

# THE COURTS AND INTERCEPTION: THE UNITED STATES INTERDICTION EXPERIENCE AND ITS IMPACT ON REFUGEES AND ASYLUM SEEKERS

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This paper, originally prepared for the 2002 5th Biannual World Conference of the International Association of Refugee Law Judges, held October 22-25 in Wellington, New Zealand, has been modified to incorporate discussion of the significant development in United States' interdiction and refugee policies, triggered by the October 29, 2002 arrival in Key Biscayne, Florida of a vessel containing 211 Haitians and 3 Dominicans.

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## ***I INTERDICTION: 1. THE ACT OF PROHIBITING<sup>1</sup>***

Article 33 of the 1951 United Nations Convention on the Status of Refugees [hereinafter Refugee Convention] mandates 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, membership in a particular social group or political opinion".<sup>2</sup> Article 31 of the Refugee Convention cautions that contracting states shall not impose penalties for illegal entry or unauthorized presence on a refugee who presents him or herself to the authorities, and shall not restrict a refugee's movements pending a determination of status except as necessary.<sup>3</sup>

In 1968, the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees [hereinafter Protocol],<sup>4</sup> which incorporates by reference the terms of the Refugee Convention. Twelve years later, in the Refugee Act of 1980,<sup>5</sup> the United States Congress amended the Immigration and Nationality Act [hereinafter INA] to implement the Protocol in domestic law.<sup>6</sup> Specifically, Congress added a new statutory section to the INA, making asylum a discretionary form of protection available to persons within the United States and at United States borders<sup>7</sup> who qualified under the definition of "refugee"<sup>8</sup> and met

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1 *Black's Law Dictionary* (7th ed, 1999).

2 Convention Relating to the Status of Refugees, Apr 24, 1954, art 33, 189 UNTS 2545.

3 Convention Relating to the Status of Refugees, Apr 24, 1954, art 31, 189 UNTS 2545.

4 Protocol Relating to the Status of Refugees, Nov 1, 1968, 19 UST 6223, 606 UNTS 267.

5 Refugee Act of 1980, Pub L No 96-212, 94 Stat 107 (codified in scattered sections of the INA).

6 See *INS v Cardoza-Fonseca*, 480 US 421, 424 (1987) (ruling that the Refugee Act of 1980 amended the INA to fully implement the United States' obligations under the Protocol). See also *INS v Stevic*, 467 US 407, 418, 421 (1984).

7 Immigration and Naturalization Act § 208(a)(1), 8 USC. § 1182(a)(1). See Deborah Anker, *The Law of Asylum in the United States* 4 (3d ed, 1999).

8 Immigration and Naturalization Act § 101(a)(42)(A), 8 USC §1101(a)(42)(A). A "refugee" is "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person

other statutory criteria. Congress also amended existing section 243(h) of the INA, ostensibly to conform to the Refugee Convention (Article 33), by providing that, "[t]he Attorney General *shall not deport or return any alien...* to a country if the Attorney General determines that such alien's life or freedom would be threatened in that country because of race, religion, nationality, membership in a particular social group or political opinion".<sup>9</sup>

Within one year of the codification of these provisions, pursuant to Executive Order No 12,324, a bilateral executive agreement signed with the Haitian government,<sup>10</sup> the United States began interdicting and screening any Haitian found in international waters. The U.S.-Haiti Agreement authorized the United States to return "detained vessels and persons to a Haitian port," but expressly

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last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." In "such special circumstances as the President after appropriate consultation (as defined under section 207(e) of the INA) may specify," the term "refugee" may mean any person within that person's country of nationality or habitual residence who is persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. Id. § 101(a)(42)(B), 8 USC § 1101(a)(42)(B).

- 9 Immigration and Naturalization Act § 243(h), 8 USC § 1253(h) (emphasis added). As amended by the Refugee Act of 1980, section 243(h) of the INA applied only to aliens "within the United States," which limited its scope to aliens facing deportation proceedings and expulsion from the United States, but not to those facing exclusion proceedings, which were then prescribed for aliens who had not effected an "entry" into the United States. Section 243(h) has since been amended and codified as section 241(b)(3) of the INA (providing that "the Attorney General *may not remove* an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of race, religion, nationality, membership in a particular social group or political opinion.") (emphasis added). A discussion of the criticism of sections 243(h) and 241(b)(3) of the INA for treating asylum as discretionary and perpetuating the use of the "would be threatened" standard of proof, rather than adopting the "well-founded fear" standard contained in the Refugee Convention and made applicable to asylum claims, is beyond the scope of this paper.
- 10 See Exec Order No 12,324; Agreement on Migrants-Interdiction, Sept 23, 1981, US-Haiti, 33 UST 3559, 3560, TIAS No 10241 [hereinafter US-Haiti Agreement] (including a guarantee from the Haitian Government that its repatriated citizens would not be punished for illegal departure).

acknowledged that even on the high seas, the United States was bound by "international obligations mandated in the Protocol Relating to the Status of Refugees"<sup>11</sup>

On September 29, 1981, six days after the US-Haiti Agreement was signed, President Reagan issued Presidential Proclamation No 4865, characterizing "the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States" as "a serious national problem detrimental to the interests of the United States".<sup>12</sup> Accordingly, President Reagan suspended the entry of undocumented aliens from the high seas and ordered the Coast Guard to intercept vessels carrying such aliens and to return them to their point of origin.<sup>13</sup> Consistent with the terms of the U.S.-Haiti Agreement, however, the proclamation provided expressly that "no person who is a refugee will be returned without his consent".<sup>14</sup>

These interceptions and repatriations continued for ten years. Following the September 30, 1991 military coup that overthrew the government of Jean Bertrand Aristide, the first democratically-elected president in Haitian history,

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11 Id. A "credible fear" standard was used to determine which interdicted Haitians might be "screened in" to apply for protection from return to Haiti under US laws implementing the Protocol.

12 Proclamation No 4865, 3 C.F.R. §50-51 (1981-1983 Comp.). According to an INS Fact Sheet, This Month In Immigration History: November 1991, available at <http://www.ins.usdoj.gov/graphics/aboutins/history/nov91.htm> (last visited Jan. 31, 2003) [hereinafter INS fact sheet], this program was known as the Haitian Migrant Interdiction Operation (HMIO), until the acronym was later changed to the Alien Migrant Interdiction program (AMIO) to reflect the fact that not all of the interdicted persons were Haitian. See also *Sale v Haitian Ctrs Council, Inc*, 509 US 155, 160-61 (1993) (discussing the recent history of Haitian interdiction under various executive orders and proclamations).

13 *Sale*, 509 US 160-61.

14 Id. (citing Exec Order No 12,324, 3 C.F.R. § 2(c)(3), 181 (1981-1983 Comp)). See also Proposed Interdiction of Haitian Flag Vessels, 50 Op. Off. Legal Counsel 242, 248 (1981) [hereinafter OLC Opinion] (concluding that, even on the high seas, Article 33 obliged the United States to ensure that interdicted Haitians "who claim that they will be persecuted...must be given an opportunity to substantiate their claims."). In the face of contrary views expressed by the legal adviser to the State Department, however, this Office of Legal Counsel opinion was later withdrawn.

several hundred Haitians fled Haiti and were interdicted and held on United States Coast Guard cutters, circling in international waters in the Caribbean.<sup>15</sup>

On November 18, 1991, citing concern for the health and safety of the several hundred Haitians and crew on the cutters, the United States announced that the program of forced repatriation of "screened-out" Haitians would resume.<sup>16</sup> The Haitian Refugee Center, representing the Haitians, immediately sought injunctive relief, alleging that the government had failed to establish and implement adequate screening procedures to protect Haitians who qualified for asylum from being returned to Haiti.<sup>17</sup> During the temporary period in which the district court suspended all forced repatriations, the United States opened the U.S. Naval Station at Guantanamo Bay, Cuba and erected tent camps to house and process the refugees.<sup>18</sup>

On May 24, 1992, pursuant to Executive Order 12,807, also known as the Kennebunkport Order, President George H Bush ordered that refugee determinations were no longer required in the cases of Haitian and other migrants coming to the United States by sea.<sup>19</sup> Instead, to prevent illegal migration to the United States, the Coast Guard was authorised to stop and board vessels intercepted beyond the territorial sea of the United States, and to return the vessel

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15 See INS Fact Sheet, above n 12 (indicating that although the interdicted Haitians were screened by INS officers according to the informal "credible fear of return" standard, senior officials in Washington were uncertain how to handle the Haitians who were either "screened in" or "screened out").

16 *Id.*

17 *Haitian Refugee Ctr v Baker*, 783 F Supp. 1552 (SD Fla 1991) (granting temporary relief that precluded any repatriations until February 4, 1992). But see *Haitian Refugee Ctr v Baker*, 949 F.2d 1109 (11th Cir. 1991) (*per curiam*) (reversing and remanding the order), *cert denied*, 502 US 1122 (1992); and *Haitian Refugee Ctr v Baker*, 953 F.2d 1498 (11th Cir 1992).

18 See INS Fact Sheet, above n 12 (stating that the informal "credible fear" standard was then formalised in an administrative memorandum from the INS Deputy Commissioner).

19 Exec Order 12,807, Interdiction of Illegal Aliens, 57 Fed Reg 23,133 (May 24, 1992) (suspending the entry of aliens coming by sea to the United States without necessary documentation and declaring that the international obligations of the United States do not extend to persons located outside the territory of the United States). See also *id.*, § 4 (revoking and replacing Exec Order No 12, 324).

and its passengers to the country from which it came. The order states explicitly that nothing in it shall be construed "to require any procedures to determine whether a person is a refugee".<sup>20</sup> Therefore, refugees interdicted under these circumstances were to be repatriated.<sup>21</sup>

In 1993, the Supreme Court in *Sale v Haitian Centers Council Inc*, found that in the decade following enactment of the Refugee act of 1980, "the Coast Guard interdicted approximately 25,000 Haitian migrants".<sup>22</sup> The Supreme Court acknowledged that "[a]fter interviews conducted on board Coast Guard cutters, aliens who were identified as economic migrants were 'screened out' and promptly repatriated," while "[t]hose who made a credible showing of political refugee status were 'screened in' and transported to the United States to file formal applications for asylum".<sup>23</sup>

Nevertheless, the Supreme Court reported that, "[f]or 12 years, in one form or another, the interdiction program challenged here has prevented Haitians such as respondents from reaching our shores and invoking those [refugee] protections".<sup>24</sup> Apparently, even under the original system, in which those found to have a credible fear were "screened in," it appeared that few bona fide claims to refugee status were presented, with the result that "all interdicted have been returned to Haiti".<sup>25</sup>

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20 *Id.*

21 According to the INS Fact Sheet, above n 12, repatriated Haitians were allowed to pursue their claims "through in-country US refugee processing established under section 101(a)(42)(B) of the INA."

22 *Sale v Haitian Ctrs. Council Inc*, 509 US 155, 161-62 (1993).

23 *Id.* The informal "credible fear" screening standard, originally introduced in 1981 in President Reagan's high seas extraterritorial interdiction program, was the precursor in name and operation to the "credible fear" determination now required by statute in the case of every putative refugee who appears at a United States port of entry without valid documents. See Immigration and Naturalization Act §§ 235(b)(1)(A)(ii), 235(b)(1)(B)(ii)-(iii).

24 *Sale*, 509 US 160.

25 See, eg, *Haitian Refugee Ctr v Gracey*, 809 F2d 794, 797 (DC Cir 1987) (concluding that "over 78 vessels carrying more than 1800 Haitians have been interdicted," and that after interviewing all interdicted Haitians the government found that "none has presented a bona fide claim to refugee status"). According to INS reports, between 1981

In the ten years since the *Sale* decision, the United States' increasingly restrictive interdiction policy has undoubtedly reduced refugee claims made by Haitians and other refugees who may have warranted consideration and protection under United States refugee law. Most recently, in the wake of the October 29, 2002 arrival in Key Biscayne, Florida of a vessel containing 211 Haitian and 3 Dominican men, women and children, the Department of Justice adopted a new policy making fast-track expedited removal procedures applicable to all those arriving by sea.<sup>26</sup> In a self-described effort to "assist in deterring surges in illegal migration by sea," which "threatens national security,"<sup>27</sup> the policy requires a refugee arriving by sea to satisfy the "credible fear" test before being allowed to present an asylum claim. Immediately thereafter, President George W. Bush issued Executive Order 13,276,<sup>28</sup> affirming Executive Order 12,807 and authorizing the Attorney General to maintain custody and conduct screening of any undocumented aliens intercepted in the Caribbean region at Guantanamo Naval base or any other appropriate location.

This paper examines the background, scope and implementation of United States' policies related to refugees interdicted on the high seas or in extra-territorial waters that culminated in the Supreme Court decision in *Sale v. Haitian Centers Council, Inc.* It also considers the recent federal regulations, which resort to expedited removal and mandatory detention as a means of deterring others from coming to the United States by sea to seek asylum. In light of these policies and practices, the paper raises questions concerning the United States' adherence

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and 1991, more than 25,000 were interdicted, "while only six had been 'screened in' for transfer to the United States." INS Fact Sheet, above n 12.

26 INA § 235(b)(1)(A)(iii), 8 USC. § 1225(b)(1)(A)(iii) permits the Attorney General, "in his sole and unreviewable discretion," to designate as subject to expedited removal any alien who is not a described in subparagraph (F) (referring to Cubans), who has not been admitted or paroled and is inadmissible under section 212(a)(6)(C) or 212(a)(7) of the INA, and who has not affirmatively shown that he has been physically present in the United States for a 2-year period immediately prior to the date inadmissibility is determined.

27 Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed Reg 68,923-26, 68,924 (Nov 13, 2002) [hereinafter November 13, 2002 Notice].

28 Exec Order No 13,276, 67 Fed Reg 69,983-86 (Nov 19, 2002).

to the terms of Articles 33 and 31 of the 1951 Refugee Convention, to which it is bound by virtue of its accession to the 1967 United Nations Protocol.

## ***II INTERDICTION AND DOMESTIC AND INTERNATIONAL LAW RELATING TO REFUGEES***

The United States' interdiction practices relating to refugees are governed by various international treaties, domestic statutes, regulations, and executive orders. International law, as expressed in Article 33 of the Refugee Convention provides:

- 1 No 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, membership of a particular social group or political opinion.
- 2 The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

In addition, Article 31 provides:

- 1 The Contracting States shall not impose penalties, on account of illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article I, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
- 2 The Contracting States shall allow such refugees a reasonable period and all necessary facilities to obtain admission into another country.

Under Article 33, a contracting state undertakes a duty not to return a refugee to circumstances in which he or she risks being persecuted based on one of the five attributes covered in the refugee definition<sup>29</sup> - an obligation that must attach prior to the time refugee status is confirmed and asylum is granted by the

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<sup>29</sup> Convention Relating to the Status of Refugees, Apr 24, 1954, art 33, 189 UNTS 2545.

contracting state.<sup>30</sup> In discussing Australia's 2001 interception and repulsion of the Norwegian container ship "Tampa" carrying more than 400 refugees, Professor James C Hathaway posits that withholding the fundamental protection against refoulement in Article 33 until there has been an official confirmation of a refugee's qualifications for refugee status is likely to place genuine refugees at risk and call into question the contracting state's compliance with its obligations under the Refugee Convention.<sup>31</sup>

Accordingly, a putative refugee's basic right to at least provisional protection "applies as soon as a refugee comes under the de jure or de facto jurisdiction" of a contracting state, as the Refugee Convention does not qualify "Article 33 protection to 'refugees' . . . based on the level of attachment to the asylum state."<sup>32</sup> Furthermore, Article 31 arguably limits the detention or the imposition of other restrictions on refugees to justifiable reasons, such as pending a determination of the refugee's identity, or whether he or she poses a risk to the contracting state's security.<sup>33</sup>

The United States domestic statute relating to protection from return to a country in which an individual's life or freedom would be threatened because of race, religion, nationality, membership in a particular social group or political opinion has been modified twice since the United States acceded to the Protocol and enacted the Refugee Act of 1980. Specifically, section 241(b)(3)(A) of the INA currently provides:<sup>34</sup>

Notwithstanding paragraphs...[relating to arriving aliens and others], the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of race, religion, nationality, membership in a particular social group or political opinion.

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30 See James C Hathaway, *Refugee Law is not Immigration Law*, in United States Committee for Refugees, *World Refugee Survey* 38 (2002). As Professor Hathaway explains, this duty continues until there has been a fair determination that the putative refugee does not so qualify.

31 *Id.* 41.

32 *Id.* (citing James C Hathaway & Anne K Cusick, *Refugee Rights are Not Negotiable*, 14 *Geo Immigr L J* 481, 491-93 (2000)).

33 *Id.* 42.

34 INA, § 241(b)(3)(A) (emphasis added).

Additionally, prior to its amendment in 1996, section 243(h) of the INA, as amended by the Refugee Act of 1980, provides:<sup>35</sup>

The Attorney General *shall not deport or return* any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

In contrast, the pre-1980 provision, which was not mandatory and referred to an alien "within the United States", read:<sup>36</sup>

The Attorney General *is authorized to withhold* deportation of any alien...within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

In addition, a refugee arriving at a land border or port of entry may apply for asylum.<sup>37</sup> However, since the enactment of "expedited removal" provisions in the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), which apply to any alien arriving without valid documents for admission, the statute and regulations condition access to apply for both asylum and withholding of removal on the refugee's ability to assert and establish a "credible fear" of "persecution".<sup>38</sup>

The United States' relevant executive authority includes 3 significant proclamations and executive orders relating to interdiction and refugees. The first of these authorities was Executive Order No 12,324,<sup>39</sup> which allowed interdiction, screening and return of Haitian migrants. The second authorization, Presidential Proclamation No 4865, precluded entry and ordered interception and repatriation

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35 INA, § 243(h) (emphasis added).

36 *Id.*

37 Immigration and Naturalization Act § 208(a), 8 USC § 1158 (covering any alien who is physically present or who arrives in the United States, including "an alien who is brought to the United States after having been interdicted in international waters).

38 Immigration and Naturalization Act § 235(b)(1)(A)-(B); 8 CFR § 235.3.

39 Exec Order No 12,324, above n 10. See also 46 Fed Reg 48,109 (1981).

of all undocumented migrants intercepted on the high seas.<sup>40</sup> Both Order No. 12,324 and Proclamation 4865 provided that an individual claiming refugee status would be given an opportunity to substantiate his claim.<sup>41</sup> The third of these authorities, Executive Order No 12,807 ("Kennebunkport Order"), terminated the screening process provided in Executive Order 12,324 and allowed the Coast Guard to interdict Haitians on the high seas and immediately repatriate them to Haiti without making any determination of refugee status.<sup>42</sup>

In addition, as noted above, there is now executive authority providing that various agency heads, and in particular, the Attorney General, may carry out their duties relating to "migration of aliens in the Caribbean region", consistent with applicable law.<sup>43</sup> Specifically, the Attorney General may maintain custody of any alien who is believed to be seeking to enter the United States and who is interdicted or intercepted in the Caribbean region.<sup>44</sup>

### ***III UNITED STATES INTERDICTION POLICY AND PRACTICE***

The United States Coast Guard has the lead responsibility for at-sea enforcement of United States immigration law and related international agreements.<sup>45</sup> The Coast Guard, which has been involved in immigration enforcement since the passage of anti-slavery legislation in the late eighteenth and early nineteenth centuries, "conducts patrols and coordinates with other federal agencies and foreign countries to interdict undocumented migrants at sea, denying them entry via maritime routes to the US, its territories and possessions."<sup>46</sup>

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40 Proclamation No 4865, above n 12.

41 Exec Order No 12,324, above n 10 and Proclamation No 4865, above n 12.

42 Exec Order No 12,807, above n 19.

43 Exec Order No 13,276, above n 28.

44 *Id.*

45 14 USC, §§ 2, 14.

46 See generally Department of Transportation, United States Coast Guard homepage, available at <http://www.uscg.mil/uscg.shtm> (last visited Jan. 31, 2002) [hereinafter Coast Guard Website Materials] (with links to Alien Migration Interdiction, available at <http://www.uscg.mil/hq/g-o/g-opl/mle/AMIO.htm> [hereinafter Alien Migration Interdiction], and History of the Coast Guard in Illegal Immigration, available at <http://www.uscg.mil/hq/g-o/g-opl/mle/amiohist.htm>).

The Coast Guard's stated operational goal is to eliminate most of the potential flow of undocumented migrants entering the United States by sea.<sup>47</sup> The Coast Guard's current migrant interdiction operations are principally directed by national security goals under Executive Order No. 12,807.<sup>48</sup> As described in an overview of its Alien Migrant Interdiction program, "[i]nterdicting migrants at sea means they can be quickly returned to their countries of origin without the costly processes required if they successfully enter the United States".<sup>49</sup>

The Coast Guard reports that starting with the "Mariel Boat Lift" from Cuba in 1980, which brought some 124,000 Cubans to the United States, there has been a steady-state flow of several migrant nationalities via the Caribbean, including Haitians, Cubans, and Dominicans.<sup>50</sup> An initial mass exodus of Haitians followed the collapse of the Duvalier regime in the early eighties.<sup>51</sup> In 1991, a second exodus of Haitian refugees followed the military coup that overthrew the democratically-elected government of Jean Paul Aristide.

According to the Coast Guard, during the 6-month period following the 1991 coup in Haiti, it interdicted over 34,000 Haitians.<sup>52</sup> A third exodus of Haitian migrants occurred in 1993-1994. The Coast Guard responded with "Operation Able Manner", involving a large number of Coast Guard units from both the Atlantic and Pacific Areas.<sup>53</sup> In addition, the Operation, which addressed another exodus of Cubans in 1994, resulted in the interdiction of 38,560 Cubans. The

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47 *Id.*

48 Exec Order No 12,807, above nn 18 and 36. See generally *Coast Guard Migrant Interdiction Operations Before The House Comm. on the Judiciary, Subcomm. On Immigration and Claims*, 106th Cong. (May 18, 1999) (statement of Captain Anthony S Tangeman, US Coast Guard), available at <http://www.house.gov/judiciary/tang0518.htm> (last visited Feb. 3, 2003) [hereinafter Statement of Captain Anthony S Tangeman].

49 See Alien Migration Interdiction, above n 46.

50 *Id.*

51 *Id.*

52 See INS Fact Sheet, above n 12 (reporting that of these 34,000, 10,000 established a "credible fear" and were "screened in.").

53 See Alien Migration Interdiction, above n 46.

Coast Guard's "surge response" to these two mass migrations in 1994 resulted in the rescue and/or interdiction of over 64,000 migrants.<sup>54</sup>

The other principal source of maritime migration to the United States in the past decade has been from the People's Republic of China, and includes migrants who have sought entry via numerous maritime regions, including the east and west coasts of the United States, Puerto Rico, the United States Virgin Islands, Hawaii, and Guam. In its 1999 testimony to the United States House of Representatives Committee on the Judiciary, the Coast Guard posited that China has been the greatest source of human trafficking by sea, with "an estimated 15,000-20,000 illegal Chinese aliens entering the Western Hemisphere by sea each year, most ultimately destined for the United States".<sup>55</sup>

The Coast Guard reported that, since 1991, it had interdicted over 5,000 Chinese migrants, the vast majority of whom have been repatriated to China.<sup>56</sup> Most Chinese migrants were found on coastal freighter-type vessels or retired fishing vessels interdicted by the Coast Guard far offshore.<sup>57</sup> The Coast Guard explained that in response to Coast Guard interdiction efforts during the mid-nineties, smugglers from China shifted their routes to Mexico and Central America, causing the number of interdictions off the immediate shore of the United States to taper off significantly.<sup>58</sup> Although there were still two to three large Chinese migrant interdictions off United States shores in the late nineties,

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54 Id. As a result, in fiscal year 1996 under Operation ABLE RESPONSE, the Coast Guard directed available resources at the Mona Passage (between the Dominican Republic and Puerto Rico), causing the interdiction of Dominican migrants, who ordinarily do not present refugee claims, to double to more than six thousand.

55 Statement of Captain Anthony S Tangeman, above n 48. The testimony indicates specifically that recent smuggling ventures carrying migrants from the People's Republic of China are typically planned and crewed by violent, highly organized criminal operators known as "snakeheads."

56 Id.

57 Id. (noting that "[a]s long as these cases do not become search and rescue, the Coast Guard complies with the national policy of keeping interdicted PRC migrants outside the reach of US shores. Once these migrants are interdicted, it can often take weeks to finalise disposition as the US government negotiates direct repatriation or the assistance of a third government").

58 Id.

Chinese smugglers appeared to have discovered that Guam, which is only 1700 miles from China and subject to United States immigration laws, offered a "gateway to the continental United States".<sup>59</sup> Therefore, in the late nineties, Chinese interdiction efforts increasingly focused on the seas surrounding Guam.

The Coast Guard report on its Alien Migration Interdiction program indicates that in 1999 and 2000, Coast Guard cutters on counter drug patrol in the Eastern Pacific encountered increasing numbers of migrants being smuggled from Ecuador to points in Central America and Mexico.<sup>60</sup> In its most recent report, the Coast Guard indicates that during fiscal year 2001, it continued to interdict migrants from the traditional source countries of Cuba, Haiti, and the Dominican Republic, and that Ecuadorian cases also continued as a consistent trend in migrant interdiction.<sup>61</sup> Although maritime migration from the People's Republic of China tapered off in 2001, and Cuban migration was steady but slightly less than previous years, Haitian migration to the Bahamas appeared to be increasing, and over 1000 Ecuadorian migrants were interdicted in six events in Pacific waters.<sup>62</sup>

For some reason, on October 29, 2002, the Coast Guard did not stop the vessel carrying 214 persons, including 211 Haitians, when the boat entered United States' waters. Although authorities apparently allowed the boat to enter Biscayne Bay and discharge its passengers, many of whom either jumped off of the ship into the bay or were found on the Rickenbacker Causeway, these individuals were

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59 Id.

60 See Alien Migration Interdiction, above n 46 (noting that while such maritime migration may not have a direct connection to the United States, the Coast Guard acts for humanitarian reasons, as the vessels used by smugglers operate under inhumane conditions and lack emergency safety equipment).

61 See Migration Interdiction Years in Review, at <http://www.uscg.mil/hq/g-o/g-opl/mle/amioyear.htm>

62 Id.

apprehended shortly thereafter and, with few exceptions, remain in detention.<sup>63</sup> In response, the Department of Justice immediately issued harsh new rules limiting access to ordinary removal procedures, including the opportunity to apply for asylum, and restricting the freedom of movement of those who arrive in the United States illegally by sea.<sup>64</sup>

#### *IV SALE v HAITIAN CENTERS COUNCIL, INC*

It has been vigorously argued that Article 33 of the Refugee Convention, section 243(h) of the INA, and the US-Haiti Agreement all prohibit the United States from returning Haitians interdicted on the high seas to Haiti without first making individualized determinations regarding their claims of persecution in that country. It was pursuant to such legal precepts that the United States followed an interdiction program of "preliminary screening before return" for ten years during the eighties. Yet, by 1991, Haitian flight had escalated to the extent that interdiction and "screening in" based on a "credible fear" evaluation no longer seemed either a desirable or a viable option to the United States government. Instead, interdiction and involuntary repatriation took its place.

Notwithstanding the contention of refugee advocates that Article 33's prohibition against "refoulement" applied categorically and without geographic limitation, the Kennebunkport Order stated expressly that, as far as the United States was concerned, Article 33 "do[es] not apply to persons located outside the territory of the United States".<sup>65</sup> The plan was simple: catch or "interdict" a

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63 In a statement issued November 8, 2002, the INS specified that although the policy of expedited removal of aliens arriving by sea would apply from November 13, 2002 forward, "our policy of deterring mass migration has led us to seek the continued detention of the migrants arriving on the October 29 vessel as well." INS Statement, *INS Announces Notice Concerning Expedited Removal* (Nov 8, 2002), available at [http://www.ins.usdoj.gov/graphics/publicaffairs/statements/expremnotice\\_ST.htm](http://www.ins.usdoj.gov/graphics/publicaffairs/statements/expremnotice_ST.htm) (last visited Feb 3, 2003).

64 See Immigration and Naturalization Act § 235(b)(1)(A)(iii). See also 67 Fed Reg 68,923-68,926, above n 27. These restrictions do not apply to an "arriving alien" coming to the United States by sea, who is already covered under the definition in 8 CFR 1.1(q), ie, "an alien interdicted in international or United States waters brought into the United States by any means, whether or not to a designated port of entry, and regardless of the means of transport."

65 Exec Order 12,807, above n 19.

putative refugee on the high seas before Article 33 takes hold, and the need for a refugee evaluation simply evaporates.<sup>66</sup>

In addressing the Haitian Centers Council challenge to the United States interdiction program in *Sale*, the Supreme Court endorsed this plan, ruling that:<sup>67</sup>

The President has directed the Coast Guard to intercept vessels legally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they may qualify as refugees...We hold that neither § 243(h) nor Article 33 of the United Nations Protocol Relating to the Status of Refugees applies to action taken by the Coast on the high seas.

The Supreme Court framed the "question presented...[as] whether such forced repatriation, 'authorized to be undertaken only beyond the territorial sea of the United States,' violates §243(h)(1) of the Immigration and Nationality Act of 1952".<sup>68</sup> The Court acknowledged that because aliens residing illegally in the United States or arriving at the border (including those temporarily paroled into the country) were subject to eventual removal, they could request asylum or withholding of deportation under the INA.<sup>69</sup> In contrast, it appeared that aliens interdicted by the United States Coast Guard on the high seas could not.

#### ***A Background to the Haitian Cases***

As the Supreme Court recognized, on September 30, 1991, a group of military leaders displaced the government of Jean Bertrand Aristide, the first democratically elected president in Haitian history.<sup>70</sup> The Supreme Court

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66 See Alien Migration Interdiction, above n 46; Statement of Captain Anthony S Tangeman, above n 48 (discussing the "costly processes required if migrants successfully enter the United States" and the fact that "illegal immigration can potentially costs US taxpayers billions of dollars each year in social services.").

67 *Sale v Haitian Ctrs Council Inc*, 509 US 155, 159-160 (1993) (footnotes omitted).

68 *Id.*

69 *Id.* 159 ("When an alien proves that he is a 'refugee' the Attorney General has discretion to grant him asylum pursuant to § 208 of the Act. If the proof shows that it is more likely than not that the alien's life or freedom would be threatened...the Attorney General must not send him to that country.") (citing *INS v Stevic*, 467 US 407, 423, n 18 (1984)). See also *INS v Cardoza-Fonseca*, 480 US 421, 424 (1987).

70 *Sale*, 509 US, 162.

reported that "since the military coup 'hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs. Thousands have been forced into hiding.'"<sup>71</sup>

Many years before *Sale*, the Court recounted that the Coast Guard's announcement on November 18, 1991 that it would proceed with interdiction, screening and repatriation despite the coup, was met with litigation alleging that the government had failed to provide adequate procedures to protect Haitians who qualified for asylum.<sup>72</sup> Subject to an injunction to provide an adequate screening process, and because "so many interdicted Haitians could not be safely processed on Coast Guard cutters, the Department of Defense established temporary facilities at the United States Naval Base in Guantanamo, Cuba, to accommodate them during the screening process".<sup>73</sup> However, after interdicting more than 34,000 Haitians and intercepting 127 vessels carrying 10,497 undocumented Haitians in May 1992 alone, the Navy determined that it could no longer safely accommodate any other Haitians at Guantanamo.<sup>74</sup>

On May 24, 1992, under the authority of Executive Order 12,807, the Coast Guard and the INS instituted a new interdiction program of "summary return without screening",<sup>75</sup> and forcibly returned bona fide refugees, without any process or questioning whatever, to Haiti.<sup>76</sup> As described by the Supreme Court:<sup>77</sup>

With both the facilities at Guantanamo and available Coast Guard cutters saturated, and with the number of Haitian emigrants in unseaworthy craft increasing (many

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71 *Id.*

72 *Id.* See also above n 17.

73 *Sale*, 509 US 162.

74 *Id.* (referring to the United States Naval base maintained at Guantanamo, Cuba).

75 Exec Order 12,807, above n 19.

76 By superseding Executive Order 12,324, which had afforded refugees a measure of due process, Executive Order No 12,807 allowed the Coast Guard and INS to dispense with theretofore acknowledged legal obligations not to return refugees to a country where their lives or freedom would be threatened.

77 *Sale*, 509 US 163.

had drowned as they attempted the trip to Florida), the Government could no longer both protect our borders *and* offer the Haitians even a modified screening process. It had to choose between allowing Haitians into the United States for the screening process or repatriating them without giving them any opportunity to establish their qualifications as refugees.

This policy was also adopted by President Clinton, who decided not to modify the order when he became President. Accordingly, the United States' interdiction and involuntary repatriation policy under the Kennebunkport Order, gave rise to litigation on behalf of Haitian refugees who were turned back without either screening or any other opportunity to apply for protection under INS provisions governing asylum and withholding of deportation.<sup>78</sup>

### ***B Supreme Court Decision in Sale v Haitian Centers Council, Inc***

In *Sale v Haitian Centers Council Inc*, the Supreme Court eschewed consideration of the wisdom of such policy choices and focused on "whether Executive Order No. 12,807...which reflects and implements those choices, is consistent with § 243(h) of the INA"<sup>79</sup> The Supreme Court stated at the outset that the dispute between the parties turned on the statutory language in section 243(h)(1) of the INA.<sup>80</sup>

The Court concluded that the language of section 243(h)(1) restricted the action of the Attorney General, but could not be read as restricting the President's

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78 See generally K Highet, G Kahale III, and AN Vollmer, *Aliens-Interdiction of Haitians on the High Seas*, 88 Am J Int'l L 114 (1994). See also *Haitian Refugee Ctr Inc v Baker*, 949 F.2d 1109 (1991) (*per curiam*), *cert. denied*, 502 US 1122 (1992) (reversing a district court's temporary grant of relief precluding repatriation), and *Haitian Ctrs. Council, Inc v McNary*, 969 F.2d 1350 (2d Cir 1992) (reversing a district court's denial of relief, finding that the 1980 amendment of section 243(h) of the INA to remove the reference to aliens within the United States mandated a different result).

79 *Sale*, 509 US 166. A full discussion of the prior decisions of the Eleventh and Second Circuit Courts of Appeal in *Haitian Refugee Center v Baker*, 953 F.2d 1498 (11th Cir. 1992), *cert denied*, 502 US 1122 (1992) and *Haitian Centers Council v McNary*, 969 F.2d 1350 (2d Cir), *cert granted*, 506 US 814 (1992) is beyond the scope of this paper.

80 *Sale*, 509 US 170 ("Both parties argue that the plain language of § 243(h)(1) is dispositive.").

authority to repatriate aliens interdicted in international waters.<sup>81</sup> In particular, the Court pointed to section 212(f) of the INA, which confers power on the President to suspend the entry of any aliens that "would be detrimental to the interests of the United States..."<sup>82</sup> Accordingly, the majority effectively ruled that the reference to *the Attorney General* in section 243(h)(1) did not circumscribe the authority of *the President* to order the interdiction and involuntary repatriation of Haitian refugees.<sup>83</sup>

Also at issue in *Sale* was the removal of the words "within the United States" from the pre-1980 version of section 243(h)(1) of the INA, and the addition of the word "return" to the post-1980, pre-1996 version of section 243(h)(1) of the INA. Arguably, this language was modified by Congress to conform section 243(h)(1) with Article 33(1) of the 1951 Refugee Convention and 1967 Protocol.

The respondents in *Sale* (the Haitian advocates) argued that section 243(h)(1) of the INA, read in harmony with Article 33, must be construed to apply extraterritorially, even to refugees picked up as migrants on the high seas. Rejecting this view, the Supreme Court ruled that the reference to the Attorney General in the statutory text applied principally to his or her responsibilities to conduct expulsion and deportation proceedings in United States territory, the forum in which a request for asylum or withholding of deportation could be advanced.<sup>84</sup> Moreover, the Court noted that even if the relevant portion of the statute were not limited to strictly domestic procedures, "the presumption that

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81 Id 172. Indeed, the Court found that other provisions of the INA conferred powers or responsibilities on the Secretary of State, the President, the Secretary of Labor, the Secretary of Agriculture and even the federal courts.

82 Id. The Supreme Court found, both Executive Order Nos. 12,324 and 12,807 "expressly relied on statutory provisions that confer authority on the President to suspend the entry of 'any class of aliens' or to 'impose on the entry of aliens any restrictions he may deem to be appropriate.'" Id.

83 Id (emphasis added).

84 Id 173 ("Since there is no provision in the statute for the conduct of such proceedings outside the United States...we cannot reasonably construe § 243(h) to limit the Attorney General's actions in geographic areas where she has not been authorised to conduct such proceedings.")

Acts of Congress do not ordinarily apply outside our borders would support an interpretation of § 243(h) as applying only within United States territory".<sup>85</sup>

The Court found that there was no provision in the INA authorising the Attorney General to conduct such proceedings in geographic areas outside the United States and thus, no specific reference to an extraterritorial application of section 243(h) of the INA.<sup>86</sup> Rather, the legislative history reflected that section 243(h)(1) of the INA was simply meant to provide access to refugee protection to both deportable and excludable aliens,<sup>87</sup> whereas previously, only aliens subject to deportation could claim non-refoulement protection.<sup>88</sup>

The Supreme Court rejected the respondents' theory that the 1980 excision of the words "within the United States" in the domestic statute meant that the United States had embraced an extraterritorial application of Article 33. The Court recognized that given the "extensive consideration to the Protocol" that preceded the 1980 Act and Congress' amendment to harmonise the two, it might be argued that Congress intended to impose any extraterritorial obligations imposed by Article 33 on the United States.<sup>89</sup> The Court, however, went on to reason that "the

85 Id (citing *EEOC v Arabian Am Oil Co*, 499 US 244, 248 (1991) (citing, in turn, *Foley Bros v Filardo*, 336 US 281, 285, (1949))).

86 Id at 176 ("It would be extraordinary for Congress to make such a important change in the law without any mention of that possible effect."). See also id at 177 ("When the United States acceded to the Protocol in 1968...[i]t offered *no* such protection to any alien who was beyond the territorial waters of the United States...we would not expect the Government to assume a burden as to those aliens without some acknowledgment of its dramatically broadened scope.").

87 Id 176, n 33 (citing HR Rep No 96-608, p 30 (1979)) (the changes "require...the Attorney General to withhold deportation of aliens who qualify as refugees and who are in exclusion as well as deportation proceedings."). See also S Rep. No 96-256, 17 (1979); US Code Cong. & Admin. News 141, 157.

88 Cf. *Sale*, 509 US at 175 (citing *Leng May Ma v Barber*, 357 US 185, 186 (1958) (holding that even though an alien was physically present within our borders, she was not "within the United States" as those words were used in § 243(h)). ("It is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission...and those who are within the United States after an entry, irrespective of its legality) Id (citing *Shaughnessy v United States ex rel Mezei*, 345 US 206, 212 (1953); *Kwong Hai Chew v Colding*, 344 US 590, 596 (1953)).

89 *Sale*, 509 US at 178.

text and negotiating history of Article 33 of the United Nations Convention are both completely silent with respect to the Article's possible application to actions taken by a country outside its own borders".<sup>90</sup>

The Court found that within the context of the Refugee Convention, "return" denoted "a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination... In the context of the Convention to 'return' means to 'repulse' rather than to 'reinstate.'"<sup>91</sup> Additionally, the court construed that the phrase "deport or return" in section 243(h)(1) of the INA, as amended, merely paralleled the phrase "expel or return ('refouler')" in Article 33.<sup>92</sup> Furthermore, it found that, as used in section 243(h)(1) of the INA, the prohibition against return...refers to the exclusion of aliens who are merely "on the threshold of initial entry".<sup>93</sup>

Accordingly, the Court concluded that "[w]hile we must, of course, be guided by the high purpose of both the treaty and the statute, we are not persuaded that either one places any limit on the President's authority to repatriate aliens interdicted beyond the territorial seas of the United States."<sup>94</sup> The majority ruled that "[w]hether the President's chosen method of preventing the "attempted mass migration" of thousands of Haitians...poses a greater risk of harm to Haitians...is irrelevant to the scope of his authority to take action that neither the Convention nor the statute clearly prohibits".<sup>95</sup>

Justice Blackmun, the sole dissenter, focused on Congress' use of the specific language in the amended statute, stating that "[T]hat Congress would have meant what it said is not remarkable."<sup>96</sup> He emphasized that the majority was able to

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90 Id.

91 Id 182 (referring to a state's authority under the Refugee Convention to send a refugee back to his homeland or to another country).

92 Id 180.

93 Id (citing *Leng May Ma v Barber*, 357 US 187 (quoting *Shaughnessy v United States ex rel. Mezei*, 345 US 212)).

94 Id 187 (finding it perfectly clear that "section 212(f)...grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores").

95 Id 187-88.

96 Id 189.

conclude that the forced repatriation of Haitian refugees is perfectly legal only because it found that the word "return" does not mean return, that the opposite of the phrase "within the United States" is not outside the United States, and because the official charged with controlling immigration has no role in enforcing an order to control immigration.<sup>97</sup> Justice Blackmun thus differed with the majority's finding that it was "extraordinary" "...that Congress would have intended the ban on returning 'any alien' to apply to aliens at sea" (emphasis added),<sup>98</sup> concluding that "the duty of nonreturn expressed in both the Protocol and the statute is clear." He emphasized forcefully that "[w]hat is extraordinary in this case is that the Executive, in disregard of the law, would take to the seas to intercept fleeing refugees and force them back to their persecutors - and that the Court would strain to sanction that conduct".<sup>99</sup>

***V INTERDICTION COMES TO SHORE: EXPEDITED  
REMOVAL AND DETENTION AS A DETERRENT***

The application of expedited removal procedures<sup>100</sup> to those arriving illegally by sea directly extends the prohibitive purpose of United States' interdiction policies and practices to interceptions made on dry land. As the supplementary information accompanying the "Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A) (iii) of the Immigration and Nationality Act" states, it "will ensure that all aliens...[with the exception of Cuban migrants] who arrive illegally by sea, *whether interdicted or not*, will be subject to expedited removal".<sup>101</sup>

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97 Id 188-89.

98 Id 189.

99 Id.

100 See above n 41. "Expedited removal" under section 235 of the INA was first imposed in the "IIRIRA," effective April 1, 1997. The statute now allows INS inspectors to issue binding removal orders applicable to aliens who arrive at a port of entry without proper documents or who attempt to enter the United States through fraud or misrepresentation. Prior to April 1, 1997, only an immigration judge was allowed to issue an order of deportation. Individuals subject to expedited removal are not entitled to a hearing or review of the justification for the order, and are cannot establish eligibility for re-entry into the United States for a period of five years.

101 November 13, 2002 Notice, above n 27, 68,925 (emphasis added).

In effect, the expedited removal provisions of the statute provide that an immigration officer shall order an alien arriving in the United States without proper entry documents, who is determined to be inadmissible under section 212(a)(6)(C) or section 212(a)(7) of the INA, removed without further hearing or review.<sup>102</sup> If an alien subject to expedited removal indicates either "an intention to apply for asylum under section 208 or a fear of persecution," then the officer shall refer the alien for a credible fear interview by an asylum officer.<sup>103</sup>

The statute applies these provisions to any alien who has not been admitted or paroled, and who has not affirmatively shown to the satisfaction of an immigration officer that he or she has been physically present in the United States continuously for the two-year period prior to the determination of inadmissibility under the statute.<sup>104</sup> This authority has been delegated by the Attorney General to the INS Commissioner by regulation.<sup>105</sup>

The November 13, 2002 Notice represents the first time the expedited removal procedures have been applied to a new class of arriving aliens under the rule.<sup>106</sup> The supplementary information provides:<sup>107</sup>

This Notice authorizes the Immigration and Naturalization Service (the Service) to place in expedited removal proceedings certain aliens who arrive in the United States by sea, either by boat, or other means, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period prior to the determination of inadmissibility under this Notice.

Thus, pursuant to the November 13, 2002 Notice, a refugee coming to the United States by sea is subject to expedited removal even if he or she has been physically present in the United States for months, a year, or even as long as 23 months and 30 days after arrival. In essence, if he or she asserts a fear of persecution, he or she is "screened" and must be determined to have a "credible

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102 Immigration and Naturalization Act § 235(b)(1)(A)(i).

103 Id § 235(b)(1)(A)(ii).

104 Id § 235(b)(1)(A)(iii).

105 8 CFR § 235.3(b).

106 November 13, 2002 Notice, above n 27, 68,924.

107 Id 68,924-25.

fear" before being afforded an opportunity to apply for asylum or withholding of removal.<sup>108</sup> In addition, the Notice provides that "[a]liens falling within this newly designated class who are placed in expedited removal proceedings will be detained, subject to humanitarian parole exceptions, during the course of immigration proceedings, including, but not limited to, any hearings before an immigration judge".<sup>109</sup>

The supplementary information accompanying the November 13, 2002 Notice explains that the Service believes that by detaining this group of aliens, will deter surges in illegal migration by sea, including mass migration, which it describes as "threaten[ing] national security by diverting resources from counter-terrorism and homeland security responsibilities".<sup>110</sup> Furthermore, "Placing these individuals in expedited removal proceedings and maintaining detention for the duration of all immigration proceedings, with limited exceptions, will ensure prompt immigration determinations and ensure removal from the country of those not granted relief."<sup>111</sup>

In limiting access to asylum and withholding of removal through the use of expanded expedited removal procedures, and imposing the burden of arbitrary and discriminatory detention on asylum seekers, the policies and practices prescribed in the November 13, 2002 Notice appear to be inconsistent with the substance of Articles 31 and 33 of the Refugee Convention.<sup>112</sup>

Critics of the United States' expedited removal policy have noted that "[t]he right to seek and enjoy asylum is a fundamental human right guaranteed by Article 14 of the Universal Declaration of Human Rights...[y]et, the Service

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108 Immigration and Naturalization Act § 235(b)(1)(A)(ii).

109 November 13, 2002 Notice, above n 27, 68,924.

110 *Id.*

111 *Id.* See also Exec Order No 13,276, above n 28.

112 The new policy has met with considerable criticism from human rights organizations such as the United Nations High Commissioner on Refugees, Amnesty International, the Florida Immigrant Advocacy Center, the National Immigration Forum, and others who submitted comments to the INS in response to November 13, 2002 Notice. As the Notice indicates, comments, including those submitted by these organizations, are available for public inspection by contacting the INS. November 13, 2002 Notice, above n 27, 68,924.

seeks to employ detention in order to specifically deter victims of persecution from seeking asylum, intending to frustrate individuals from escaping harm and seeking safety elsewhere."<sup>113</sup> According to Amnesty International:<sup>114</sup>

[m]andatory detention of an entire class of asylum-seekers based on their mode of arrival and lack of proper travel documents appears on its face to violate both Article 31 of the Refugee Convention, which prohibits States from penalizing or unnecessarily restricting the movement of refugees on account of their illegal entry or presence and Article 9 of the International Covenant on Civil and Political Rights, which prohibits arbitrary detention.

Moreover, the United Nations High Commissioner on Refugees ("UNHCR") raised concerns over the coupling of expedited removal and mandatory detention, commenting that "[g]iven that the Notice mandates detention throughout immigration court proceedings, which severely limit an individual's ability to secure legal representation... the Notice would impair the ability of asylum seekers who arrive by sea to fully access the asylum process."<sup>115</sup> Likewise, a study conducted by Georgetown University's Institute for the Study of International Migration indicated that asylum seekers in detention are more than twice as likely as those who are not detained to be without legal representation and that persons with attorneys are four to six times more likely to be granted asylum.<sup>116</sup>

These concerns are not unfounded. On its face, the expedited removal process restricts access to asylum and withholding of removal at the outset by requiring a refugee to qualify under the "credible fear before being afforded the opportunity to prove eligibility under the well-founded fear of prosecution" standard contained

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113 Comments of the Florida Immigrant Advocacy Center, on file at the INS. See also comments of Amnesty International, USA, on file at the INS (stating that "[d]etention for purposes of deterrence seriously compromises the exercise of the right to seek asylum from persecution outside one's country, a right enshrined in Article 14 of the Universal Declaration of Human Rights."). See above n 112.

114 Comments of Amnesty International, USA, on file at INS. See above n 112.

115 Comments of the UNHCR, on file at INS. See above n 112.

116 Comments of Amnesty International, USA, above n 112, (citing Dr Andrew I Schoenholtz, Director of Law and Policy Studies, Institute for the Study of International Migration, Georgetown University, *Asylum Representation*, Summary Statistics, (May 2000)).

in the Refugee Convention and incorporated in United States statutory refugee definition.<sup>117</sup> Indeed, Amnesty International noted in its comments that according to INS and Government Accounting Office sources, in FY 1999, "these low-level INS inspectors [charged with screening arriving aliens subject to expedited removal] only referred 0.6 percent of the 89,035 persons for "credible fear" interviews.<sup>118</sup>

Unlike the refugees covered by the United States' present interdiction policy, and notwithstanding the Supreme Court's decision in *INS v. Sale*, the refugees arriving in the United States by sea who will be subjected the expedited removal under the Notice are not outside the territorial waters of the United States. In fact, they will be physically present in the United States. Nevertheless, the impediments associated with the expedited removal procedure may frustrate a refugee's ability to apply for asylum and put a legitimate refugee at risk of being erroneously returned to circumstances in which he or she will face persecution in violation of Article 33.

In addition, as noted by many of the commentators critical of the November 13, 2002 Notice, the mandatory detention prescribed by the November 13, 2002 Notice for purposes of deterring others inappropriately penalizes and restricts the movement of refugees arriving by sea. Such detention is not only contrary to Article 31, but likely to compromise the ability of those who do succeed in being screened in for an interview and who meet the credible fear standard to successfully present their asylum claims. Unlike the refugees interdicted at sea and repatriated, these refugees will have at least the possibility of obtaining legal representation. However, as a practical matter, lack of funds, unavailability of pro bono legal representation, geographic isolation of the detention facility, language barriers, and other factors make it is extremely difficult to retain the services of an attorney while detained. A refugee who is without counsel and subject to the institutional restrictions imposed by the detention facility, is often unable to adequately fill out the application forms, obtain the necessary supporting

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117 Immigration and Naturalization Act § 101(a)(43).

118 Comments of Amnesty International, USA, on file at INS ("AIUSA has had experience in the past year of trying to bring to the INS's attention arriving aliens who appeared likely to be seeking asylum, but who were nevertheless summarily returned to their countries of origin without having had the opportunity for a credible fear interview."). See above n 112.

documentation to corroborate her claims, locate witnesses and otherwise complete the preparation that is essential to a full and fair asylum hearing.

## **VI CONCLUSION**

Although it remains to be seen whether the United States' policies over the last two decades have actually deterred migration surges, the United States has successfully imposed and expanded methods of limiting the refugee flow and repelling refugees. Interdiction and forced repatriation remain in force, and the majority's holding in *INS v Sale* authorises high seas interdictions to this day.<sup>119</sup> According to the Supreme Court's decision in *Sale*, such interdiction is merely rescue or repatriation, a wholly permissible policy and practice well within the authority of the President.<sup>120</sup> Notwithstanding the terms of Article 33 of the Refugee Convention, it is not "return," and is not prohibited by section 243(h)(1) – or by the current provision mandating withholding of removal, section 241(b)(3) of the INA.

Moreover, the United States policy of interdiction on the high seas and forced repatriation of putative refugees has found an adjunct: expedited removal and mandatory detention for any migrant coming to the United States by sea, including a refugee who manages to reach United States shores and is discovered within two years of arrival. Although the November 13, 2002 Notice does not absolutely preclude a refugee who comes to the United States by sea from applying for asylum and withholding of removal, and does not authorize forced repatriation, it undeniably encumbers a refugee's access to the asylum process and restricts a refugee's liberty to the extent that it calls the United States' compliance with Articles 31 and 33 into question.

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119 See eg, *Cuban-American Bar Ass'n Inc v Christopher*, 43 F.3d 1412 (11th Cir 1995). Cf *Ahmed v Goldberg*, 2001 WL 1843382 (DN Mar I) (Not Reported in F Supp 2d) (finding asylum and withholding of deportation procedures to available persons outside of the geographic United States, but emphasising that under section 207 of the INA, the statute does provide a mechanism for aliens not within the United States or at its borders to apply for refugee status through United States consular offices).

120 *Sale*, 509 US 155.

