apr. 1, 1992, at 1-2.

30. NEWSDAY, Mar. 22, 1992, at 31; Al Kamen, *For Haitians, a U.S. Way Station in Cuba*, WASH. POST, Nov. 26, 1991, at A1; Renee Loth, *Red, White and Scared*, BOSTON GLOBE, Nov. 24, 1991, at A21.

31. John Dillon, *Migration to U.S. Expected to Break Record in '90s*, CHRISTIAN SCI. MONITOR, Nov. 21, 1991, at 8.

Along with a handful of legitimate political refugees, is an army of economic migrants waiting to descend on South Florida. We made a mistake in Cuba and we ought not to compound that error by repeating it with Haiti.³²

The legal battle was not immune from these political pressures. "The nature of this case from beginning to end was extraordinarily political," said Ira Kurzban, lead attorney for the Haitian Refugee Center.³³ Kurzban noted that for only the third time in U.S. history the Solicitor General of the United States argued on behalf of the executive branch before a U.S. district court. "In addition," said Kurzban, "the policy decisions concerning this case were not made by the INS or even the Department of State. The issues were directed from the National Security Council and the White House."³⁴

The Haitians had the misfortune of fleeing during an economic recession in the United States and a presidential election campaign when the economic and social ills of the country were being blamed on foreigners. That they were fleeing the poorest country in the hemisphere blinded many Americans to the widescale political persecution occurring in the wake of the Haitian coup. The concern overwhelmingly was about the social and economic impact of poor immigrants on the United States. There was little appreciation expressed on the campaign trail either for the dangers faced by Haitians being hunted down for their political beliefs, or of the implications of this policy on the rest of the world.

With the May 23rd Kennebunkport Order,³⁵ Bush followed the logic of the position he was arguing in the courts, and did away with screening altogether.³⁶ From that point on, Haitians caught by the Coast Guard would be summarily returned without a hearing to determine if they had valid refugee claims. The distinction made by Bush on November 21 between economic migrants and political refugees was gone, and with the Kennebunkport Order the parameters of the discussion about refugee rights were radically changed. The adequacy and fairness of asylum procedures, which had been the preoccupation of American refugee rights advocates throughout the 1980s, were no longer relevant in the case of persons interdicted in international waters or otherwise blocked from access to the procedures.

32. *FAIR Warns of Potential Haitian "Mariel"; Calls for Repeal of Cuban Adjustment Act*, Press Release, FAIR, Nov. 20, 1991.

33. *Hearings Before the House Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 102d Cong., 2d Sess., Apr. 9, 1992 (statement of Ira J. Kurzban, General Counsel for the Haitian Refugee Center).

34. *Id.*

35. Exec. Order No. 12,807, 57 Fed. Reg. 23, 133 (1992).

36. *Id.*

II. Preserving First Asylum: The Vietnamese Boat People Model

The international system of refugee protection is based on an understanding that countries immediately bordering a refugee-producing State will accept refugees until the rest of the world can assist. The bordering State is called the country of first asylum. Over the years, the United States and other rich, industrialized countries, removed from refugee hot spots, have maintained pressure on potential first-asylum countries not to turn back refugees. This has been demonstrated most dramatically by the international response to the exodus of Vietnamese boat people. The greatest surge of boat departures occurred in 1979. Feeling threatened by the massive exodus, Malaysia began pushing the boats back to sea, stranding an estimated 40,000 Vietnamese boat people.³⁷ Thailand, Indonesia, and the Philippines soon followed suit, stopping boats from reaching their shores.³⁸

In July 1979, the UNHCR convened a conference in Geneva, at which the United States and other countries agreed to relieve the burden on the first asylum countries. The countries decided to resettle significant numbers of refugees and agreed to provide at least temporary asylum.³⁹ "The conference appeared to be a success on virtually all counts," wrote Court Robinson.⁴⁰ "The policy of resettlement in order to secure asylum worked for Vietnamese refugees with often remarkable efficiency. The boat people population in the region dropped from 205,000 in mid-1979 to about 40,000 three years later."⁴¹ Most importantly, the doors were kept open in Thailand, Malaysia, Hong Kong, Indonesia, and the Philippines to those making their initial escape. Robinson was not uncritical of the reliance on resettlement outside the region as the means of preserving first asylum. He observed that over the years the Vietnamese appeared to be leaving "not in search of asylum, but in search of resettlement."⁴² He suggested diversifying the protection mechanisms, including orderly migration programs from within Vietnam, and other regional solutions, including "valid screening procedures, local settlement, and safe repatriation."⁴³ This would preserve first asylum without creating a different kind of magnet for boat departure in the form of an almost automatic resettlement offer.⁴⁴

The process of admitting to the United States more than 500,000 Vietnamese boat people who landed in Asian countries of first asylum has been expensive and politically difficult. First asylum was maintained only through the great efforts of the United States and other countries

37. JOSEPH CERQUONE, *UNCERTAIN HARBORS: THE PLIGHT OF VIETNAMESE BOAT PEOPLE* 4-5 (1987).

38. *Id.*

39. Court Robinson, *Sins of Omission: The New Vietnamese Refugee Crisis*, *THE WORLD REFUGEE SURVEY: 1988 IN REVIEW* 5 (1989).

40. *Id.* at 10.

41. *Id.*

42. *Id.* at 8.

43. *Id.* at 10.

44. *Id.*

willing to resettle the refugees. A decade after the first Geneva conference on the Vietnamese boat people, a new Comprehensive Plan of Action ("CPA") was forged at another meeting of governments in Geneva in June 1989. Under the CPA, the countries of the region, such as Hong Kong and Thailand, agreed that "temporary refuge will be given to all asylum seekers."⁴⁵ However, they also established screening procedures for asylum seekers. The screened-in refugees would be allowed to seek resettlement; persons screened-out (found not to be refugees), "should return to their country of origin in accordance with international practices."⁴⁶ The agreement added that "[i]n the first instance, every effort will be made to encourage voluntary return."⁴⁷

As the CPA was being implemented, controversy arose over the adequacy of Hong Kong's screening procedures (which began well before the CPA, in 1988), the conditions of detention in its closed camps, and the decision by Hong Kong and Britain in 1990 to forcibly repatriate screened-out Vietnamese. The U.S. government strongly opposed the forced return of the screened-out refugees. U.S. Deputy Secretary of State Lawrence S. Eagleburger, the head of the U.S. delegation to the conference, declared that "[u]nless and until dramatic improvements occur in [Vietnam's] economic, social and political life, the United States will remain unalterably opposed to the forced repatriation of Vietnamese asylum seekers."⁴⁸ The United States opposition was addressed to the forced return of asylum seekers who had been screened out and found not to be refugees. There was no suggestion that anyone would be forcibly repatriated without first undergoing a refugee screening procedure.

III. The Search for a Regional Solution in the Caribbean Basin

For a variety of historical reasons, the United States became the principal champion of the first asylum rights of Vietnamese boat people. But as the Haitian refugee crisis heated up, and the United States government's radically variant response was revealed, a geographical aspect became evident as well. Vietnam was about as far away from the United States as the globe allows; the same is not true of Haiti.

In other words, unlike the situation with Vietnamese boat people, the United States now found itself positioned as a country of first asylum. Although it was not the closest country to Haiti, it was generally assumed that most Haitians taking off in rickety boats intended the United States as their preferred destination. This raised a question at the outset whether a Haitian asylum seeker who sets down briefly in Cuba or the Bahamas to repair and reprovision his boat and then contin-

45. Court Robinson, *Pirate Attacks on Vietnamese Refugees Grow More Vicious*, WORLD REFUGEE SURVEY: 1989 IN REVIEW 59 (1990).

46. *Id.* at 54.

47. *Id.*

48. *Update*, REFUGEE REP., June 16, 1989, at 8.

ues on to the United States can be said, when landing, to have reached the country of first asylum. While one could quibble with the notion of "first," United States law, at least, seems clear that stopping briefly in transit, where no protection is offered or sought, does not invalidate the asylum claim in the United States.⁴⁹

In 1971, when refugees were admitted as conditional entrants under the seventh preference category, the Supreme Court ruled that an alien fearing persecution must have reached the United States as "a consequence of [his or her] flight in search of refuge," "reasonably proximate to the flight," and not "interrupted by intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge."⁵⁰ The federal regulations issued in 1990 that implement the United States asylum procedure provide that a refugee has not been firmly resettled in a third country provided that "his entry into that nation was a necessary consequence of his flight from persecution, that he remained in that nation only as long as was necessary to arrange onward travel, and that he did not establish significant ties to that nation."⁵¹

Given the almost automatic credible fear of persecution that the United States government accords to Cubans fleeing Cuba, there ought to be sympathy for the notion that a person compelled to leave one dangerous place ought not to be compelled to seek asylum in another where conditions may also be oppressive. Although it is less relevant to a discussion about boat departures, the same considerations ought to inform discussions about the availability and desirability of asylum in the Dominican Republic. The Dominican Republic has a long history of summary, at times brutal, treatment of Haitians in its territory. For years, undocumented Haitians were lured to the Dominican Republic by recruiters working for the Dominican State Sugar Council. Once inside the Dominican Republic, they would be taken into military custody and transported to sugar plantations, where they would be forcibly confined for the duration of the sugar harvest.⁵² Although some improvements in conditions were noted in 1992, the plantations continued to foster harsh, abusive, and restrictive treatment of Haitian laborers.

Human rights groups, including Americas Watch and Amnesty International, have documented cases of individuals with strong asylum claims who were not able to register their claims for refugee status, and who were forced to work on the plantations after crossing into the Dominican Republic.⁵³ This is particularly disturbing since the Dominican Republic has a well-established record of periodically repatriating

49. 8 C.F.R. § 208.15(a).

50. *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 56-57 (1971).

51. 8 C.F.R. § 208.15(a).

52. See AMERICAS WATCH AND THE NATIONAL COALITION FOR HAITIAN REFUGEES, A TROUBLED YEAR: HAITIANS IN THE DOMINICAN REPUBLIC (1992), as well as previous reports by the organizations.

53. *Id.* at 23, regarding the case of Jean Claude Aladin; *Haiti: Human Rights Held to Ransom*, 26 AMNESTY INT'L (Aug. 1992), regarding the case of Prosper Thérismé.

Haitian workers summarily. Approximately 7,000 Haitians were forcibly returned in 1991, and another 25,000 to 50,000 were coerced to "voluntarily" return to Haiti.⁵⁴ The repatriations were summary as well as capricious, often a result of round-ups in which persons entitled to Dominican residence were detained and deported.

In March 1992, the U.S. Committee for Refugees ("USCR") reported that the Dominican Republic pointedly refused to establish border camps for Haitian refugees and failed to provide a screening system to evaluate their claims for asylum. USCR stated that:

No Haitian has been accepted as a political refugee by the Dominican government; it has treated the few who have made formal applications for official status with open hostility. Some have been placed under arrest, and threatened with *refoulement* For Haitian refugees, hostility and neglect mean that fear, uncertainty, and physical hardship are everyday companions.⁵⁵

Given that the United States could legitimately be considered a country of first asylum in the region, the straightforward course of action when the refugee numbers began to grow in November 1991 would have been for the United States to allow Haitian boat people to land, or to rescue those in distress and bring them ashore, and to give them the opportunity to apply for asylum like everyone else. This is the practice accepted as a customary norm and formalized in the UNHCR's ExCom Conclusion No. 23 (XXXII), which places a positive obligation on states not only not to return asylum seekers rescued at sea, but to admit them on a temporary basis:

In accordance with established international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied in the case of asylum seekers rescued at sea. *In cases of large-scale influx, asylum seekers rescued at sea should always be admitted, at least on a temporary basis.* States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities.⁵⁶

On November 11, 1991, Sadako Ogata, the United Nations High Commissioner for Refugees, called on the United States to "allow all of the individuals now on board [United States Coast Guard] vessels to be

54. *Id.* at 9. The U.S. State Department Bureau for Human Rights and Humanitarian Affairs, *Country Reports on Human Rights Practices* (1992) says, at 575-76, that 6,000 Haitians were forcibly repatriated in 1991, citing the Dominican Republic government.

55. ROBIN KIRK, *STONE OF REFUGE: HAITIAN REFUGEES IN THE DOMINICAN REPUBLIC* 2,3 (1992).

56. *Problems Related to the Rescue of Asylum Seekers in Distress at Sea*, Conclusion No. 23 (XXXIII). Conclusion endorsed by the Executive Committee of the High Commissioner's Programme upon the Recommendation of the Sub-Committee of the Whole on International Protection of Refugees, 1981, *Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, (UNHCR-Geneva, 1980) 53 (emphasis added).

disembarked in the United States and admitted for determination of their refugee status."⁵⁷ The parameters of debate had not yet shifted. Her concern, consistent with ExCom Conclusions, was the Haitians' right to be admitted to seek asylum; she apparently assumed that forced return was not under consideration by the United States authorities.

But the United States clearly had other intentions. Admitting the Haitians, even temporarily, was not an option the United States would choose. The government came up with the idea of creating an artificial tier of first-asylum countries in the region. It began shopping around the Caribbean to create middlemen to take on the Haitians interdicted by the United States Coast Guard. The choices—Belize, Venezuela, and Honduras—were demonstrably less well equipped than the United States to shoulder the burden of caring for the refugees, and very unlikely stopping points for anyone journeying by boat from Haiti.

By November 25, 1991, 4,530 Haitians had been interdicted in the post-coup period.⁵⁸ Of that number, about 3,600 were on United States Coast Guard or Navy vessels in international waters of the Caribbean or at the United States Navy base at Guantánamo Bay, Cuba; 120 had been screened in to the United States to pursue asylum claims; and 351 were transferred to Venezuela and Honduras.⁵⁹ Conditions for the 250 Haitians in Honduras were harsh. Honduras is not a signatory to the United Nations Refugee Convention and Protocol, and has a deplorable record with respect to Salvadoran refugees who were kept as virtual prisoners in closed camps during the 1980s. There are well-substantiated reports of abuse of refugees by Honduran military personnel. The Haitians were held in a school building surrounded by barbed wire and guarded by soldiers. Within a short period of time, nearly all of the Haitians in Honduras "voluntarily" repatriated.⁶⁰

Members of Congress as well as the Administration complained publicly about the lack of response from other governments in the region. But there was good reason to doubt that temporary asylum offers from other countries in the region would be forthcoming. First, Haitians in the Caribbean, very much like Vietnamese in Southeast Asia, are not generally welcome. As with the Vietnamese, this is due to a variety of historical, cultural, economic, and, probably, racial reasons. Paralleling the Malaysian and Thai pushbacks of Vietnamese boats, the Bahamas has also pushed Haitian boats out to sea. On July 10, 1990, the Bahamian Defense Forces interdicted a Haitian boat; the boat capsized as it was being towed, drowning at least thirty-nine Haitians.⁶¹

57. Statement by the United Nations High Commissioner for Refugees, Nov. 11, 1991 (unpublished) (on file with the author).

58. *Haitian Interdiction Crisis Erupts*, REFUGEE REP., Nov. 29, 1991, at 1.

59. *Id.*

60. *Id.*

61. U.S. COMMITTEE FOR REFUGEES, *THE WORLD REFUGEE SURVEY—1991* 86 (1991).

More importantly, there was a question of responsibility. Although the United States assumed (probably correctly in the overwhelming majority of cases) that the Haitian boats were bound for the United States, it was nevertheless United States naval and coast guard vessels that went out into international waters to take the Haitians into custody. The Haitians had not entered the territories or territorial waters of surrounding countries; they had been taken into United States custody by official United States government forces at the behest of the President. Since the United States had gone out of its way (i.e., outside its territorial waters) to take the Haitians into custody, it strained logic to see them as any other country's responsibility.

Both the Bush Administration and now the Clinton Administration like to put a humanitarian gloss on interdiction by calling it "rescue at sea." Of course, it isn't. The United States "rescues" boats that are not in distress and detains their occupants, even against their will. In all cases, without exception, the boats are sunk, destroying the property of the boat owners. But for the shaky "legal" foundation of an exchange of letters between representatives of President Reagan and "Baby Doc" Duvalier—a thoroughly discredited dictator—the United States interdiction of these boats on the high seas would easily rank as an act of international piracy.⁶²

But, for the sake of argument, taking the two United States presidents at their word, the ExCom Conclusion No. 23 instructs them that "asylum seekers rescued at sea should always be admitted at least on a temporary basis."⁶³ And where should they be admitted? The ExCom Conclusion says that "persons rescued at sea should normally be disembarked at the next port of call."⁶⁴ It is quite a stretch to interpret Honduras, Venezuela, or Belize as the "next port of call" for United States Coast Guard vessels patrolling the Windward Passage.

Rather than acting in accord with customary international norms for the protection of asylum seekers at sea, norms that the United States government actively promoted in Southeast Asia, the United States government spent its energies looking for dumping grounds among regional regimes that had shown little regard for refugees in the past and who were far less capable of absorbing them. The United States position stood the principle of burden sharing on its head. Unquestionably, the United States economy, even in recession, was better able to absorb a refugee influx than any other in the region. In addition, the United States legal system was far more likely to ensure respect for due process once the asylum claimant gained access to the procedures.

62. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *REFUGEE REFOULEMENT: THE FORCED RETURN OF HAITIANS UNDER THE U.S.-HAITIAN INTERDICTION AGREEMENT 13* (1990) ("In an interview with representatives of the Lawyers Committee, President Prosper Avril stated that he believes that the interdiction agreement is illegal under Haitian law since an exchange of diplomatic letters is not a proper method of entering into a bilateral agreement with another country.")

63. Conclusion No. 23 (XXXIII), *supra* note 56, at 53.

64. *Id.*

IV. The Clinton Disappointment

During his campaign for the presidency, Bill Clinton seemed clearly to understand the essential cruelty and illegality of the Bush policy of summary return. Clinton stated:

I am appalled by the decision of the Bush Administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to political asylum This process must not stand. It is a blow to the principle of first asylum and to America's moral authority in defending the rights of refugees around the world.⁶⁵

In this statement, Clinton not only demonstrated a sensitivity to the fears of fleeing Haitians and the need to protect them, but also showed an understanding of the implications of the policy for the principle of first asylum.

This level of understanding makes Clinton's post-election reversal and reversion to a warmed-over Bush Administration Haitian refugee policy all the more distressing. The principal outlines of the refugee aspect of the policies differ only slightly in that Clinton says he will begin immediately to make it safer and easier to apply for refugee status within Haiti by, among other things, increasing the numbers of United States officials posted there for refugee processing.⁶⁶ His rationale for the policy is identical to that put forward by Bush on November 21, 1991. "I fear that boat departures in the near future would result in further tragic losses of life," he said in a radio address broadcast to Haiti on January 14, 1993.⁶⁷ "For this reason, the practice of returning those who flee Haiti will continue, for the time being, after I become President."⁶⁸

It sounds humanitarian. If the United States can provide safe, viable ways for Haitians under threat of persecution to escape other than by taking off in leaky boats, then by all means, the United States should pursue every available option. President Clinton and his transition team deserve due credit for pursuing political solutions within Haiti that could restore respect for human rights and democracy, and that would make escape unnecessary. But what do we do in the meantime? What do we do when a desperate refugee fearing for his life jumps in a boat and throws himself on our mercy pleading for asylum? President Bush made the decision to send him back. It was automatic. It was effective. It stopped the flow. What refugee, after all, would take the risk of the boat journey if being caught meant certain return into the hands of his persecutors?

In the name of order, the Bush Administration sacrificed the most fundamental principle of refugee protection—the right of refugees to

65. *Clinton Continues Summary Return of Haitians: U.S. Lawyers Investigate In-Country Processing*, REFUGEE REP., Jan. 29, 1993, at 1, 2 (quoting Presidential Candidate Bill Clinton).

66. *Id.* at 1.

67. *Id.* (quoting President-Elect Bill Clinton in radio address to Haitian people on Jan. 14, 1993)

68. *Id.*

flee their countries, to seek asylum from persecution in other countries, and not to be returned into the hands of their persecutors.

V. In-Country Refugee Processing: An Insufficient Alternative to Asylum

In response to criticism of his interdiction policy, President Bush, in February 1992, introduced a program of in-country refugee processing from within Haiti. The expectation was that Haitians would come to the United States embassy in Port-au-Prince to apply for refugee status. At a later date they would return for interviews, first with State Department consular officers, then with Immigration and Naturalization Service ("INS") officers. Applicants would then have to wait for visas to be processed. By the close of 1992, 15,580 persons had inquired about the program, but only 136 had actually been admitted to the United States, an average of 12 per month.⁶⁹ What protection was really being offered for people claiming to fear for their lives? They were basically told to "take a number and wait your turn." They were left to their own devices to figure out how to avoid arrest during the wait.

The message President Bush sent to refugees was: You can only be protected if you are willing to wait in line. But real refugees can't wait. That is the essence of what it is to be a refugee, to be genuinely afraid and to need to escape. And President Bush sent them another message: If you attempt to take control of your own destiny by escaping on your own to seek asylum outside Haiti, you will be punished—you will be sent back to the very situation that threatens your life.

In-country refugee processing may help for some people under certain circumstances, but it is not a substitute for the right to seek asylum outside the country of persecution. Overseas refugee admissions procedures are completely discretionary. The United States government can designate as a refugee for United States admission anyone it chooses, but it is compelled to accept no one. A discretionary refugee admissions program, therefore, does not come close to addressing the requirements of refugee protection in international law. Expanding the in-country refugee processing program is a positive step, but it cannot be a smoke-screen for *refoulement*.

A similar in-country procedure for processing refugees was created at the height of the Vietnamese boat exodus. However, those who decided to flee by boat were never turned back simply because such a program existed. As discussed previously, the United States was vigilant in ensuring that regional governments would respect the principle of first asylum. For the United States to have said that the existence of an Orderly Departure Program meant that Vietnamese boat people could be summarily returned without a hearing was unthinkable.

In-country processing has also been used for resettling Soviet Jews

69. *Id.* at 4.

and Evangelical Christians out of Moscow.⁷⁰ In fact, due to the direct admissions from Cuba, Vietnam, and the former Soviet Union, the majority of "refugee" admissions to the United States this year are not even refugees by international definition, because they are not outside their home countries when they are so designated.⁷¹ Long before in-country refugee processing had started for Haitians, Ricardo Inzunza, the deputy commissioner of the INS, identified the problems associated with in-country processing:

Unfortunately, in most cases, those most in need of this legal remedy [i.e., in-country processing]—those most vulnerable to abuses and with least access to any viable alternatives—are least likely to be able to take advantage of it. Those in active flight are unlikely to get into the U.S. embassy, or even to it, without being noticed and/or arrested It is slow and many persons with a "well-founded fear of persecution" simply cannot wait for such processing to be completed.⁷²

In June 1992, then-Representative Stephen Solarz (who later became one of the architects of the Clinton policy during the transition period) sharpened this general criticism of in-country processing in the specific Haitian context, where the Bush Administration used it as a justification for its summary return policy. Solarz testified before the Western Hemisphere Subcommittee that the use of in-country processing to justify the summary return of boat people was "a ludicrous argument."⁷³

In the Soviet Union, Cuba, Vietnam, and Romania, in-country processing has been an alternative option for those with the inclination, courage, and gumption to use it. But it has never been the exclusive option, and it is clear that making it the exclusive option does not conform to international law.⁷⁴

Solarz, then-chairman of the Subcommittee on Asian and Pacific Affairs, and a prime mover within Congress in defense of Vietnamese refugees, commented on the damage the Haitian policy would do for refugee protection in Asia.

I pity the poor American diplomat who in the future is asked to go to the British or the Bangladeshis or the Malaysians or the Thais and say, "Respect the principle of first asylum." There will be peals of laughter in the room. They will say, "Who are you kidding. You guys don't respect the principle yourself. Why should we." We are forfeiting our moral authority here. And we are compromising our capacity to come to the defense of refugees all over the world.⁷⁵

70. Ricardo Inzunza, *The Refugee Act of 1980: Ten Years After—Still the Way to Go*, 2 INT'L J. REFUGEE L. 413, 421-22 (1990).

71. *Id.*

72. *Id.*

73. *Congress, Courts React to Presidential Order Turning Back Haitian Boat People*, REFUGEE REP., June 19, 1992, at 11, 14.

74. *Id.*

75. *Id.* at 13.

Solarz need not have limited his comments to East Asia. In October 1992, Spain reached an agreement with Morocco by which Morocco agreed to step up its patrols in the Strait of Gibraltar to prevent Moroccans from leaving for Spain.⁷⁶ Also, in 1992, Yemen and Kenya both briefly refused to allow boats carrying Somali refugees to land on their shores.⁷⁷

Since mid-1991, Italy has been patrolling the Adriatic Sea and interdicting Albanian boats.⁷⁸ In August 1991, Italy summarily returned 19,000 Albanians who had arrived by boat, including about 2,000 who refused to leave a stadium where they were being held until Italian authorities were promised that their asylum claims would be considered.⁷⁹ However, they too were rounded up and summarily deported with hardly a murmur of international protest.

In 1992, Italy continued to declare Albania a safe country and considered all Albanian asylum seekers economic migrants despite deteriorating human rights conditions in that country. On July 9, 1992, a group of 103 Albanians, including at least 30 military personnel, commandeered an Albanian military vessel and fled to Italy. After landing at the Brindisi port, Italian authorities apprehended the Albanians and summarily returned them to Albania by plane without a hearing of their asylum claims.⁸⁰

These developments on the international front might have occurred with or without the United States precedent. At the least, however, Solarz's point about the "poor American diplomat" is well taken. The United States is now in no moral position to protest the treatment of refugees and asylum seekers by other governments, even when the United States thinks it is wrong. For example, on December 10, 1991, after Hong Kong forcibly repatriated twenty-eight Vietnamese, the United States State Department expressed "regret" that the returnees had not been allowed to apply for a voluntary return program run by the United Nations.⁸¹ No sooner had the State Department spokesman made this statement than he was confronted with the question of why the United States opposes forced refugee returns to Vietnam but not to Haiti. He awkwardly responded that "the United States believes that country conditions in Haiti are such that the persons who are returned will not face persecution," but that in Vietnam "the United States opposes forcible repatriation under present conditions in that country."⁸² This statement holds Haitians to a standard of actually facing

76. Alan Riding, *Aliens Find a European Gateway at Spain's Coast*, N.Y. TIMES, Oct. 18, 1992, at 3.

77. *300 Somali Refugees Leave Ship Off Kenya*, N.Y. TIMES, July 29, 1992, at A2.

78. See Bill Frelick, *Closing Ranks to Deny Access to Asylum*, IMMIGRATION NEWSLETTER, National Lawyers Guild., Vol. 20, No. 3, 1991, at 3-5 (Aug. 1992).

79. *Id.*

80. *Id.*

81. Barbara Basler, *Hong Kong Ousts More Boat People*, N.Y. TIMES, Dec. 11, 1991, at A16.

82. *Id.*

"persecution" and presumes no Haitians meet this standard. In the same breath, it uses a vague standard of "present conditions" in Vietnam as sufficient to prevent return of Vietnamese. There is no suggestion that Vietnamese would have to show actual, probable, or even possible persecution upon return to Vietnam in order to be protected from involuntary return. The State Department spokesman's formulation did not actually say that human rights conditions were any worse in Vietnam than in Haiti. Indeed, by the Bureau for Human Rights and Humanitarian Affairs's own reporting on the two countries, it would be quite difficult to promote such an argument.⁸³

United States government actions on Haitians render its words about refugee protection meaningless. Such actions signal to the rest of the world our seriousness in upholding international principles of refugee protection. If the Clinton Administration bows to domestic pressures by saying the United States cannot afford to absorb a refugee influx, then it will never again be in a position to insist that other, poorer and smaller countries do the same. How could the United States tell Malawi to host nearly a million Mozambican refugees, tell Pakistan to host three million Afghans, or tell Croatia to keep its borders open to Bosnians? Candidate Clinton was right: the policy is "a blow to the principle of first asylum and to America's moral authority in defending the rights of refugees around the world."⁸⁴

VI. Recommendations

As a first step, President Clinton should return to his campaign promise to lift President Bush's executive order for the summary return of Haitian boat people. In addition, he should rescind the Reagan executive order and discontinue the interdiction program itself. Only then would President Clinton be able effectively to involve other countries in the region in providing first asylum to Haitian asylum seekers.

As long as the United States government goes into international waters, interdicts boats, and takes the passengers into custody, it cannot expect other countries to think of the Haitian refugee population as a shared responsibility. However, if rescue-at-sea operations were genuine, and if the Haitian boat people boarded Coast Guard cutters willingly, the United States would have a better claim to appeal to "next ports of call" in the area, and to ask other nations outside the region, such as France and Canada, to share the burden.

If planned properly and in conjunction with other countries, the offer of safe haven need not precipitate a stampede of boat people to the United States. While a limited number of persons under immediate threat could be brought to the United States directly from within Haiti, this should not be used as a rationale for denying asylum to others who

83. See generally U.S. STATE DEPARTMENT BUREAU FOR HUMAN RIGHTS AND HUMANITARIAN AFFAIRS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (1992).

84. REFUGEE REP., *supra* note 66, at 2.

opt to escape on their own. More importantly, the United States should, working through the UNHCR, assist countries such as the Bahamas, Suriname, and French Guiana to accommodate refugees temporarily until their safe return to Haiti could be assured. One way to persuade these countries to keep their doors open is to resettle some Haitian refugees in the United States.

Boat people in seaworthy vessels who refuse offers of assistance should be allowed to sail on, although their movement could be closely monitored. When they reach United States territorial waters, the Coast Guard could then board the vessels and INS officials could determine if any on board have proper travel documents. Assuming most would not, they would be placed in exclusion proceedings where they could file asylum claims and have the right, at their own expense, to legal counsel. Extra immigration judges could be placed in Miami in anticipation of a large influx. While undoubtedly these arrangements would represent increased costs to the United States, the fears of the adjudication system being completely overwhelmed are exaggerated.

Most Haitians, even with strong claims, would have difficulty navigating the asylum process in the United States. Although high levels of repression continue in Haiti, the extra-legal and capricious character of much of the persecution there, combined with a largely illiterate society lacking a functioning justice system, means that documenting and corroborating claims is exceedingly difficult. Given these circumstances, a temporary safe haven seems particularly warranted for those who are not able to establish an asylum claim, but nevertheless express fear of return. Immigration judges ought to be instructed to allow Haitians facing deportation to designate Guantánamo as the place to which they should be deported.

Despite claims of the United States military to the contrary, the United States has the capacity to build a decent refugee camp, or camps, at Guantánamo to provide temporary safe haven to persons unwilling to go back but who have not established an asylum claim. Such a holding camp could also be used for persons rescued at sea pending screening of their claims and third-country resettlement.

In contrast to the way in which Guantánamo has been operated thus far, however, a safe haven camp must be predicated on voluntariness. The Haitians' camp would be for those who have chosen Guantánamo either by willingly allowing themselves to be rescued at sea and staying at Guantánamo awaiting screening, or those who chose Guantánamo over being deported to Haiti. United States voluntary agencies and the UNHCR would have to be invited to assist in administering the camp(s), and the military would have to keep a low profile, staying outside the actual boundaries of the camp compound(s) unless security made their presence necessary. The United States authorities at Guantánamo, in close consultation and cooperation with the UNHCR, would encourage and facilitate voluntary repatriation for those who felt sufficiently safe to return. This would have to be completely non-coercive, although posi-

tive incentives could be made available to make voluntary repatriation an attractive option.

Although the poor conditions in Honduras and elsewhere certainly contributed to the decision of nearly all of the few hundred Haitians who were provided regional safe haven to repatriate, the fact that the United States was no longer open to them undoubtedly also contributed to their decision to return. The same likely would be the case for those Haitians who would opt for Haiti after being deported from the United States. They would be offered temporary asylum with no opportunity for onward movement. The temporary asylum option, therefore, would be self-selecting. Those who left Haiti primarily for the purpose of immigrating to the United States, ultimately frustrated in that attempt, would most likely decide to go home. Those who continued to harbor genuine fears would stay and be provided for, but would know that there was no "future" for them at Guantánamo. Their situation would be essentially the same as a majority of the other 18 million refugees around the world, most of whom live in first asylum camps, with no prospect of third-country resettlement.

The responsibility of the United States would be to assist them so that they could live in safety in temporary asylum pending a durable solution. Although a relative few would be determined individually to be refugees and be able to be resettled, most would have to bide their time until their security in Haiti could be assured.

President Clinton is right to emphasize the need to address root causes of refugee flows, which, in Haiti, means essentially the restoration of democracy and respect for human rights. Once that is done, the refugee problem solves itself—persons in exile can repatriate voluntarily and persons within the country no longer feel compelled to flee. This alone, however, cannot be the sum total of a refugee policy. A refugee policy is about what to do in the meantime, how to protect and assist people outside their country while the country of origin is still dangerous. Essentially, that is a question of asylum, temporary or permanent. It is a question that cannot responsibly be avoided.