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# The “Haiti Paradigm” in United States Human Rights Policy

Harold Hongju Koh<sup>†</sup>

Six years ago, I explained in these pages *Why the President (Almost) Always Wins in Foreign Affairs*.<sup>1</sup> That article identified the recurrent patterns of executive activism, congressional passivity, and judicial tolerance that push Presidents successfully to press the limits of law in foreign affairs. Four years later, in *Transnational Public Law Litigation*,<sup>2</sup> I applauded the turn by private litigants to United States courts to promote the observance of international human rights norms by foreign and United States government officials. In the Haitian refugee litigation, the theses of these two articles collided, yet both, ironically, came true.

In *Sale v. Haitian Centers Council*<sup>3</sup> (HCC), transnational public law litigants sued United States officials for violating internationally recognized human rights standards, won the release of more than three hundred refugees held unlawfully at the U.S. naval base in Guantánamo, Cuba, and established important public law precedents. Yet in the end, the predicted result occurred: the President took drastic action in response to a perceived foreign policy crisis, Congress stood silent, and the Supreme Court condoned the result by making bad law regarding treaties, refugees, and foreign affairs.

While litigating *Haitian Centers Council*, I came to realize that by focusing on these two interlocking paradigms, I had overlooked a third: what

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† Gerard C. and Bernice Latrobe Smith Professor of International Law and Director, Orville H. Schell, Jr., Center for International Human Rights, Yale University; Counsel of Record for plaintiffs in *Sale v. Haitian Centers Council*. Portions of this Essay were presented, in preliminary form, at lectures and workshops at the law schools of the University of Maryland, McGill University, the University of Utah, Southern Methodist University, Washington University, the Carnegie Endowment Face-to-Face Program, the 1994 Annual Meeting of the American Society of International Law, and in testimony before the Subcommittee on Western Hemisphere and Peace Corps Affairs of the Senate Foreign Relations Committee. I am grateful to Bruce Ackerman, Akhil Amar, Gene Coakley, Renée DeMatteo, Elizabeth Detweiler, Mary-Christy Fisher, Lucas Guttentag, Laura Ho, Gerry Neuman, Michael Ratner, Robert Rubin, Ron Slye, Joe Tringali, Cecillia Wang, and Alex Wendt for their help with this Essay, and to all those who worked on the *Haitian Centers Council* case for their friendship and inspiration.

1. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988) [hereinafter *Why the President Wins*]. I later expanded upon that article in HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

2. 100 YALE L.J. 2347 (1991) [hereinafter *TPLL*].

3. 113 S. Ct. 2549 (1993); *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993).

I now call the “Haiti Paradigm” in United States human rights policy. Understanding why human rights activists sue and why Presidents successfully defend does not explain why administrations make bad human rights policy. Nearly three years after the military coup that overthrew the first democratically elected government of Haiti, our policy toward that country stands perilously close to upside-down: inordinately soft on the illegitimate regime, while unfairly harsh on fleeing refugees. How could this happen? What led an administration ostensibly committed to a foreign policy of democracy and human rights to respond to an unfolding crisis with policies that have accomplished neither result?

This Essay looks back on the Haitian crisis through the lens of the *Haitian Centers Council* litigation. It explains why the litigants sued and what they accomplished. It analyzes why Congress desisted, the Supreme Court erred, and the President prevailed. Finally, it assesses why a policy foundered.

In my view, a failure of recognition and resolve led two successive administrations to address the problems of democracy and human rights in Haiti with good intentions and bad results. I conclude by suggesting that the United States government failed to recognize and avoid the policy pitfalls the Haiti Paradigm revealed. As we move toward the next century, we should remember the Haiti fiasco of the early 1990’s not as an isolated moment of broken campaign promises or *realpolitik*. We should regard it instead as a cautionary tale, a source of basic lessons that should guide United States human rights policy to better results in other troubled spots in the New World Disorder.

### I. THE HAITI STORY

The Haitian refugee story has been told in many places,<sup>4</sup> and can be quickly recounted here. In September 1981, the Governments of the United States and Haiti entered a unique bilateral agreement “for the establishment of a cooperative program of interdiction and *selective return* to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti.”<sup>5</sup> Pursuant to that agreement and the executive order implementing it,<sup>6</sup> the Coast Guard began “interdicting” fleeing Haitians on the high seas and

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4. For just a sampling, see Victoria Clawson, Elizabeth Detweiler, & Laura Ho, *Litigating as Law Students: An Inside Look at Haitian Centers Council*, 103 YALE L.J. 2337 (1994) [hereinafter *Litigating as Law Students*]; The Lowenstein International Human Rights Clinic, *Aliens and the Duty of Nonrefoulement: Haitian Centers Council v. McNary*, 6 HARV. HUM. RTS. J. 1 (1993); Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT’L L.J. 1 (1994) [hereinafter *Reflections*]; Harold Hongju Koh, *The Human Face of the Haitian Interdiction Program*, 33 VA. J. INT’L L. 483 (1993).

5. Agreement Effected by Exchange of Notes, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559 [hereinafter 1981 U.S.-Haiti Agreement] (emphasis added).

6. Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981).

summarily interviewing, or “screening” them, bringing to the United States only those few “screened-in” Haitians found to have “credible fears” of political persecution.

To the extent that the interdiction program tolerated the return of de facto political refugees, it appeared to violate the “*nonrefoulement*” requirement of Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees.<sup>7</sup> That provision mandated 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 . . . political opinion.”<sup>8</sup> Various contemporaneous government documents and instruments implementing the interdiction program confirmed that this obligation applied on the high seas.<sup>9</sup> Nevertheless, an early judicial challenge to the interdiction program foundered for lack of standing, leaving the program in place for more than a decade.<sup>10</sup>

In 1990, in a United Nations-monitored election, more than 67% of the voters elected Jean-Bertrand Aristide President of the first freely elected democratic government of Haiti. After a brief and troubled presidency, Aristide was overthrown by military coup in September 1991. Initially, top officials of the Bush administration declared, “This is a time for collective action.”<sup>11</sup> Pursuant to the Santiago Commitment to Democracy,<sup>12</sup> the Organization of

7. 19 U.S.T. 6259, 189 U.N.T.S. 150, *done* July 28, 1951. The United States became a party to the Refugee Convention when it acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 189 U.N.T.S. 150. For a critique of the Haitian interdiction program, see Stephen H. Legomsky, *The Haitian Interdiction Programme, Human Rights and the Role of Judicial Protection*, INT’L J. REFUGEE L., Special Issue, Sept. 1990, at 181.

8. 19 U.S.T. at 6276 (emphasis added).

9. President Reagan effectively acknowledged that the *nonrefoulement* obligations of Article 33 applied to interdicted Haitians when he issued Exec. Order No. 12,324, 46 Fed. Reg. at 48,110. In order to ensure “the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland,” *id.*, that order guaranteed “that no person who is a refugee will be returned without his consent,” *id.* at 48,109. INS Guidelines issued to implement the 1981 Executive Order further mandated that INS personnel “be constantly watchful for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol.” IMMIGRATION & NATURALIZATION SERVICE, INS ROLE IN AND GUIDELINES FOR INTERDICTION AT SEA (Oct. 6, 1981) (emphasis added), *quoted in* Haitian Refugee Ctr. v. Baker, 953 F.2d 1498, 1501-02 (11th Cir. 1992). Finally, two opinions from the Justice Department’s Office of Legal Counsel reaffirmed the point. *See* Proposed Interdiction of Haitian Flag Vessels, 5 Op. Off. Legal Counsel 242, 248 (1981) (reasoning that interdicted Haitians “who claim that they will be persecuted . . . must be given an opportunity to substantiate their claims”); Memorandum from Larry L. Simms, Deputy Assistant Att’y Gen., Off. Legal Counsel, to the Associate Att’y Gen. (Aug. 5, 1981) (“Those who claim to be refugees must be given a chance to substantiate their claims [under Article 33].”), *quoted in* Joint Appendix at 222, *Haitian Ctrs. Council*, 113 S. Ct. 2549, No. 92-344 (1993).

10. Haitian Refugee Ctr. v. Gracey, 809 F.2d 794 (D.C. Cir. 1987).

11. Statement of Secretary of State James Baker, OAS Meeting of Foreign Ministers, OEA/Ser.F/V.1, MRE/ACTA 1/91, Oct. 2, 1991, at 17; *see also id.* (“[I]t is imperative that we agree—for the sake of Haitian democracy and the cause of democracy throughout the hemisphere—to act collectively to defend the legitimate government of President Aristide.”).

12. *Resolution on Representative Democracy*, OAS AG/RES. 1080 (XXI-0/91) (calling for an automatic meeting of the OAS Permanent Council “in the event of any occurrences giving rise to the sudden or irregular interruption of . . . the legitimate exercise of power by the democratically elected government in any of the Organization’s member states”).

American States (OAS) adopted sanctions programs and issued resolutions urging the restoration of constitutional government in Haiti.<sup>13</sup>

But as boatloads of refugees began fleeing Haiti in unprecedented numbers, the Bush administration's mood changed. Instead of bringing screened-in Haitians to the United States, the Coast Guard began taking them to the U.S. Naval Base in Guantánamo Bay, Cuba, and detaining them in makeshift military camps behind razor-barbed wire without due process rights of any kind. In November 1991, the Haitian Refugee Center (HRC) sued Secretary of State Baker and other government officials in the Southern District of Florida, challenging, *inter alia*, the practice of returning screened-out Haitians based upon insufficient process. Despite HRC's initial district court successes, the Eleventh Circuit twice ruled against it.<sup>14</sup> HRC's suit ended in February 1992, when the Supreme Court denied HRC's petition for certiorari, with only Justice Blackmun dissenting.<sup>15</sup>

At that point, some 3000 Haitians were being held incommunicado at Guantánamo. Virtually all had been found to have credible fears of political persecution. In March 1992, the Immigration and Naturalization Service (INS) determined to reinterview the Haitians held there—without lawyers present—and to send those who failed the test of political asylum back to Haiti to face possible persecution and death.<sup>16</sup>

At that point, Michael Ratner (of the Center for Constitutional Rights) and I were co-teaching the Allard K. Lowenstein International Human Rights Clinic, a clinical course at the Yale Law School that we had taught for several years.<sup>17</sup> Initially we had brought “international tort suits”—including one against the former dictator of Haiti—seeking civil damages against an array of

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13. OAS MRE/RES. 1/91, Doc. OEA/Ser.F/V.1 (Oct. 3, 1991) (demanding “full restoration of the rule of law and of the constitutional regime” and the immediate reinstatement of Aristide, recommending action to bring about the diplomatic isolation of the junta, and urging all OAS states to suspend nonhumanitarian economic financial and commercial ties with Haiti); OAS MRE/RES. 2/91 (Oct. 8, 1991) (condemning the decision to replace the constitutional president of Haiti); OAS MRE/RES. 3/92 (May 17, 1992) (asking OAS members to deny port access to vessels violating the embargo and to freeze the assets of coup supporters); OAS CF/RES. 594 (923/92) (Nov. 10, 1992) (urging OAS member states to act through the United Nations to strengthen representative democracy and constitutional order in Haiti).

14. *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109 (11th Cir. 1991); *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992).

15. *Haitian Refugee Ctr. v. Baker*, 112 S. Ct. 1245 (1992).

16. See *Litigating as Law Students*, *supra* note 4, at 2353 (describing Rees Memorandum).

17. The Clinic originated, by student request, as an arm of the Allard K. Lowenstein International Human Rights Project, a student-run organization founded at Yale Law School in 1981 to educate and inspire law students, scholars, practicing attorneys, and policymakers in the defense of international human rights. Both the Clinic and Project took their name from Allard Lowenstein, the political activist and Yale Law graduate who had served as U.S. Ambassador to the U.N. Human Rights Commission in the Carter administration. See generally WILLIAM H. CHAFE, NEVER STOP RUNNING: ALLARD LOWENSTEIN AND THE STRUGGLE TO SAVE AMERICAN LIBERALISM (1993). For an early account of the Clinic's work, see Thomas Scheffey, *Yale Project: Making Sure Torture Doesn't Pay*, CONN. L. TRIB., Mar. 11, 1991, at 1.

foreign government officials for human rights abuses they had committed against their own citizens.<sup>18</sup>

Our experience litigating these cases led to *Transnational Public Law Litigation*, in which I characterized these and other lawsuits as part of an emerging transnational analogue to the now-familiar domestic phenomenon of “public law litigation.”<sup>19</sup> Private litigants, I argued, are increasingly turning to United States courts not simply to seek judicial reform of domestic institutions, such as prisons, hospitals, and school systems, but also to enforce internationally recognized human rights standards against foreign and U.S. government officials. I applauded such litigation for both furthering the protection of international human rights and returning U.S. courts to their proper, but neglected role, as interpreters of international law. In a “new international legal process,” I argued, domestic courts would decide such cases more frequently, reinforcing international norms, exerting political pressure, provoking improved governmental practices, and positively affecting human lives.<sup>20</sup>

Given the Haitians’ desperate plight, our Clinic felt obliged to test these academic assertions in practice. Supported by able co-counsel,<sup>21</sup> we filed suit against an array of United States government officials in Brooklyn federal court, asserting that lawyers and clients have a right to communicate with one another before the clients are returned to political persecution. Ultimately captioned *Sale v. Haitian Centers Council*,<sup>22</sup> the suit invoked statutes, treaties,

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18. In our first case, we sued the former Haitian dictator, Prosper Avril, under the Alien Tort Statute, 28 U.S.C. § 1350 (1988), for human rights violations committed against Haitian opposition leaders. *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993). In subsequent semesters, we took similar positions against the former Defense Minister of Guatemala, *Xuncax v. Gramajo*, No. 91-11564WD (D. Mass. filed June 6, 1991); *Ortiz v. Gramajo*, No. 91-11612WD (D. Mass. filed June 13, 1991), and an Indonesian general responsible for the massacre at East Timor, *Todd v. Panjaitan*, No. 92-12255WD (D. Mass. filed Sept. 17, 1992), and submitted *amicus curiae* briefs in a Ninth Circuit case involving Ferdinand Marcos, *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989), 978 F.2d 493 (9th Cir. 1992); and in several human rights cases before the Supreme Court. See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989); *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993); *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992); *Jaffe v. Snow*, 610 So. 2d 482 (Fla. Dist. Ct. App. 1992), *review denied*, 621 So. 2d 432 (Fla. 1993), *petition for cert. filed*, 62 U.S.L.W. 3149 (U.S. Aug. 9, 1993) (No. 93-241).

19. *TPLL*, *supra* note 2. That article grew, in turn, out of Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT’L L.J. 169 (1987).

20. *TPLL*, *supra* note 2, at 2398-2402. A better descriptive term, I now believe, is “Transnational Legal Process.” See Harold Hongju Koh, *Transnational Legal Process*, Gerard C. and Bernice Latrobe Smith Professorship Inaugural Lecture, Yale Law School (Apr. 19, 1994) (unpublished manuscript, on file with author).

21. We recruited as co-counsel Joseph Tringali, Jennifer Klein, and Susan Sawyer from the New York firm of Simpson Thacher & Bartlett; Lucas Guttentag and Judy Rabinovitz of the ACLU Immigrants’ Rights project in New York; Robert Rubin and Ignatius Bau of the Refugee Rights Project at the San Francisco Lawyers’ Committee for Civil Rights; and Suzanne Shende of the Center for Constitutional Rights. For an account of the remarkable role of Yale Law students in the case, see *Litigating as Law Students*, *supra* note 4.

22. 113 S. Ct. 2549 (1993). When the case began, the lead defendant was the Bush administration’s INS Commissioner, Gene McNary; by the time the case reached the Supreme Court, the Clinton administration’s Acting INS Commissioner, Chris Sale, had been substituted.

and constitutional norms, and was brought on behalf of the class of screened-in Haitian refugees and several service organizations who sought to give the refugees legal advice.<sup>23</sup>

In the first phase of the case (*HCC-I*), we won a temporary restraining order (TRO) and preliminary injunction requiring that the Haitians be afforded counsel before repatriation to Haiti, rulings that the Second Circuit ultimately upheld on appeal.<sup>24</sup> As that appeal was pending, on Memorial Day, 1992, President Bush abruptly changed course and issued an order from his Kennebunkport vacation home authorizing the Coast Guard to return all fleeing Haitians to Haiti without any process at all.<sup>25</sup> In our view, the “Kennebunkport Order” constituted a textbook case of *refoulement*, for it effectively erected a “floating Berlin Wall” around Haiti that prevented Haitians from fleeing anywhere, not just to the United States. Relying on several counts in our existing complaint, we returned to court for a new TRO, challenging the Kennebunkport Order as violating Article 33 of the Refugee Convention; Article 33’s domestic statutory analogue, § 243(h) of the Immigration and Nationality Act (INA);<sup>26</sup> and the 1981 executive agreement between the United States and Haiti. These laws, we argued, imposed on our government a unified mandate of *nonrefoulement*: executive officials shall not return political refugees with colorable asylum claims forcibly and summarily to a country where they will face political persecution.

Reasoning that Article 33 is not self-executing, District Judge Sterling Johnson, Jr. denied our TRO.<sup>27</sup> But on expedited appeal, the Second Circuit declared the *refoulement* policy illegal, finding that the new Bush policy violated the plain language of § 243(h)(1) of the Immigration and Nationality Act (*HCC-II*).<sup>28</sup> Two days later, presidential candidate Bill Clinton praised the Second Circuit for making the “right decision in overturning the Bush administration’s cruel policy of returning Haitian refugees to a brutal

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23. The organizational plaintiffs were Haitian Centers Council, Inc., a Brooklyn Haitian service organization; New York’s National Coalition for Haitian Refugees; and the Immigration Clinic of the Jerome N. Frank Legal Services Organization of the Yale Law School, all public service organizations that asserted First Amendment rights of access to the Guantánamo Haitians for the purpose of giving them legal counsel. *Cf. In re Primus*, 436 U.S. 412 (1978) (holding that First Amendment protects advocacy organization’s right of access to particular persons to disseminate legal advice).

24. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993).

25. Exec. Order No. 12,807, 3 C.F.R. 303 (1992).

26. 8 U.S.C. § 1253(h)(1) (1988) (“The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of [his] . . . political opinion.”).

27. *Haitian Ctrs. Council, Inc. v. McNary*, No. 92-CV1258, 1992 U.S. Dist. LEXIS 8452, at \*1 (E.D.N.Y. June 5, 1992). Judge Johnson went on to say, however, “It is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it. This court is astonished that the United States would return Haitian refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so.” *Id.* at \*5.

28. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992), *rev’d sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).

dictatorship without an asylum hearing.”<sup>29</sup> But shortly before taking office, President-elect Clinton abandoned that position, endorsed both Bush policies, and prepared to defend both the summary return policy and the legality of the Guantánamo internment before the courts.

Meanwhile, about 300 Haitian men, women, and children remained interned on Guantánamo. All had credible claims of political persecution, and many had already established full-fledged claims of political asylum. Nevertheless, they were barred from entering the United States, because most had the HIV virus.<sup>30</sup> When the Guantánamo phase of the case returned to Brooklyn federal court for consideration of permanent relief, we amended our complaint to challenge directly the legality of our clients’ confinement in America’s first HIV concentration camp. Following a two-week trial, Judge Johnson ordered the Guantánamo Haitians immediately released (*HCC-III*).<sup>31</sup> The Clinton administration chose not to seek a stay of that order, and after noticing an appeal, settled the case.<sup>32</sup> On June 21, 1993, the government defendants released the last of the Guantánamo Haitians into the United States.

That same day, in an opinion by Justice Stevens, the Supreme Court sustained the legality of the *refoulement* policy, with only Justice Blackmun dissenting.<sup>33</sup> The Court held that neither the *nonrefoulement* obligations of § 243(h) of the INA nor Article 33 of the Refugee Convention applied to Haitians apprehended on the high seas, thereby articulating a domestic rule of “territorial *nonrefoulement*.”

Less than two weeks later, President Aristide and the military coup leader reached an agreement at Governors Island, New York, which provided for President Aristide’s return to Haiti by October 30, 1993.<sup>34</sup> The Clinton administration helped broker the Governors Island Accord, which provided that Aristide would appoint a Prime Minister; that trade sanctions would be lifted after the Prime Minister’s appointment, but *before* President Aristide returned to Haiti; that multinational forces would train the Haitian army and create a

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29. *Clinton Statement on Appeals Court Ruling on Haitian Repatriation*, U.S. Newswire, July 29, 1992, available in LEXIS, News Library, Currnt File. This statement echoed remarks Governor Clinton had made only three days after the Kennebunkport Order had been issued. See *Statement by Gov. Clinton on Haitian Refugees*, U.S. Newswire, May 27, 1992, available in LEXIS, News Library, Currnt File (“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 policy must not stand.”). For an extensive listing of Clinton’s statements, see *Litigating as Law Students*, *supra* note 4, at nn.61-63.

30. See 8 U.S.C. § 1182(a)(1)(A)(i) (1993) (excluding from admission into the United States persons “determined . . . to have a communicable disease of public health significance”).

31. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993).

32. The plaintiffs ultimately agreed that Judge Johnson’s orders (but not his opinions) could be vacated on the ground that defendants had fully complied with those orders, in exchange for defendants’ agreement to dismiss their appeal and to pay an award of fees and costs totalling \$634,100. See *Stipulated Order Approving Class Action Settlement Agreement*, *Haitian Ctrs. Council, Inc. v. Meissner*, No. 92-1258 (E.D.N.Y. Feb. 22, 1994).

33. See *Haitian Ctrs. Council*, 113 S. Ct. 2549.

34. *Governors Island Accord, Memorandum of Agreement*, July 3, 1993 (on file with author).



new police force; that the coup leaders would take early retirement; and that the military leaders would be granted amnesty for crimes committed while in office. Two weeks later, the political forces and parliamentary blocs of Haiti agreed to a separate "New York Pact," which called upon the armed forces to respect the Governors Island agreement and to end ongoing human rights violations.<sup>35</sup>

After brief euphoria, it became apparent that the coup leaders would not honor the terms of the Governors Island Accord. Numerous key Aristide supporters and cabinet ministers were murdered on the streets of Port-au-Prince.<sup>36</sup> In late October, the U.S.S. *Harlan County*, a warship carrying lightly armed military personnel, was sent to Haiti with the stated purpose of retraining the Haitian military. When Haitian gangs staged an anti-American demonstration at the dock, the ship retreated. The Clinton administration then began enforcing a multinational blockade off the coast of Haiti, alongside Coast Guard cutters charged with intercepting and returning fleeing boat people directly to Haiti.<sup>37</sup> With the collapse of the Governors Island Accord, the deadline for Aristide's return passed. Despite several efforts to revive or to develop replacements for that accord, at this writing, Aristide's exiled government remains in limbo, while the Clinton administration's summary repatriation policy continues.

## II. APPLIED TRANSNATIONAL PUBLIC LAW LITIGATION

Transnational public lawsuits exhibit five distinctive features:

(1) a *transnational party structure*, in which states and nonstate entities equally participate; (2) a *transnational claim structure*, in which violations of domestic and international, private and public law are all alleged in a single action; (3) a *prospective focus*, fixed as much upon obtaining judicial declaration of transnational norms as upon resolving past disputes; (4) the litigants' strategic awareness of the *transportability of those norms* to other domestic and international fora for use in judicial interpretation or political bargaining; and (5) a subsequent process of *institutional dialogue* among various domestic and international, judicial and political fora to achieve ultimate settlement.<sup>38</sup>

Transnational litigants turn to United States courts to pursue an array of goals. Litigants bring international tort cases against governmental officials—of the

35. New York Pact, Memorandum of Agreement, July 16, 1993 (on file with author).

36. See, e.g., Howard W. French, *Haiti Justice Minister Slain in Defiance of U.S. Warning to Military To Keep Peace*, N.Y. TIMES, Oct. 15, 1993, at A1.

37. R.W. Apple, Jr., *President Orders Six U.S. Warships for Haiti Patrol*, N.Y. TIMES, Oct. 16, 1993, at A1.

38. *TPLL*, *supra* note 2, at 2371 (internal citations omitted).

kind our Clinic had brought before the Haitian case—in search of compensation, deterrence, denial of safe haven to defendants, and enunciation of legal norms.<sup>39</sup> By contrast, transnational “institutional reform litigants”—like their domestic counterparts<sup>40</sup>—seek these aims, but also broader political objectives, such as the revision of governmental policies.<sup>41</sup> In 1991, I praised transnational public law litigation as a development whose success should be measured not by favorable judgments, but by practical results: the norms declared, the political pressure generated, the government practices abated, and the lives saved.

How, by these measures, did the *HCC* litigation fare? Perhaps law professors should not write their own report cards. But on balance, the *HCC* litigation seems to have verified both the descriptive and normative claims of the transnational public law litigation model. As the case unfolded, *HCC* developed a sprawling transnational party structure. In addition to the U.S. government officials, Haitian aliens, and refugee service organizations who comprised the original party set, the *amici curiae* supporting the plaintiffs came to embrace a broad array of intergovernmental organizations,<sup>42</sup> international human rights nongovernmental organizations (NGO’s),<sup>43</sup> domestic civil rights groups,<sup>44</sup> “rule of law” proponents,<sup>45</sup> refugee advocates,<sup>46</sup> and members of Congress.<sup>47</sup> The elaborate transnational claim

39. *Id.* at 2349 & n.11, 2371.

40. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

41. *TPLL*, *supra* note 2, at 2371-72.

42. Brief of the Office of the United Nations High Commissioner for Refugees as *Amicus Curiae* in Support of Respondents, *Haitian Ctrs. Council* (No. 92-344).

43. Brief of Human Rights Watch, *Amicus Curiae*, in Support of Respondents, *Haitian Ctrs. Council* (No. 92-344); Brief of *Amicus Curiae* Amnesty International and Amnesty International-USA in Support of Respondents, *Haitian Ctrs. Council* (No. 92-344); Brief of *Amicus Curiae* The Lawyers Committee for Human Rights in Support of Respondents, *Haitian Ctrs. Council* (No. 92-344); Brief of the International Human Rights Law Group as *Amicus Curiae* in Support of Respondents, *Haitian Ctrs. Council* (No. 92-344).

44. Brief of the National Association for the Advancement of Colored People, Transafrica, and the Congressional Black Caucus as *Amicus Curiae* in Support of Respondents, *Haitian Ctrs. Council* (No. 92-344); Brief of *Amici Curiae* American Jewish Committee and Anti-Defamation League in Support of Respondents, *Haitian Ctrs. Council* (No. 92-344).

45. Brief of the Association of the Bar of the City of New York as *Amicus Curiae* in Support of Respondents, *Haitian Ctrs. Council* (No. 92-344); Brief for Nicholas DeB. Katzenbach, Benjamin R. Civiletti, and Griffin Bell, Former Attorneys General of the United States of America, as *Amici Curiae* in Support of Respondents, *Haitian Ctrs. Council* (No. 92-344).

46. Brief *Amici Curiae* of the American Immigration Lawyers Association and the Legal Action Center of the American Immigration Law Foundation in Support of Respondent, *Haitian Ctrs. Council* (No. 92-344); Brief of *Amici Curiae* Haitian Service Organizations, Immigration Groups and Refugee Advocates, *Haitian Ctrs. Council* (No. 92-344). The only amicus brief supporting the governmental defendants was filed by the Federation for American Immigration Reform (FAIR).

47. Brief of *Amici Curiae* Members of Congress Urging Affirmance, *Haitian Ctrs. Council* (No. 92-344) [hereinafter Brief *Amici Curiae* Sponsors of 1980 Refugee Act]; Brief of the National Association for the Advancement of Colored People, Transafrica, and the Congressional Black Caucus as *Amici Curiae* in Support of Respondents, *Haitian Ctrs. Council* (No. 92-344).

structure intertwined statutory claims, constitutional claims, and claims based on both bilateral and multilateral agreements.<sup>48</sup> These claims not only interlocked but also evolved, the “lead claim” shifting as the case moved from forum to forum.<sup>49</sup>

Like all public law litigation the suit’s focus was never backward-looking, but always prospective, evolving, and expanding. The plaintiffs began with a relatively modest aim: securing the right to counsel for Haitians being subjected to de facto asylum interviews on Guantánamo.<sup>50</sup> But over time, the narrow right-to-counsel case (*HCC-I*) expanded into a broad legal challenge against most aspects of the United States government’s policy toward Haitian refugees, ranging from the extraterritorial *refoulement* of Haitians fleeing Haiti (*HCC-II*) to the sustained offshore internment of HIV-positive Haitians on Guantánamo (*HCC-III*).<sup>51</sup>

From the start, the plaintiffs recognized that their chances of ultimate success before the Supreme Court were slim.<sup>52</sup> For that reason, their governing strategy was to provoke the articulation of norms by sympathetic judicial fora—the Eastern District of New York and the Second Circuit—and then to transport those norms to other fora for use in political bargaining. Once won, the lower court victories were used to focus press attention,<sup>53</sup> to score points in Congress,<sup>54</sup> to influence the Clinton campaign and transition

48. Statutory claims were brought under the Immigration and Nationality Act and the Administrative Procedure Act. Constitutional claims were brought under the First and Fifth Amendment Due Process and Equal Protection Clauses. International claims were brought under the U.N. Refugee Convention and the U.S.-Haiti Agreement. See *Litigating as Law Students*, *supra* note 4, at 2342-43, 2345.

49. At the initial TRO stage of *HCC-I*, the judge granted relief based on a statutory right to counsel under the INA. At the preliminary injunction phase, he shifted to a due process right to counsel and the Haitian Service Organizations’ First Amendment rights. On appeal, the Second Circuit affirmed on due process grounds. In *HCC-II*, plaintiffs initially led with Article 33 of the U.N. Refugee Convention, but when the district judge found that provision not self-executing, they led at the Second Circuit with the statutory *nonrefoulement* claim under § 243(h). In *HCC-III*, the district judge ruled on both statutory and constitutional grounds. Some claims were elaborately intertwined. For example, the Haitian Service Organizations’ First Amendment claims rested on their right to inform Haitian clients about, inter alia, their due process rights; the Haitians’ liberty interest for due process purposes derived from their treaty-based right of *nonrefoulement* under Article 33 of the Refugee Convention. See *Litigating as Law Students*, *supra* note 4, at 2342-50.

50. Indeed, at the start, the plaintiffs rested on the narrowest fact-specific grounds: that the Haitian aliens had due process rights because they were (1) in custody, (2) had credible fears of persecution, and (3) were being held on Guantánamo, territory subject to the exclusive jurisdiction of the United States. See Transcript of Oral Argument at 40-41, *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992).

51. Although the suit did not directly challenge the detention of various Haitian parolees scattered throughout the United States, their fate often arose during settlement discussions.

52. See *infra* text accompanying notes 132-34.

53. See *Litigating as Law Students*, *supra* note 4, at 2370-79.

54. See, e.g., *U.S. Human Rights Policy Toward Haiti: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 102d Cong., 2d Sess. 97 (1992) [hereinafter *Hearing on U.S. Human Rights Policy Toward Haiti*] (testimony of Harold Hongju Koh and Sarah Cleveland) (urging House committee to investigate abuses on Guantánamo by citing district court preliminary injunction opinion); *U.S. Policy Toward Haitian Refugees: Hearings Before the Subcomm. on Int’l Operations and the Subcomm. on Western Hemisphere Affairs of the House Comm. on Foreign Affairs*, 102d Cong., 2d Sess. (June 11, 1992) [hereinafter *Hearing on U.S. Policy Toward Haitian Refugees*] (testimony of Harold Hongju Koh).

teams,<sup>55</sup> and ultimately to bargain for client interests in negotiations with the Justice Department.

In the early phases of the suit, the plaintiffs' goal was simply to keep the refugee issue politically alive until Bill Clinton could be elected President and undo the Bush administration's Haitian policies.<sup>56</sup> As in memorable domestic public law cases involving such thorny public issues as prison reform<sup>57</sup> and school busing,<sup>58</sup> the judicial decisions in *HCC* set the bounds and allocated bargaining chips for a process of institutional dialogue among a number of fora and players concerned with different dimensions of the larger Haitian problem. Like other institutional reform litigants, upon winning injunctive relief from the district court, the plaintiffs in *HCC* pursued a strategy of "complex enforcement" in which court orders formed a relatively minor part of the overall remedy.<sup>59</sup> Most notably, the plaintiffs became de facto partners with the district judge and government in the running of the Guantánamo camp. Although the government consistently denied plaintiffs' right-to-counsel claim, arguing that the presence of counsel would disrupt the operation of the naval base, during the last nine months of the case the defendants acquiesced in the nearly continuous presence of plaintiffs' lawyers on Guantánamo.<sup>60</sup> Over time, it became apparent that defendants' right-to-counsel violations stood at the tip of the iceberg, as "[t]he desire to bring 'ongoing violation[s] to an immediate halt' propel[led the] court inexorably to search for and eliminate their causes."<sup>61</sup> Bargaining in the shadow of the district court's injunctive orders, the plaintiffs, the INS, Justice Department officials, and various refugee resettlement groups engaged in an ongoing dialogue that led to the piecemeal parole of scores of refugees for health and humanitarian reasons, before final classwide relief was judicially granted.<sup>62</sup> In the endgame, the plaintiffs bartered vacatur of the district court's trial orders for the freedom of the Haitians held at Guantánamo, a governmental decision not to pursue one final appeal, and a compensatory award of fees and costs.<sup>63</sup>

In terms of precedent and human impact, the Guantánamo phase of the case alone vindicated the decision to bring the transnational lawsuit. On the

55. See *Litigating as Law Students*, *supra* note 4, at 2373-74.

56. *Reflections*, *supra* note 4, at 9-10.

57. See, e.g., *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

58. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

59. See Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981) (describing judicial intervention in systemic enforcement of the Eighth Amendment).

60. See *Litigating as Law Students*, *supra* note 4, at 2375-76.

61. Note, *supra* note 59, at 630 ("As the causes identified reveal deeper systemic deficiencies, they too must be addressed through increasingly expansive remedies.")

62. See *Litigating as Law Students*, *supra* note 4, at 2361-63.

63. See *supra* note 32. The Supreme Court has not yet resolved the precedential weight of district court orders that have been vacated by agreement while appeal is pending. See *Kaisha v. U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam) (dismissing writ of certiorari as improvidently granted in case challenging vacatur of final judgment at parties' request when case was settled). Thus, it remains unclear how much, if anything, plaintiffs gave away in the settlement negotiations that ultimately resolved *HCC-III*.

precedential ledger, the plaintiffs won judicial enunciation of due process norms: both a ruling by a court of appeals (*HCC-I*) and a permanent injunction from the district court (*HCC-III*) declaring that aliens—even those held outside the United States—have due process rights. These rights include decent medical care, living conditions, and assistance of counsel in asylum hearings, which were violated by indefinite incommunicado detention in an HIV-internment camp.<sup>64</sup> Most concretely, the suit won the release and parole of some 310 Haitians held on Guantánamo, who have now begun new lives in America.

From the *nonrefoulement* portion of the case (*HCC-II*), a more mixed balance sheet emerges. As Part IV below elaborates, the Supreme Court made bad law, which has emboldened the Clinton administration to pursue a similar policy of intercepting Chinese refugees in the Gulf of Mexico.<sup>65</sup> Moreover, unlike the Guantánamo phase, in which plaintiffs operated under favorable district court injunctions for many months, in the *nonrefoulement* phase, plaintiffs won judicial relief for only three days before the Supreme Court stayed the Second Circuit's ruling.<sup>66</sup> The absence of an enforceable order drastically limited plaintiffs' capacity to use that chip to bargain for gradual amelioration of the conditions of the summary return program while appeals were proceeding.

Even so, the *nonrefoulement* challenge was almost certainly worth bringing. Given the long history of judicial challenges to the Haitian interdiction program,<sup>67</sup> it would have been anomalous *not* to contest the Kennebunkport Order, the strongest U.S. assault ever against the *nonrefoulement* principle. Moreover, read carefully, the precedential weight of the Supreme Court ruling is limited. The Haitian interdiction program is uniquely discriminatory. The Coast Guard stops Haitian boats on the high seas solely pursuant to the 1981 United States-Haiti accord, a soon-to-be-terminated agreement that the United States has yet to extract from any other nation.<sup>68</sup>

64. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993). We also won a preliminary injunction to the same effect, later affirmed by the Second Circuit, which was vacated by the Supreme Court on other grounds. *See McNary v. Haitian Ctrs. Council*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot*, 113 S. Ct. 3028 (1993).

65. *See* Anthony DePalma, *3 Ships Adrift in a Diplomatic Limbo*, N.Y. TIMES, July 11, 1993, at A20; Deborah Sontag, *Mexico's Position on Aliens Contradicted by Past Deeds*, N.Y. TIMES, July 15, 1993, at A18.

66. *See Litigating as Law Students*, *supra* note 4, at text accompanying notes 52-53.

67. *See infra* note 102.

68. *See* 1981 U.S.-Haiti Agreement, *supra* note 5. As Louis Henkin has noted, the 1981 U.S.-Haiti Agreement along with the President's proclamation ordering interdiction

would seem to have been designed to avoid "sea-issues" of international law: the interdiction program applies only to vessels which the United States may interdict and inspect *without violating international law*, i.e., vessels flying the United States flag; vessels flying no flag; and vessels flying the flag of Haiti, (which has agreed to the interdiction program) . . . .

Louis Henkin, *The Constitution at Sea*, 36 ME. L. REV. 201, 215 (1984) (emphasis added). On April 4, 1994, the Government of Haiti invoked the six months' termination provision of the U.S.-Haiti agreement and notified the United States that it would terminate the agreement in October 1994. *See* Steven

Nothing in the Court's decision provides general authority for the Coast Guard to intercept and return refugees from other countries (including China) for whom no such accord, and no Kennebunkport Order, exists.

Nor did the Supreme Court's decision in the *nonrefoulement* piece of the case in any way settle the Haitian refugee crisis, which continues unabated at this writing.<sup>69</sup> By stanching the outflow of refugees, the Kennebunkport Order relieved much of the political pressure on the Bush and Clinton administrations to make good on their promise to restore democracy in Haiti. When the *HRC* suit ended in early 1992, judicial oversight over the government's administration of both the interdiction program and the Guantánamo camp died with it. The *HCC* suit won lower court declarations of illegality regarding both policies, and during the year that appeals were pending, restored pressure on the executive branch to deal with the underlying political crisis. During the presidential campaign, candidate Clinton used the court decisions as part of a broader attack on Bush's foreign policy.<sup>70</sup> After Clinton took office and reversed field, the betrayal of the Haitian refugees became a grassroots political issue on which ordinary citizens took a stand.<sup>71</sup> Had the case died in the courts in February 1992, there would have been no similar focal point around which such political pressure could coalesce. Furthermore, the public outcry against the Supreme Court's decision arguably hastened the signing of the Governors Island Accord several weeks later. After that accord failed, with no litigation pending, no similar proposals to return Aristide have won comparable U.S. government support.

Similarly, the Supreme Court's decision did not resolve the legality of the interdiction policy under international, as opposed to domestic, law. Other human rights groups have pressed arguments similar to those urged by the *HCC* plaintiffs as a basis for challenging the U.S. government's policy before the U.N. High Commissioner on Refugees (UNHCR) and the Inter-American

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Greenhouse, *Aristide to End Accord That Allows U.S. to Seize Refugee Boats*, N.Y. TIMES, Apr. 8, 1994, at A6. Given that the United States arguably breached the Agreement as of May 24, 1992, see *infra* note 74, the government of Haiti could declare its own obligations under the agreement immediately suspended, without waiting for six months to run. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 60(1), 1155 U.N.T.S. 331, 8 I.L.M. 679 ("A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.") (emphasis added).

69. See Richard Cohen, *Haiti: Time for Muscle*, WASH. POST, Apr. 7, 1994, at A27 ("If there is a worse foreign policy botch than Haiti, nothing comes to mind. . . . American policy has been almost totally discredited."); Howard W. French, *Months of Terror Bring Rising Toll of Deaths in Haiti*, N.Y. TIMES, Apr. 2, 1994, at A1 ("Hundreds of supporters of the Rev. Jean-Bertrand Aristide and other civilians have been killed in Haiti in recent months in the bloodiest wave of political terror since the army overthrew Father Aristide as President two and a half years ago."); *id.* at A2 ("The disfigured body of one returnee . . . was recently found near the airport, his eyes plucked out, a rope around his neck, [and] his hands tied . . .").

70. See *Litigating as Law Students*, *supra* note 4, at nn. 61-63 (quoting Clinton campaign statements).

71. See *No More Nice Guy; Lani Guinier Nomination*, THE NATION, June 28, 1993, at 891 (describing "the legal and grass-roots campaign to free the Haitian refugees at Guantanamo").

Commission on Human Rights.<sup>72</sup> Nor does the Supreme Court's decision insulate the *nonrefoulement* policy from other lines of attack under international law. Absent exceptional circumstances, under both customary and conventional international law, a state may board another state's vessel only with the express consent and authorization of that state.<sup>73</sup> The Bush-Clinton program of summary return arguably works material breaches of the 1981 U.S.-Haiti interdiction agreement, which authorizes the United States to board Haitian vessels.<sup>74</sup> In response, President Aristide has recently given notice that he will terminate the 1981 U.S.-Haiti Agreement by October 1994.<sup>75</sup> Such an act would withdraw Haiti's prior consent and deprive the United States of legal justification, under international law, for stopping, boarding,

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72. See *UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council*, 32 I.L.M. 1215 (1993) ("[T]he obligation not to return refugees to persecution arises irrespective of whether governments are acting within or outside their borders. . . . UNHCR considers the Court's decision a setback to modern international refugee law . . ."). The Inter-American Commission on Human Rights is considering a petition brought by the Center for Human Rights and Constitutional Law challenging the Haitian interdiction program as a violation of the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights, OAS Treaty No. 36. In March 1993, the Commission issued an interim Resolution adopting Provisional Measures, "[c]alling upon the United States Government to review as a matter of urgency its practice of stopping on the seas Vessels destined for the USA with Haitians and returning them to Haiti without affording them an opportunity to establish whether they qualify as refugees." The interim resolution noted that the U.S. policy prevents the exercise by the Haitians of the right to seek refuge. See discussion of Case No. 10,675, in *Petitioners Release Resolution of the Inter-American Commission on Human Rights Concerning U.S. Program of Haitian Refugee Interdiction*, 32 I.L.M. 1215 (1993). A final resolution is expected in the spring of 1994.

73. Art. 22(1) of the Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 2318, 450 U.N.T.S. 82, and Art. 87 of the U.N. Convention on the Law of the Sea, Oct. 7, 1982, 21 I.L.M. 1261 (which the United States has accepted as customary international law, 83 DEP'T STATE BULL. No. 2075, at 70-71 (1983)) guarantee all state's vessels freedom of navigation on the high seas.

*Except where acts of interference derive from powers conferred by treaty*, a warship which encounters a foreign merchant ship on the high seas is *not justified in boarding her* unless there is reasonable ground for suspecting: (a) that ship is engaged in piracy; or (b) that the ship is engaged in the slave trade; or (c) that, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

Art. 22(1) of the 1958 Convention on the High Seas, *supra* (emphasis added); see also U.N. Convention on the Law of the Sea, art. 110, *supra*; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 522(2) (1986) [hereinafter THIRD RESTATEMENT].

74. Article 60(3) of the Vienna Convention on the Law of Treaties, *supra* note 68, declares that "A material breach of a treaty, for the purposes of this article, consists in . . . a repudiation of the treaty . . . [or] the violation of a provision essential to the accomplishment of the object or purpose of the treaty." The stated purpose of the U.S.-Haiti Agreement was "the establishment of a cooperative program of interdiction and *selective* return to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti." 1981 U.S.-Haiti Agreement, *supra* note 5, at 3559 (emphasis added). The United States Government's summary repatriation policy, as conducted since May 24, 1992, has unilaterally substituted a program of interdiction and *blanket* return to Haiti of all Haitian migrants. This policy not only exceeds the scope of Haitian consent under the 1981 agreement, but also plainly violates the object and purpose of the agreement. Furthermore, the United States has violated its pledge that "the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status," *id.* at 3560, and its declaration that any repatriation policy will be conducted with "regard to . . . the international obligations mandated in the Protocol Relating to the Status of Refugees done at New York 31 January 1967," *id.* at 3559.

75. See Greenhouse, *supra* note 68. A provision in the U.S.-Haiti Agreement authorizes the Government of Haiti to terminate the agreement upon six months' notice for any reason whatsoever, and a plausible argument can be made that the United States has already terminated the agreement by conduct. See *supra* note 68.

inspecting, and returning Haitian vessels to Haiti. If the U.S. policy of direct summary repatriation were to continue, both private litigants and the Government of Haiti could pursue available remedies against the United States and its officials before appropriate fora.<sup>76</sup>

Those tempted to dismiss such remedies with the realist refrain, "international law cannot be enforced," should consider the reaction of the international community to *United States v. Alvarez-Machain*.<sup>77</sup> In that case, the Supreme Court held that a Mexican accused's forced abduction by U.S. agents from Mexican territory, without resort to an existing bilateral extradition treaty, did not divest U.S. courts of criminal jurisdiction to try that defendant.<sup>78</sup> *Alvarez-Machain* sparked intense media criticism and protests from political leaders in Mexico, Canada, Europe, and the Caribbean.<sup>79</sup> The decision triggered congressional hearings,<sup>80</sup> proposals for remedial legislation, and an internal Justice Department review of the policy of transborder kidnapping.<sup>81</sup> The Permanent Council of the Organization of American States requested a legal opinion regarding the international legality of the Supreme Court's decision from the Inter-American Juridical Committee, which concluded that "the decision is contrary to the rules of international law."<sup>82</sup> The United Nations Working Group on Arbitrary Detention similarly determined that Alvarez had been arbitrarily detained in violation of the International Covenant on Civil and Political Rights, which the United States had just ratified.<sup>83</sup> An exasperated district judge acquitted Alvarez-Machain of criminal charges,<sup>84</sup> and Alvarez thereafter filed a civil action in federal court against the U.S. officials who had ordered his kidnapping.<sup>85</sup> Finally, in June 1993, during the North American Free Trade negotiations, Secretary of

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76. See generally THIRD RESTATEMENT, *supra* note 73, §§ 901-907 (reviewing such remedies, including interstate claims and remedies, dispute-resolution before international arbitral and judicial tribunals, certain unilateral remedies, and private remedies for the violation of international law).

77. 112 S. Ct. 2188 (1992).

78. In dissent, Justice Stevens argued that "most courts throughout the civilized world . . . will be deeply disturbed by the 'monstrous' decision the Court announces today." *Id.* at 2206 (Stevens, J., dissenting) (citations omitted).

79. See Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939, 941-42 & nn. 11-15 (1993).

80. See *Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 82 (1992).

81. See Paul Hoffman, *U.S. Must Not Kidnap Suspects Abroad*, NEWSDAY, Dec. 2, 1993, at 114 (noting legislation introduced by Senator Moynihan and internal Justice Department review ordered by Attorney General Reno in response to decision).

82. Organization of American States, Permanent Council, *Legal Opinion on the Decision of the Supreme Court of the United States*, 4 CRIM. L.F. 119, 124 (1993).

83. Decision No. 48/1993 (U.S.), United Nations Working Group on Arbitrary Detention at 135-40, U.N. Doc. E/CN.4/1994/27 (Sept. 30, 1993). The United States finally ratified the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, *opened for signature*, Dec. 19, 1966 (entered into force Mar. 23, 1976), in 1992, more than sixteen years after it entered into force. See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS AND NEW DEVELOPMENTS 344 (1994).

84. Seth Mydans, *Judge Clears Mexican in Agent's Killing*, N.Y. TIMES, Dec. 15, 1992, at A20.

85. *Alvarez-Machain v. United States*, No. 93-4072 (C.D. Cal. 1994).



State Warren Christopher announced that the United States and Mexico had agreed to amend the U.S.-Mexico Extradition Treaty to prohibit transborder kidnapping.<sup>86</sup>

The point is that adverse Supreme Court decisions are no longer final stops, but only way stations, in the process of “complex enforcement” triggered by transnational public law litigation. However unfamiliar this argument may be to American lawyers, European civil rights litigants have long understood that adverse national court decisions may be “appealed” to and even “reversed” by the European Court of Human Rights.<sup>87</sup>

Political realists deride the enforceability of international law, suggesting that states “will keep their bargains so long as it is in their interest” and at no other time.<sup>88</sup> By this reasoning, U.S. government officials, now freed by the Supreme Court to conduct a Haitian repatriation policy, will have no occasion or incentive to care whether such policies comply with international law.

But such simplistic reasoning overlooks what I call the “normativity of transnational legal process.” In Louis Henkin’s famous phrase, “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”<sup>89</sup> But Henkin’s description of *how* nations behave leaves unanswered the crucial question: *why* nations behave in accordance with international law, and particularly, what ultimately brings nations who flout international law rules back into compliance with them.

In my view, the answer is *transnational legal process*. Even resisting nations cannot insulate themselves forever from complying with international law if they regularly participate, as all nations must, in transnational legal interactions.<sup>90</sup> Through a complex process of rational self-interest and norm internalization—at times spurred by transnational litigation—international legal norms seep into and become entrenched in domestic legal and political processes. In this way, international law helps drive how national governments conduct their international relations.

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86. *U.S. Curbs Its Agents in Mexico*, NEW HAVEN REG., June 22, 1993, at 20.

87. One striking illustration is the European Court’s decision in *The Sunday Times Case*, 30 Eur. Ct. H.R. (ser.A) (1979). In that case the British Attorney General sought and won an injunction restraining a British newspaper from publishing a story about thalidomide children. At various stages, eight (of eleven) English judges ruled against the newspaper, but in the end both the European Commission and the European Court ruled in favor of the *Times*, requiring the British government to pay the newspaper more than 22,000 Pounds Sterling. For a description of the *Sunday Times* litigation, see MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 263-64 (2d ed. 1993).

88. HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 560 (5th ed. 1978).

89. LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979).

90. The argument presented here, which is partially sketched at the close of *TPLL*, *supra* note 2, at 2398-2402, is more fully developed in Harold Hongju Koh, *International Law and International Relations: The State of the Dialogue* (1994) (unpublished manuscript, on file with author). For a recent study of compliance issues, see Abram Chayes & Antonia H. Chayes, *On Compliance*, 47 INT’L ORG. 175 (1993).

The Cold War realists dismissed international law as utopian and epiphenomenal to the realities of power politics.<sup>91</sup> Yet in the post-Cold War period, contemporary international relations theorists have recognized that nations are not exclusively preoccupied with maximizing their power vis-à-vis one another in zero-sum games. Rather, they employ cooperative strategies to pursue more complex and multi-faceted long-run national interests, in which compliance with negotiated norms serves as a winning strategy in a reiterated “prisoner’s dilemma” game.<sup>92</sup> As “regime theorists” have further elaborated,<sup>93</sup> institutional, governmental and private participants in a given issue area will develop a set of governing arrangements, along with a set of ideologies and expectations, that both restrain the participants and provide means for achieving their common aims. Within these regimes, international law plays a critical role both in stabilizing the expectations and in reinforcing the restraints that regimes seek to foster.<sup>94</sup>

The picture becomes richer when one recognizes that national interests are not givens, but rather, socially constructed products of learning, knowledge, cultural practices, and ideology.<sup>95</sup> Nation-states internalize norms of international lawfulness and react to other states’ reputations as law-abiding or not.<sup>96</sup> Legal ideologies prevail among domestic decisionmakers such that they

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91. See, e.g., MORGENTHAU, *supra* note 88; MICHAEL J. SMITH, *REALIST THOUGHT FROM WEBER TO KISSINGER* (1986).

92. Game theory predicts that states, as rational, self-interested actors, will pursue a variety of strategies to achieve both short- and long-term gains, depending on the relative costs and benefits of competition, cooperation, or defection from a cooperative scheme. Thus, even when competition or defection provides a short-term advantage, patterns of cooperation may nevertheless emerge from anarchy because “the logic of collective action” convinces self-interested states that cooperation better serves their longer-term interests. See, e.g., ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT’L STUD. Q. 379 (1988); ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971).

93. A regime, as defined by political scientist Stephen Krasner, is a set of “implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.” Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT’L ORG. 185, 186 (1982). See generally INTERNATIONAL REGIMES (Stephen D. Krasner ed. 1983).

94. Legal rules promote compliance with regime norms by providing channels for dispute settlement, triggering retaliatory actions, signaling states when negative responses by other states will likely ensue, and requiring states to furnish information that will highlight defections on their own part. For recent scholarship espousing this “rationalistic” view of international law, see, e.g., Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT’L L. 335 (1989); Kenneth W. Abbott, *The Trading Nation’s Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT’L L.J. 501 (1985); Kenneth W. Abbott, “Trust But Verify”: *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT’L L.J. 1 (1993).

95. See Keohane, *supra* note 92, at 389-92 (referring to the “cognitivist” or “reflective” models of institutional behavior found in the work of Hayward Alker, Richard Ashley, Friedrich Kratochwil, John Ruggie, and Alex Wendt); Peter J. Katzenstein, *Norms and National Security: The Japanese Police and Military as Agents of Non-Violence 21*, presented at Yale Law and Int’l Pol. Seminar, Apr. 4, 1994 (unpublished manuscript, on file with author) (“Norms condition interests, and interests affect norms.”).

96. One scholar has argued that the factor determining whether nations interact in a zone of law or a zone of politics is whether or not the state can be characterized as “liberal.” Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205 (1993). What Burley’s essentialist analysis misses is that a state’s identity is not exogenously given. Rather,

are affected by perceptions that their actions are unlawful—or that domestic opponents or other nations in the global regime will so characterize them. Moreover, domestic decisionmaking becomes enmeshed with international legal norms, as institutional arrangements for the making and maintenance of an international commitment become entrenched in domestic legal and political processes.<sup>97</sup>

This reasoning predicts that in time, the United States will comply with the norm of “extraterritorial *nonrefoulement*,” in much the same way as it ultimately bowed to the demand for anti-kidnapping rules in its extradition treaty with Mexico. Law-abiding states incorporate international law into their domestic legal and political structures. When such a state violates international law, that violation creates frictions and contradictions that affect its ongoing participation in the transnational legal process.<sup>98</sup> Indeed, transnational public law litigation of the “institutional reform” type aims precisely to provoke judicial action that will create such frictions, thereby helping shape the normative direction of governmental policies.

It is possible, of course, that instead of returning to compliance, the United States will seek to promote its departure from international norms as the new governing international rule.<sup>99</sup> In the same way as a river that has overflowed its banks may either recede or carve a new path, the United States government may try to argue internationally, as it did before the U.S. Supreme Court, that the norm of *nonrefoulement* does not apply extraterritorially, an idea that may prove attractive to other developed nations that act as magnets for fleeing refugees.<sup>100</sup> Yet such arguments, wherever made, would not settle the question of international legality. Instead, they would simply stimulate another round of transnational legal interaction, in which the integrity of the revised norm could be challenged and tested by other nations and nongovernmental actors. The process of institutional dialogue would begin again, starting perhaps with a debate over whether to amend or reinterpret Article 33 of the U.N. Convention Relating to the Status of Refugees to incorporate HCC’s notion of “territorial *nonrefoulement*.” However this might be done, another cycle of transnational public law litigation would almost certainly ensue before the revised norm of “territorial *nonrefoulement*,” now entrenched by the

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participation in the transnational legal process *helps constitute the identity* of a state as one that obeys the law, and hence as “liberal” or not. See Koh, *Transnational Legal Process*, *supra* note 20.

97. See Robert O. Keohane, *Compliance with International Commitments: Politics within a Framework of Law*, in *International Law and International Relations Theory: Building Bridges*, in PROCEEDINGS OF THE 86TH ANNUAL MEETING OF THE AMERICAN SOC’Y OF INT’L LAW (1992).

98. See, e.g., KOH, *supra* note 1, at 155 (noting that because the United States is party to a network of closely interconnected treaties, unilateral executive decisions to break or bend one treaty tend to force the U.S. into vicious cycles of treaty violation).

99. See Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457 (1985).

100. See Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT’L L. 503 (1993).

Supreme Court in our domestic legal order, could “percolate up” and become entrenched as the new governing international rule.<sup>101</sup> In short, whatever global norm ultimately emerges, the *HCC* litigation marks only one episode in what will certainly be a continuing series of transnational public lawsuits regarding the United States’ legal obligations to fleeing boat people.<sup>102</sup>

### III. WHY THE PRESIDENT WON

In *The National Security Constitution*, I argued that we face a continuing dysfunction in our national security system. As Vietnam and the Iran-*Contra* affair illustrated, our national security decisionmaking process has degenerated into one that forces the President to react to perceived crises, that permits Congress to acquiesce in and avoid accountability for important foreign policy decisions, and that encourages the courts to condone these political decisions. The result is a national security decisionmaking process that places too great a burden upon the presidency, while allowing Congress and the courts too easily to avoid constructive participation in important national security decisions. The synergy among these institutional incentives, not the motives of any single branch, explains the recurring pattern of executive unilateralism in our postwar foreign policy.<sup>103</sup> During the Haitian refugee crisis, all three branches reenacted their predicted roles.

#### A. *Why the President Acted*

Presidents Bush and Clinton did not create the Haitian refugee crisis; they merely reacted to it. Responsive action is characteristic of most Presidents, regardless of political party.<sup>104</sup> During the Iranian hostage crisis, for example, President Carter reacted to both international and domestic pressures by conducting one of the most dramatic exercises of the President’s peacetime foreign affairs power in United States history.<sup>105</sup> During the Reagan-Bush

101. An analogous process occurred in the United States with regard to the death penalty, whereby individual states took narrower views of what constitutes cruel and unusual punishment than did the Supreme Court, thereby prompting Supreme Court reconsideration of the Eighth Amendment rule. *See, e.g., Stanford v. Kentucky*, 492 U.S. 361 (1989).

102. Indeed, the *HCC* case was the third in a four-part cycle of suits that began with *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987), followed by *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109 (11th Cir. 1991); 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S. Ct. 1245 (1993), and that has continued again after *HCC* with suits regarding Chinese refugees. *See, e.g., Guo Chun Di v. Carroll*, No. CV-93-1377-A, 1994 U.S. Dist. LEXIS 394 (E.D. Va. Jan. 14, 1994); *Yang v. Maugans*, No. 94-7060 (3d Cir. argued Mar. 24, 1994).

103. Harold Hongju Koh, *Reply*, 15 *YALE J. INT’L L.* 382, 385 (1990).

104. *Cf. KOH, supra* note 1, at 121-22 (“The same public opinion that has empowered the plebiscitary president has simultaneously subjected him to almost irresistible pressures to act quickly in times of real or imagined crisis. . . . This pattern has afflicted presidents of both political parties, without regard to whether they have generally been viewed as weak or strong, reckless or law-abiding . . .”).

105. *Id.* at 122.

years, similar pressure led to a wave of treaty-breaking and bending.<sup>106</sup> Frequent presidential use of short-term military strikes and emergency economic powers (to respond to terrorism), longer-term military commitments in Lebanon and the Persian Gulf (to respond to requests for peacekeeping), arms sales (to respond to military tensions in the Middle East), and covert actions (to effectuate neo-containment policies in Central America and Angola) all reflected the modern American perception that crisis situations uniquely demand a presidential response. Part and parcel of this trend was President Bush's issuance of the Kennebunkport Order,<sup>107</sup> prompted at least in part by an election-year desire to avoid a replay of the Cuban Marielito boat crisis that had plagued the Carter presidency.<sup>108</sup>

The Clinton administration's decision to perpetuate the Bush response to the Haitian refugee crisis, made even before Clinton's Inauguration Day, continued this pattern of executive reactivity.<sup>109</sup> What puzzles, however, is why President Clinton chose to retain Bush's policy even after painstakingly laying the public groundwork for reversing that position.

Those who focus on Bill Clinton's "presidential character"<sup>110</sup> and "leadership style"<sup>111</sup> might ascribe the change to the President's own preferences: a retrospective desire to avoid a replay of the "Fort Chaffee incident"—when Mariel Cubans seized an Arkansas penitentiary and doomed Clinton's first Governorship<sup>112</sup>—and a prospective desire to avoid a refugee inflow that might distract attention from his ambitious domestic policy agenda. Students of Graham Allison's "governmental politics" model<sup>113</sup> might explain the shift by pointing to the truncated group that helped Clinton make the decision—a group that reportedly included the incoming Secretary of State, National Security Assistant and Deputy, and Secretary of Defense, but no one from Congress, the Justice Department, or with bureaucratic responsibility for the promotion and protection of human rights or refugees.<sup>114</sup> Lack of input

106. *Id.* at 43-45, 155.

107. *See supra* note 25.

108. JIMMY CARTER, *KEEPING FAITH: MEMOIRS OF A PRESIDENT* 533-34 (1982).

109. Another recent example is President Clinton's reactive decision to bomb Baghdad in response to the supposed assassination attempt against George Bush. *See* Michael Ratner & Jules Lobel, *Bombing Baghdad: Illegal Reprisal or Self Defense?*, *LEGAL TIMES*, July 5, 1993, at 24.

110. JAMES D. BARBER, *THE PRESIDENTIAL CHARACTER: PREDICTING PERFORMANCE IN THE WHITE HOUSE* (4th ed. 1992).

111. Fred I. Greenstein, *The Presidential Leadership Style of Bill Clinton: An Early Appraisal*, 108 *POL. SCI. Q.* 589 (1993-94).

112. Ellen Deberport, *The Cubans: A Year of Turmoil*, UPI, May 7, 1981, available in LEXIS, News Library, UPI File; Steve Wick, *Campaign '92; A Profile; Clinton: The Man*, *NEWSDAY* (Nassau & Suffolk ed.), Mar. 22, 1992, at 7.

113. GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 144-84 (1971).

114. Elaine Sciolino, *Clinton Aides Urge Freer Haiti Policy*, *N.Y. TIMES*, Jan. 6, 1993, at A1 (describing Clinton Haitian planning group). Indeed, press accounts reported that the Clinton administration had closely coordinated its Haitian policy with officials of the departing Bush administration, some of whom stayed on well into the early months of the Clinton administration specifically to handle Haiti policy. *See* Steven A. Holmes, *Bush and Clinton Aides Link Policies on Haiti*, *N.Y. TIMES*, Jan. 7, 1993, at A10;

by political appointees in the Justice Department might also explain how President Clinton could seek to reverse before the Supreme Court what he had previously called a “right decision” by the Second Circuit, without ever explaining why a policy he had deemed unlawful had suddenly become lawful.<sup>115</sup>

One explanation offered by President Clinton himself was that it was more humanitarian to continue the forced return policy than to lift it, thereby enticing numerous Haitians onto the high seas to drown.<sup>116</sup> But as I discuss more fully in Part V, this explanation does not account for the administration’s failure to adopt any of a whole series of “less restrictive alternatives” that would have protected Haitians from drowning without forcing them back into the arms of the Haitian military. Finally, a related explanation draws on Allison’s “rational actor” model.<sup>117</sup> Under this theory, whether or not the Bush *nonrefoulement* policy was humanitarian, its continuation was prudent and rational in light of American national interests, a reality that Governor Clinton fully grasped only once he was about to become President.<sup>118</sup> But this claim rests on the core assertion that a rational assessment of national interests dictated a policy of forced, summary return of refugees, a claim that I examine and reject in Part V below.

### B. *Why Congress Didn’t Act*

What explains Congress’ passivity in the face of President Clinton’s policy shift? Not only is immigration a field within the zone of Congress’ plenary authority,<sup>119</sup> but in the Refugee Act of 1980, Congress had specifically amended past legislation to direct that “the Attorney General shall not return any alien” to conditions of persecution.<sup>120</sup> Since 1952, Congress has

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Thomas L. Friedman, *Clinton Rounds Out State Dept. Team*, N.Y. TIMES, Jan. 20, 1993, at A12; cf. IRVING JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES (1972) (describing how “groupthink” can drive decisionmakers to exclude viable policy options).

115. When the decision to defend *HCC* before the Supreme Court was made, the Clinton administration still had not found a confirmable Attorney General, and the Solicitor General-designate, my colleague Drew S. Days III, was recused because he had signed the plaintiffs’ brief. See Brief for the Respondents, *McNary v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993), *excerpts reprinted in appendix to Reflections*, *supra* note 4, at 21.

116. See Statement by Secretary of State Warren Christopher on *Meet the Press* (NBC television broadcast, Apr. 10, 1994) (on file with author) (“President Clinton decided that the forcible return was the more humane policy rather than permitting the people to take boats to the United States where perhaps a third of them would have been lost in that very dangerous channel passage.”).

117. ALLISON, *supra* note 113, at 10-38.

118. Such reasoning continues to drive the Clinton foreign policy team. See *When Should We Send in Our Troops?*, USA TODAY, Apr. 7, 1994, at 13A (interview with National Security Adviser Anthony Lake) (“The policy of return (of [Haitian] refugees at sea) is one that we take no pleasure in, but that we think is a regrettably necessary one—both in terms of Haiti itself and in human terms.”).

119. U.S. CONST. art. I, § 8, cl. 4.

120. See, e.g., Brief *Amici Curiae* Sponsors of 1980 Refugee Act, *supra* note 47.

legislated regularly with regard to immigration matters.<sup>121</sup> Moreover, Vietnam triggered a resurgence of congressional interest and activism in foreign policy, particularly in fields such as international trade, which directly affect congressional constituencies.<sup>122</sup>

In the wake of the Kennebunkport Order, various bills were introduced and various committees held hearings about the *refoulement* policy and the Guantánamo camp.<sup>123</sup> Both the Congressional Black Caucus and the sponsors of the 1980 Refugee Act filed *amicus* briefs before the Supreme Court in *HCC-II*.<sup>124</sup> But in the end Congress did not even come close to collective action on the Haitian refugee issue.<sup>125</sup>

Again, the explanation is both institutional and political. The same institutional reforms that have stimulated a resurgence of congressional activism in foreign policy have often left Congress too decentralized to generate coherent policy initiatives.<sup>126</sup> The loss of such devices as the legislative veto<sup>127</sup> has made it difficult for Congress to confront the President unless it can muster the two-thirds vote in both houses necessary to override a presidential veto.<sup>128</sup> Even if sufficient congressional interest had existed to support legislation protecting the Haitians, Congress had neither the time nor the incentive to enact it between Memorial Day and Election Day 1992, particularly when the incoming President appeared likely to change the Haitian policies by executive order.<sup>129</sup> Nor, before the Supreme Court ruled, was it clear why Congress should expend resources enacting legislation to reaffirm a *nonrefoulement* requirement that was already embodied in existing legislation. After Clinton's election, congressional opponents of the Haitian policy could not rally a Democrat-controlled Congress to oppose the first

121. HENRY STEINER, DETLEV VAGTS & HAROLD HONGJU KOH, *TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT* 15-18 (4th ed. 1994).

122. KOH, *supra* note 1, at 121.

123. *See, e.g., Hearing on U.S. Human Rights Policy Toward Haiti, supra* note 54; *Hearing on U.S. Policy Toward Haitian Refugees, supra* note 54; Haitian Refugee Protection Act of 1993, H.R. 1307, 103d Cong., 1st Sess. (March 11, 1993); H.R. Con. Res. 182, 103d Cong., 1st Sess. (Nov. 17, 1993); Haitian Refugee Fairness Act, H.R. 3663, 103d Cong., 1st Sess. (Nov. 22, 1993); Governors Island Reinforcement Act of 1994, H.R. 4114, 103d Cong., 2d Sess. (Mar. 23, 1994) ("Dellums Bill").

124. *See, e.g., Brief Amici Curiae Sponsors of 1980 Refugee Act, supra* note 47; Brief of the National Association for the Advancement of Colored People, Transafrica, and the Congressional Black Caucus as *Amicus Curiae* in Support of Respondents, *supra* note 47.

125. At this writing, the only legislation with a chance of enactment is the Dellums Bill, H.R. 4114, 103d Cong., 2d Sess. (1994), and companion legislation in the Senate, introduced on April 19, 1994 by Senator Dodd and four others, which provides, inter alia, for sanctions against Haiti and the halting of the interdiction and return of Haitian refugees.

126. *See* KOH, *supra* note 1, at 121.

127. *INS v. Chadha*, 462 U.S. 919 (1983).

128. *See* KOH, *supra* note 1, at 141-44.

129. Nor did either presidential candidate have a strong incentive to support such legislation, given the enormous hostility to illegal immigrants in Florida, one of the most hotly contested states in the 1992 presidential election. *See generally* Larry Rohter, *Florida Seeks U.S. Aid for Illegal Immigrants*, N.Y. TIMES, Dec. 31, 1993, at A12 (describing Florida's hostility toward illegal aliens).

Democratic President in twelve years, particularly during his first weeks in office.

In the end, political factors dictated congressional inaction. The Haitian refugee crisis arose during an economic recession, traditionally a time in which aliens have been scapegoated and borders tightened.<sup>130</sup> In contrast to Cuban and Russian refugees, who enjoy significant legislative support, black, poor Haitians afflicted with the HIV virus constitute the archetypal “discrete and insular minority,” for whom such support was not forthcoming.<sup>131</sup> Through a quirk in timing, the fate of the HIV-positive Haitians on Guantánamo became subordinated to the controversy over gays in the military, which the Clinton administration ignited almost immediately upon taking office. Significantly, the only legislative group to fight consistently for the Haitians, the Congressional Black Caucus (CBC), ultimately played an important role in winning the release of the Guantánamo Haitians. The District Court issued its opinion ordering the Haitians’ release just days after the President chose to withdraw Lani Guinier as his nominee for Assistant Attorney General of the Civil Rights Division. When members of the CBC finally met with President Clinton to rail about the Guinier nomination, they also urged him to comply with the District Court’s ruling regarding the Guantánamo Haitians. Ironically, the same refugees who were victimized for months by racial politics probably owed their freedom to the administration’s decision not to antagonize domestic black supporters by seeking a stay of a black judge’s ruling in favor of black Haitians.

### C. *Why the Court Deferred*

Once the President acted and Congress stood by, it became almost inevitable that the Supreme Court would validate the President’s actions. Indeed, the Court directly foreshadowed its ruling in *HCC-II* more than a year earlier, when it denied *certiorari* to the Haitian Refugee Center’s petition, with only Justice Blackmun dissenting.<sup>132</sup> Indeed, during the previous two years, the full Court had voted against the Haitians no less than eight times.<sup>133</sup>

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130. See Richard L. Berke, *Politicians Discovering an Issue: Immigration*, N.Y. TIMES, Mar. 8, 1994, at A19 (“From across Texas, Washington and California, Republicans and Democrats want to see, and be seen at, a get-tough effort to control immigration. . . . The politicians are prompted by polls showing that the issue is gaining an importance among voters who . . . are increasingly worried about the economic impact of immigrants and their effect on American culture.”).

131. See JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 161 (1980) (“Hostility toward ‘foreigners’ is a time-honored American tradition”); Harold Hongju Koh, *The Archetypal “Good” Aliens*, PROCEEDINGS OF THE 88TH ANNUAL MEETING OF THE AM. SOC’Y OF INT’L LAW (forthcoming 1994) (arguing that Haitian refugees are the archetypal “bad aliens,” disfavored under American immigration law).

132. See *Baker*, 112 S. Ct. at 1245.

133. The Court had thrice intervened to stay lower court rulings favoring the Haitians. See *Baker v. Haitian Refugee Ctr.*, 112 S. Ct. 1072 (1992); *McNary v. Haitian Ctrs. Council, Inc.*, 112 S. Ct. 1714 (1992); *McNary v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3 (1992). Moreover, the Court had twice denied



Most crucially, by a 7-2 vote, the Court had stayed the Second Circuit's ruling blocking the Bush policy of summary return, thereby ensuring that the policy would continue for at least eleven months before plenary Supreme Court argument and decision.<sup>134</sup> Having tipped its hand by these acts, and sanctioned *refoulement* in the interim, the Court could now hardly turn around and declare it illegal.

Once the Clinton administration played the "presidential card" before the Supreme Court, adopting the Bush policy as well as its briefs, the handwriting was on the wall. After President Clinton changed his position, Justices Kennedy, O'Connor, Souter, and Stevens—the potential swing votes—were left to wonder, "If two presidents can live with *refoulement* (including one who had once condemned it), why can't we?"

As Justice Blackmun's dissent cogently observed, the Court's opinion in *HCC-II* rested on three implausible assertions: that "the word 'return' does not mean return, . . . [that] the opposite of 'within the United States' is not outside the United States, and . . . [that] the official charged with controlling immigration has no role in enforcing an order to control immigration."<sup>135</sup> Justice Stevens first construed the legal prohibition against the "return" of aliens as inapplicable to this kind of return.<sup>136</sup> But the Kennebunkport Order itself authorized the Coast Guard "[t]o return" Haitian vessels and their passengers to Haiti, precisely the act that the law forbade.<sup>137</sup> Justice Stevens never explained why the plain meaning of the French word "*refouler*" did not apply to the Haitian situation, when French newspapers were contemporaneously reporting that "Les Etats-Unis ont décidé de *refouler* directement les réfugiés recueillis par la garde côtière."<sup>138</sup>

Second, Congress changed the statutory language from "The Attorney General is authorized to withhold deportation of any alien *within the United States*" to read, without geographic limit, simply that "The Attorney General

stay requests from Haitian refugee groups, *Haitian Refugee Ctr. v. Baker*, 112 S. Ct. 1073 (1992); *Haitian Refugee Ctr. v. Baker*, 112 S. Ct. 1245 (1992); had granted certiorari over the Haitians' opposition, *McNary v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 52 (1992); and had denied their motions both to expedite briefing, *McNary v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 4 (1992), and to suspend briefing until after Inauguration Day, *McNary v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 593 (1992).

134. *Haitian Ctrs. Council*, 113 S. Ct. at 2549. Significantly, during the October 1992 Term, the Supreme Court vacated or reversed the judgment of the Second Circuit in all but one of the eleven decisions for which it granted review. See Martin Flumenbaum & Brad S. Karp, *Second Circuit Review: Performance in the U.S. Supreme Court*, N.Y. L.J., Sept. 22, 1993, at 3.

135. *Haitian Ctrs. Council*, 113 S. Ct. at 2568 (Blackmun, J., dissenting) (citations omitted). I have critiqued the Court's opinion in *HCC-II* in *Reflections*, *supra* note 4, at 15-17, from which this Part derives.

136. *Haitian Ctrs. Council*, 113 S. Ct. at 2563-64 ("return" has a legal meaning narrower than its common meaning").

137. See Exec. Order No. 12,807, 3 C.F.R. 303-04 (1993) (appropriate directives will be issued "providing for the Coast Guard . . . to return the vessel and its passengers to the country from which it came").

138. *Le boubier haïtien*, LE MONDE, June 1, 1992, quoted in 113 S. Ct. at 2569 (Blackmun, J., dissenting) ("The United States has decided to directly *return* the refugees picked up by the Coast Guard.") (emphasis added).

*shall not* deport or *return any alien*” to conditions of persecution.<sup>139</sup> Yet Justice Stevens concluded that Congress had intended to extend statutory protection only to aliens *physically present* within the United States, even though Congress had specifically declined to use the term “alien physically present in the United States,” a phrase it employed frequently elsewhere in the same statute.<sup>140</sup> Third, the Court concluded that the statute’s directive to the “Attorney General” somehow did not limit the actions of the President and Coast Guard.<sup>141</sup> Yet, curiously, the Court appeared to acknowledge the self-executing nature of Article 33 of the Refugee Convention, which speaks of “No Contracting State” and hence plainly binds the President as head-of-state.<sup>142</sup> More troubling, the claim smacked of the Reagan administration’s claim during the Iran-*Contra* Affair that the Boland Amendments’ restriction upon United States agencies “involved in intelligence activities” did not bind the National Security Council, even when it engaged in intelligence activities.<sup>143</sup> If the Coast Guard was not enforcing the immigration laws when interdicting and returning fleeing Haitians, it was acting *ultra vires* and without statutory authority. Yet if it was enforcing those laws, it could only do so as an agent of the Attorney General, who alone by statute is granted “the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens,” with the flat proviso that she “shall not . . . return any alien” to conditions of persecution.<sup>144</sup>

But if the majority’s decision was so implausible, why was the vote so lopsided? On reflection, *Haitian Centers Council* stands at the crossroads of three recent lines of Supreme Court precedent: cases misconstruing international law, favoring presidential power, and disfavoring aliens and human rights. Together, these jurisprudential strands wove a noose from which plaintiffs could not escape.

139. *Haitian Ctrs. Council*, 113 S. Ct. at 2552 n.2 (emphasis added).

140. Compare *id.* at 2561-62 with provisions cited in *id.* at 2575-76 n.15 (Blackmun, J., dissenting).

141. *Id.* at 2559-60.

142. Justice Stevens’ decision in *Haitian Centers Council* hinted that Article 33 should be considered self-executing. See *id.* at 2562 & n.35. Consistent with this reading, Justice Stevens’ prior opinions in *INS v. Stevic*, 467 U.S. 407 (1984), and *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), had strongly suggested that Article 33 bound U.S. officials of its own force as soon as the U.S. acceded to the Refugee Protocol in 1968. See also *INS v. Doherty*, 112 S. Ct. 719, 729 (1992) (Scalia, J., concurring in part and dissenting in part) (“[A]fter 1968 . . . the Attorney General ‘honored the dictates’ of Article 33.1 in administering § 243(h).”).

143. See Harold Hongju Koh, *Boland Amendments*, in 1 ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY 111, 112 (Leonard W. Levy & Louis Fisher eds., 1994).

144. See 8 U.S.C. § 1103(a) (1988), cited in *Haitian Ctrs. Council*, 113 S. Ct. at 2575 (Blackmun, J., dissenting); 14 U.S.C. § 89(b) (1988) (“The officers of the Coast Guard insofar as they are engaged . . . in enforcing any law of the United States shall . . . be deemed to be acting as agents of the particular executive department . . . charged with the administration of the particular law [i.e., the Department of Justice] . . . and . . . be subject to all the rules and regulations promulgated by such Department . . . with respect to the enforcement of that law.”); see also *Haitian Ctrs. Council*, 113 S. Ct. at 2574 (Blackmun, J., dissenting) (“Even the challenged Executive Order places the Attorney General ‘on the boat’ with the Coast Guard.”).

### 1. *Misconstruing International Law*

*Haitian Centers Council* takes its place atop a line of recent Supreme Court precedent misconstruing international treaties. In the past few years, the Court has sanctioned the emasculation of a range of treaties governing international service of process,<sup>145</sup> taking of evidence,<sup>146</sup> bilateral extradition,<sup>147</sup> and now *nonrefoulement*. In each case, at the Government's urging, the Court applied a three-part technique that led it to sanction precisely the result the treaty was drafted to prevent.

First, in each case, the Court read unambiguous language to be ambiguous.<sup>148</sup> *HCC-II* represents the most egregious example, as a case not of single, but double plain meaning. Both the statute and the treaty mandated in unambiguous language the mutually reinforcing requirement that the United States shall not return or "refouler" "any alien" or "refugee" to his persecutors. The Court's role was to enforce this language as written, not to reconstrue it in light of current anti-alien sentiment or foreign policy exigencies. Yet Justice Stevens denied that either "return" or "refouler" meant "return" in this context, and reconstrued "any alien" to mean "any alien physically present in the United States."

Second, in each case the Court declined to construe the contested language in light of the treaty's object and purpose. Article 31 of the Vienna Convention on the Law of Treaties states the hornbook principle that treaties be construed first according to both their ordinary meaning and their object and purpose.<sup>149</sup> In each of the three predecessor cases, the object and purpose was to make the treaty's procedures the normal and presumptive mode for dealing with the problem in question. In *Alvarez-Machain*, Justice Stevens vigorously dissented, reasoning that the Court had construed an extradition treaty that was silent with regard to governmental kidnapping of criminal

145. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

146. *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987).

147. *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992).

148. *Schlunk*, for example, raised the question whether the Hague Service Convention "shall apply in all cases . . . where there is occasion to transmit a judicial or extrajudicial document for service abroad." 486 U.S. at 699 (quoting Hague Service Convention, 20 U.S.T. at 362). Relying principally on the Solicitor General's amicus brief, the Court held that U.S. plaintiffs are free to serve foreign defendants by serving their U.S. agents by nontreaty means—a substantial narrowing of the treaty—because such cases present no "occasion to transmit a judicial or extrajudicial document for service abroad." *Id.* at 707. Similarly, in *Aérospatiale*, Justice Stevens read the permissive language of the Hague Evidence Convention as creating no presumption in favor of resort to that treaty for extraterritorial discovery, even though the structure of the treaty clearly suggested that the signatories expected the Convention to provide the normal channels for transborder discovery. *See* 482 U.S. at 534-40. In *Alvarez-Machain*, the treaty's language demonstrated the parties' intent to provide mandatory procedures governing the extradition of persons in all cases not involving consensual rendition. Yet to avoid that language, the Court effectively wrote a new implied term into the treaty to authorize forcible, unconsented governmental kidnapping. *See* 112 S. Ct. at 2199 n.11 (Stevens, J., dissenting) ("[T]he Court has, in effect, written into Article 9 a new provision . . .").

149. Vienna Convention on the Law of Treaties, *supra* note 68, art. 31.

suspects to permit that result, which the treaty was drafted to forbid.<sup>150</sup> Writing for the Court in *HCC-II*, Justice Stevens similarly recognized that the drafters of the Convention Relating To the Status of Refugees “may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; *such actions may even violate the spirit of Article 33.*”<sup>151</sup> Yet, instead of construing the statute’s words consistently with that object and purpose, Justice Stevens construed them deliberately to *offend* the spirit of the treaty and the statute. As Justice Blackmun recalled, the refugee treaty’s purpose was to extend international protections to those who, having fled persecution in their own country, could no longer invoke that government’s legal protection.<sup>152</sup> He further recalled that the Convention was drafted to prevent a replay of the forced return of Jewish refugees to Europe.<sup>153</sup> Yet, Justice Stevens construed the treaty in a manner that would have permitted that result, so long as those refugees were hunted down and taken on the high seas.

Third, by subordinating text, the Court has elevated snippets of negotiating history into definitive interpretive guides. The Vienna Convention on Treaties directs that reliance on a treaty’s negotiating history is the alternative of last, not first, resort.<sup>154</sup> Justice Scalia has specifically argued that if “the Treaty’s language resolves the issue presented, there is no necessity of looking further to discover ‘the intent of the parties.’”<sup>155</sup> Yet, in *HCC-II*, the Court reversed a decades-old interpretation of a multilateral treaty by relying on statements of two foreign delegates that were never commented or voted upon by the United States, that were never presented to or considered by the Senate during its ratification of the Refugee Protocol, and that were explicitly rebutted by a sworn affidavit submitted by the U.S. government official who negotiated the treaty.<sup>156</sup>

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150. *Alvarez-Machain*, 112 S. Ct. at 2201-02 (Stevens, J., dissenting); see also *Schlunk*, 486 U.S. at 716 (Brennan, J., concurring in judgment) (“[H]ad we been content to rely on [the notions cited in the Court’s opinion], we would have found it unnecessary, in the first place, to participate in a [Service] Convention . . . .”); *Aérospatiale*, 482 U.S. at 551 (Blackmun, J., concurring in part and dissenting in part) (“By viewing the Convention as merely optional . . . , the majority ignores the policies established by the political branches when they negotiated and ratified the treaty.”).

151. *Haitian Ctrs. Council*, 113 S. Ct. at 2565 (emphasis added).

152. *Id.* at 2577 (Blackmun, J., dissenting).

153. *Id.*

154. Article 31 instructs courts to rely primarily on a treaty’s language and purpose. Vienna Convention on the Law of Treaties, *supra* note 68, art. 31. Article 32 permits use of the negotiating history in treaty construction only as a last resort, and even then, only if a plain language analysis “leaves the meaning ambiguous or obscure” or leads to a “manifestly absurd or unreasonable result.” *Id.* art. 32.

155. *United States v. Stuart*, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (quoting Majority, 489 U.S. at 366).

156. See Affidavit of Louis Henkin, appended to Brief for the Respondents, *McNary v. Haitian Ctrs. Council, Inc.*, excerpts appended to *Reflections*, *supra* note 4, at 144-47. *Alvarez-Machain*, *Schlunk*, and *Aérospatiale* each presented a variant on the same problem. In *Alvarez-Machain*, the Court read the negotiating history of the U.S.-Mexico extradition treaty as failing “to show that abductions outside of the Treaty constitute a violation of the Treaty.” 112 S. Ct. at 2194 & n.11. But as Justice Stevens’ dissent demonstrated, the U.S. government in fact “offered no evidence from the negotiating record, ratification

The Court further erred in invoking the “presumption against extraterritoriality” to argue against applying § 243(h) of the INA to aliens stopped on the high seas.<sup>157</sup> In its last three terms, the Court has refused to apply United States law extraterritorially to protect victims of employment discrimination,<sup>158</sup> environmental harm,<sup>159</sup> and federal torts.<sup>160</sup> But, as Justice Blackmun pointed out, in *HCC-II* the Court applied the presumption mechanically, without regard for the various rationales that underlie it. The statutory presumption against extraterritoriality was designed primarily to avoid judicial interpretations of a statute that infringe upon the rights of another sovereign.<sup>161</sup> Thus, the presumption should have had no force or relevance on the high seas, where no possibility exists for conflicts with other jurisdictions.

Nor did it make sense to presume that Congress had legislated with exclusively territorial intent when enacting a law governing a distinctively international subject matter—the transborder movement of refugees—that enforced an international human rights obligation embodied in a multilateral convention. Perhaps such a presumption might make sense when Congress regulates commercial activity, as opposed to immigration. But only a week after applying the presumption in *HCC-II*, the Court *permitted* extraterritorial application of the Sherman Act to foreign conduct that produces a substantial anticompetitive effect in the United States, without explaining exactly how the presumption against extraterritoriality had been overcome.<sup>162</sup>

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process, or later communications with Mexico to support the suggestion” of the Court: that the contracting states somehow intended to *authorize* unilateral invasions of each other’s territorial integrity to abduct criminal suspects. *Id.* at 2199 n.15 (Stevens, J., dissenting). Similarly, the *Schlunk* majority repeatedly cited snippets of negotiating history to argue that service is required via the Hague Service Convention only when the internal law of the forum state says there is “occasion to transmit” judicial documents for service abroad. 486 U.S. at 700-04. But, as Justice Brennan observed, statements by *the U.S. delegation* in the negotiating history strongly suggested the opposite conclusion: that the Convention’s terms “embody a substantive standard that limits a forum’s latitude to deem service complete domestically.” 486 U.S. at 708, 710-15 (Brennan, J., concurring in judgment). Finally, in *Aérospatiale*, the Court referred to negotiating history to avoid resort to the Hague Discovery Convention, 482 U.S. at 534-38, notwithstanding Justice Blackmun’s demonstration that “the very purpose of the United States’ participation in the treaty negotiations” was to obtain effective treaty procedures for securing extraterritorial discovery through treaty-based means. *Id.* at 561 (Blackmun, J., concurring in part and dissenting in part).

157. *Haitian Ctrs. Council*, 113 S. Ct. at 2560.

158. *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991).

159. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (dismissing for lack of standing); *see also id.* at 2150 n.4 (1992) (Stevens, J., concurring in judgment) (relying on presumption against extraterritoriality).

160. *Smith v. United States*, 113 U.S. 1178 (1993) (declining to apply Federal Tort Claims Act to tort claims arising in Antarctica).

161. *Haitian Ctrs. Council*, 113 S. Ct. at 2576-77 (Blackmun, J., dissenting).

162. *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2909-11 (1993) (“Although the proposition was perhaps not always free from doubt, . . . it is well established by now that the Sherman Act applies” to certain extraterritorial conduct) (citation omitted). Significantly, Justice Scalia’s partial dissent for himself and three others who had joined the *HCC* majority invoked the canon that statutes should not be interpreted to conflict with international law. *See id.* at 2919 (Scalia, J., dissenting). Yet if properly applied in *HCC-II*, that canon would have militated for, not against, extraterritorial application of the *nonrefoulement* provision of the INA. *See HCC-II*, 113 S. Ct. at 2575 n.13 (Blackmun, J., dissenting) (noting how the Court,

Finally, whether or not the Court properly applied the presumption against extraterritorial application of the INA, it should not have applied it to presume that the United States' obligations under Article 33 of the *Refugee Convention* are territorial.<sup>163</sup> It is nonsense to presume that treaty parties contract solely for domestic effect. Generally applied, such a presumption would permit the United States to commit genocide or torture on the high seas, notwithstanding the universal, peremptory prohibitions of the Genocide and Torture Conventions.<sup>164</sup>

In short, *Haitian Centers Council* looks curiously inward at a time when our allies look outward to greater reliance on international law to facilitate international commerce, migration, and democratization. The majority assumed that Congress did not mean what it said when it ratified a mutually reinforcing statute and treaty, that the negotiating parties intended through floor debate to undercut the treaty's explicit object and purpose, and that Congress enacted universal human rights obligations governing transborder activities with an exclusively territorial focus. The Court's consistent misinterpretation of international law reminds us that our current Justices, unlike John Marshall and John Jay, are no longer former diplomats well-schooled in the law of nations. Neither the Justices nor their clerks display command of basic international law precepts, at a time when the United States remains the world's only surviving superpower.<sup>165</sup> Our judges display both collective amnesia and minimal comfort when construing international law.<sup>166</sup> It hardly surprises, then, that they should look to other sources of guidance when deciding international law cases.

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erroneously "reasoning backwards, . . . actually looks to the *American* scheme to illuminate the *Treaty*" (emphasis in original)).

163. *Haitian Ctrs. Council*, 113 S. Ct. at 2565 ("[A] treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.").

164. As Justice Blackmun pointed out, "The presumption [against extraterritoriality] runs throughout the majority's opinion," including, inexplicably, its analysis of the treaty. *Id.* at 2576 (Blackmun, J., dissenting).

165. On the day after announcing his retirement, Justice Blackmun made precisely this point in a speech before the American Society of International Law. See Harry A. Blackmun, *The Supreme Court and the Law of Nations: Owing a Decent Respect to the Opinions of Mankind*, in PROCEEDINGS OF THE 88TH ANNUAL MEETING OF THE AMERICAN SOC'Y OF INT'L LAW (Apr. 7, 1994) (forthcoming 1994) (criticizing the Court for misconstruing international law in *Alvarez-Machain, HCC*, and *Stanford v. Kentucky*, 492 U.S. 361 (1989) (permitting execution of certain juvenile offenders)).

166. *TPLL*, *supra* note 2, at 2362-64, 2394-98. It is striking that in this day and age, international law is still not a required subject in United States law schools. Nor are basic rules of international law tested on either state or multistate bar examinations, even though the U.N. Convention on Contracts for the International Sale of Goods, Doc. A/Conf. 97/18, Annex I (Vienna 1980) (entered into force Jan. 1, 1988), for example, now overrides state contract rules as the governing law with respect to contracts for the sale of goods between parties whose places of business are located in contracting states.

## 2. Favoring Presidential Power

The line of Supreme Court precedents favoring presidential power presents the most prominent alternative source. The President has not lost a major foreign affairs case before the Court since the *Steel Seizure* case, and he has won many by asserting assorted justiciability defenses.<sup>167</sup> In at least one of these cases, Justice Stevens provided the President with the decisive vote on the merits.<sup>168</sup> One dim silver lining of *HCC-II* is that the Court refused to credit the Government's various claims of nonreviewability, thus avoiding broad future insulation of parallel executive conduct from judicial examination.<sup>169</sup>

Justice Stevens did, however, add two new and surprising glosses to existing presidential power precedents. First, in dictum he cited the infamous *Curtiss-Wright* case<sup>170</sup> to suggest that the statutory presumption against extraterritoriality has "special" force when courts construe "statutory provisions that may involve foreign and military affairs for which the President has unique responsibility."<sup>171</sup> But as Justice Blackmun correctly noted, "[t]he presumption that Congress did not intend to legislate extraterritorially has *less* force—perhaps, indeed, no force at all—when a statute on its face relates to foreign affairs."<sup>172</sup> In such circumstances, the presumption should in fact, run the other way, i.e., in favor of extraterritorial application of United States law unless Congress otherwise indicates.<sup>173</sup>

Second, the Court blindly accepted the Government's claim, newly minted for oral argument, that the case "concern[ed] the scope of the *President's* emergency powers to adopt measures that he deems to be necessary to prevent a mass migration of aliens across the high seas."<sup>174</sup> Yet the plaintiffs never sued the President, only his subordinates. Nor did they challenge his

167. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). See generally cases cited in KOH, *supra* note 1, at 134-49.

168. See *Regan v. Wald*, 468 U.S. 222 (1984) (upholding Reagan administration's authority to regulate travel to Cuba).

169. The Government claimed that the Second Circuit's ruling was collaterally estopped by the Eleventh Circuit's ruling in *Haitian Refugee Ctr. v. Baker*; that the INA precluded judicial review of plaintiffs' claims for classwide relief; and that the Administrative Procedure Act, 5 U.S.C. § 702(1) (1988), required the District Court to dismiss the case and deny equitable relief. See Brief of Petitioners at 13-27, 55-57, *Haitian Ctrs. Council* (No. 92-344). The Court did not even mention these arguments in rendering its ruling on the merits.

170. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); see also KOH, *supra* note 1, at 94 ("Among government attorneys, Justice Sutherland's lavish description of the president's powers is so often quoted that it has come to be known as the '*Curtiss-Wright*, so I'm right' cite . . .").

171. *Haitian Ctrs. Council*, 113 S. Ct. at 2567.

172. *Id.* at 2577 (Blackmun, J., dissenting).

173. For a persuasive argument along these lines, see generally Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992).

174. Transcript of Oral Argument (Deputy Solicitor General Mahoney) at 1 (emphasis added). Cf. *Haitian Ctrs. Council*, 113 S. Ct. at 2567 ("[W]e are not persuaded that either [treaty or statute] places any limit on the President's authority to repatriate aliens interdicted beyond the territorial seas of the United States.").

constitutional authority to direct foreign and military policy. Neither President Bush nor President Clinton issued a new proclamation nor declared a national emergency to deal with the refugee problem. The President's executive order did not even mandate that the Attorney General or Coast Guard return interdicted Haitians to Haiti. Instead, the President only ordered that "appropriate instructions" be issued, "provided . . . that the attorney general, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent."<sup>175</sup> The plaintiffs argued that the President's order could not grant the Attorney General such unreviewable discretion to return possible refugees, because the statute, treaty and executive agreement all *removed* that discretion. Even on the high seas, they argued, the President's word is not the only law: Just as the Taft-Hartley Act had removed Secretary Sawyer's discretion to seize Youngstown's steel mills during the Korean War, section 243(h) of the INA, Article 33 of the Refugee Convention, and the 1981 U.S.-Haiti accord each removed the Attorney General's discretion to return fleeing refugees in far less emergent circumstances.<sup>176</sup>

The Court rejected that claim, deciding that the presumption against extraterritoriality prevented the statute from removing that discretion.<sup>177</sup> But strangely, the Court chose to invoke the presumption in a case where the executive branch itself had cited the statute as the basis for its own extraterritorial authority to act. If, as the Court concluded, the presumption operated to deny the Haitians extraterritorial statutory protection, a fortiori it should also have operated to deny the President extraterritorial authority to stop the Haitians in the first place.<sup>178</sup> Thus, properly understood, *HCC* fell within Category III of Justice Jackson's famous concurrence in *Youngstown*, in which the executive's "power is at its lowest ebb" because executive officials act in a manner "incompatible with the express or implied will of Congress,"<sup>179</sup> expressed here in the statutory and treaty mandates that "[v]ulnerable refugees shall not be returned" to their persecutors.<sup>180</sup>

### 3. *Disfavoring Aliens and Human Rights*

Finally, *HCC* joins the long line of recent Court rulings disfavoring aliens and denying enhanced judicial protection for international human rights.<sup>181</sup>

175. Exec. Order 12,807, *supra* note 25, 3 C.F.R. 303 (1992).

176. Indeed, *HCC* presented an even less compelling case than *Youngstown*, inasmuch as the Taft-Hartley Act, unlike INA § 243(h), did not expressly remove the lower executive official's discretion to perform the challenged act.

177. *Haitian Ctrs. Council*, 113 S. Ct. at 2560.

178. See Brief for the Respondents, *McNary v. Haitian Ctrs. Council, Inc.*, excerpts appended to *Reflections*, *supra* note 4, at 40.

179. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

180. *Haitian Ctrs. Council*, 113 S. Ct. at 2568 (Blackmun, J., dissenting).

181. For a review of the Court's immigration jurisprudence, see Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1985). For discussion



If, as I have argued elsewhere, the archetypal “good” alien favored by American immigration law is a white, European, healthy, heterosexual, self-sufficient refugee, arriving alone in search of political asylum—Mikhail Baryshnikov, for example—it hardly surprises that black, poor Caribbean migrants arriving in large numbers, many afflicted with HIV (a disease associated with homosexuals) should fare poorly in our courts.<sup>182</sup> In addition to the Haitian case, in the last two terms alone, the Court upheld the INS policy of arresting and detaining unaccompanied minors,<sup>183</sup> and vacated lower court orders directing the INS to accept legalization applications beyond the statutory deadline.<sup>184</sup> Although the Court has long disfavored aliens seeking entry into the United States,<sup>185</sup> in recent years it has come to look skeptically even upon the claims of asylum seekers<sup>186</sup> as well as those invoking not an affirmative right to enter, but the negative right not to be returned to their persecutors.<sup>187</sup>

The Court’s skepticism toward this basic human right reflects its broader reluctance to apply enhanced judicial scrutiny to international human rights abuses. In recent years, the Court has denied foreign plaintiffs the right to sue foreign sovereigns under the Alien Tort Statute<sup>188</sup> and denied a criminal defendant the protection of an extradition treaty crafted to prevent his kidnapping.<sup>189</sup> Last year, in *Saudi Arabia v. Nelson*, the Court immunized a foreign sovereign for using police to commit torture within an employment relationship, reasoning that “however monstrous such abuse undoubtedly may be, a foreign state’s exercise of the power of its police has long been understood . . . as peculiarly sovereign in nature.”<sup>190</sup>

The *Nelson* Court’s reasoning suggests that the Court has yet to grasp two fundamental international human rights principles established at Nuremberg: that courts may pierce the veil of state sovereignty when governmental officials

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of the numerous judicial rulings against Haitians, see, e.g., Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269 (1993); Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch’s Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEO. IMMIGR. L.J. 1 (1993).

182. See generally Koh, *supra* note 131.

183. *Reno v. Flores*, 113 S. Ct. 1439 (1993).

184. *Reno v. Catholic Social Servs., Inc.*, 113 S. Ct. 2485 (1993).

185. See U.S. *ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”), *cited in* Transcript, *supra* note 174, at 4 (oral argument of Deputy Solicitor General Maureen Mahoney).

186. *INS v. Elias-Zecharias*, 112 S. Ct. 812 (1992) (defining narrowly circumstances in which alien fears persecution because of political opinion).

187. The Court had previously taken more generous views of the right to *nonrefoulement* in *INS v. Stevic*, 467 U.S. 407 (1984), *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), and *INS v. Doherty*, 112 S. Ct. 719, 729 (1992) (Scalia, J., concurring in part and dissenting in part).

188. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

189. *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992). As Justice Stevens recognized in *Alvarez-Machain*, extradition treaties exist not simply to impose obligations on states to surrender criminal suspects, but also to safeguard fugitives’ rights and to protect individual freedom against arbitrary detentions. *Id.* at 2197-2206 (Stevens, J., dissenting).

190. 113 S. Ct. 1471, 1479 (1993).

commit international crimes, and that “courts—both international and domestic—are peculiarly appropriate fora for determining official rights and responsibilities for crimes against humanity.”<sup>191</sup>

Not surprisingly, *HCC*'s statist account of the President's struggle to deal with the modest Haitian refugee outflow never mentioned the human plight of the refugees themselves.<sup>192</sup> Only Justice Blackmun, long a guardian of human rights, international law, and aliens,<sup>193</sup> heard the Haitians' “modest plea, vindicated by the Treaty and the Statute” that “the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse, and death.”<sup>194</sup>

#### IV. THE “HAITI PARADIGM” IN U.S. HUMAN RIGHTS POLICY

The Court's opinion in *HCC* took pains to specify that neither the morality nor the “wisdom of the policy choices made by Presidents Reagan, Bush, and Clinton is . . . a matter for our consideration.”<sup>195</sup> But no assessment of the Haitian crisis would be complete without evaluating the soundness of those policies.

A conventional wisdom now heard is that President Bush wisely “bit the bullet” on the Haitian refugee problem. In a world of failed states, global recession, and massive refugee outflows, the argument goes, the United States needed to draw a line in the sea somewhere, akin to the “line in the sand” drawn when Iraq invaded Kuwait. By this reasoning, the *HCC* lawsuit quixotically avoided the real problem: that candidate Clinton was naive to make his campaign promises to fleeing Haitians in the first place. Under this view, President Clinton was wrong before, but is right now. Upon taking office he finally recognized that returning Haiti's refugees was in America's interests and thus chose to maintain Bush's repatriation policy.

In my judgment, this assessment is upside down. President Clinton was right before and is wrong now. Watching the U.S. Government's Haitian policy unfold has been like watching a slow-motion train wreck, as two administrations have missed or mishandled one policy opportunity after another. As it currently stands, our policy toward Haiti is perilously close to upside down: too hard on Haitian refugees, yet too soft on the illegal military coup. The United States government has failed to recognize or fully promote

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191. *TPLL*, *supra* note 2, at 2359. See generally Paul Kahn, *From Nuremberg to the Hague: The United States Position in Nicaragua v. United States and the Development of International Law*, 12 *YALE J. INT'L L.* 1, 5-12 (1987).

192. 113 S. Ct. at 2552-56.

193. See, e.g., Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 *HAMLIN L. REV.* 51 (1985); Blackmun, *supra* note 165.

194. 113 S. Ct. at 2577 (Blackmun, J., dissenting).

195. *Id.* at 2556.

its national interests in preserving democracy and human rights in Haiti. How did this happen?

### A. *The Haiti Paradigm*

Even a quick look back at the Haiti Story, sketched in Part II, reveals its paradigmatic character. A powerful developed nation, here the United States, proclaims a policy of supporting and promoting democracy and human rights abroad. Another nation, here Haiti, attempts to construct both civil society and political order against large odds. That effort fails, because of coup d'état, insurrection, civil strife, or external invasion, yet the United States' initial response is largely *executive inaction*.

Unchecked, human rights abuses start to worsen and proliferate. Refugees begin to flee, in increasingly large numbers.<sup>196</sup> At this point, the executive branch finally reacts forcefully, but to the refugees, not the underlying political crisis. This period of *executive action* is followed by *legislative inaction*, in response to which private litigants—nongovernmental organizations and human rights advocates—bring a *transnational public lawsuit*, seeking to prod the government to more proactive, human rights-sensitive measures. After initial judicial victories, the harsh executive position begins to soften, but that response ends when the *Court legitimates the executive action*. The net result is upside-down human rights policy. The U.S. government's official positions, now legitimated by judicial endorsement and legislative acquiescence, are anti-refugee and curiously tolerant of human rights abusers, a far cry from the officially enunciated policies of democracy and human rights.

Although the recent Haitian saga plays out this scenario most completely, with variations, we have witnessed this paradigm unfolding in numerous locales over the last two decades: in Burma, Cambodia, Cuba, El Salvador, Guatemala, Liberia, Rwanda and Vietnam, just to name some of the most obvious. Some large-scale refugee outflows of, for example, Chinese, Cuban Marielitoes, Ugandan Asians, and Burmese Arakan Muslims, have resulted from specific policies of expulsion or repression pursued by domestic rulers.<sup>197</sup> Other refugee outflows that have transpired outside this hemisphere—for example, the flights of Albanian, Bangladeshi, Bosnian, Cambodian, Somalian, and Vietnamese refugees—have mainly affected countries other than the United States.<sup>198</sup>

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196. For an intriguing examination of the paradigmatic link between political strife, environmental scarcity, and refugee outflows, as illustrated in Haiti, see Thomas Homer-Dixon, *Across the Threshold: Empirical Evidence on Environmental Scarcities as Causes of Violent Conflict*, INTERNATIONAL SECURITY (forthcoming Spring 1994) (manuscript at 23-25, on file with author).

197. GIL LOESCHER, BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS 19 (1994).

198. See generally HUMAN RIGHTS WATCH WORLD REPORT 1993, at 41-47, 157-61, 193-200, 206-09, 262-78 (1993).

On some occasions, the paradigm has not played out fully, because one institutional player or another has not played its expected role. In rare cases, for example, Congress has overcome inertia and become energized, heading off this vicious cycle by provoking the executive branch to take firmer action in the initial phase of the crisis.<sup>199</sup> Similarly, although transnational lawsuits like *HCC* have rarely won final judgments, they have sometimes worked amelioration of U.S. government policy, usually as damage-control and public awareness measures, filed after governmental malfeasance or nonfeasance have reached objectionable levels.<sup>200</sup> In short, neither legislative action nor private litigation can retrospectively cure initial failures of executive policy—whether unjustified inaction or misguided reaction—that are committed early in a human rights crisis. The question thus becomes: By what principles should executive officials act when there is still time to forestall a human rights debacle?

### B. *The Haiti Lessons*

To measure an administration's human rights performance, we need to evaluate both the administration's rhetoric and its actions.<sup>201</sup> With regard to rhetoric, President Clinton deserves great credit for being the first American President since Jimmy Carter to place human rights prominently on his foreign policy agenda.<sup>202</sup> Secretary of State Christopher's opening address to the

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199. See, for example, Congress' role in supporting Corazon Aquino's fledgling government in the Philippines. Carl H. Lande & Richard Hooley, *Aquino Takes Charge*, 64 FOR. AFF. 1087 (1986). On other occasions, Congress has acted only after the human rights crisis has become protracted. See, e.g., RICHARD LUGAR, LETTERS TO THE NEXT PRESIDENT 208-47 (1988) (describing battle over South Africa sanctions bill); DAVID P. FORSYTHE, HUMAN RIGHTS AND U.S. FOREIGN POLICY 137-51 (1988).

200. In addition to the Haitian and Chinese suits, cited in *supra* note 102, see also Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985); Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983); Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988); Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986) (challenging as arbitrary long-term detention of Mariel Cubans).

201. An administration's *rhetoric* can be judged by how broadly it chooses to define human rights and the extent to which it judges the protection of those rights to be in the national interest. An administration's *actions* encompass its *personnel appointments*, acts of *intervention* (to prevent ongoing human rights abuses), acts of *accountability* (to promote remedies for past human rights abuses), and *preventive measures* (to forestall future human rights abuses).

202. That pattern began during the campaign in candidate Clinton's speech to the University of Wisconsin Institute of World Affairs on October 1, 1992. Democracy and human rights were also a prominent theme of Clinton's State of the Union Speech in January 1994, President William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union (Jan. 25, 1994), reprinted in WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS 154-55 (1994), and Warren Christopher's Senate confirmation hearings, *Hearing of the Senate Foreign Relations Committee*, Fed. News Serv., Jan. 13, 1993, at 71, 86 (Confirmation Hearing for Warren Christopher as Secretary of State), available in LEXIS, News Library, Currnt File. President Jimmy Carter had decided early in his presidency that "the demonstration of American idealism was a practical and realistic approach to foreign affairs, and [that] moral principles were the best foundation for the exertion of American power and influence." CARTER, *supra* note 108, at 143. Yet Carter was by no means the first President to emphasize international human rights. Woodrow Wilson's interest in the League of Nations, Franklin Delano Roosevelt's "Four Freedoms" speech, 87-1 CONG. REC. 44 (1941), and John F. Kennedy's inaugural address all sounded idealistic human rights

Vienna World Conference on Human Rights serves as the touchstone for a Clinton foreign policy of “democracy and human rights.”<sup>203</sup> Yet on closer examination, Secretary Christopher’s observation that “advancing democratic values and human rights serves our deepest values as well as our practical interests” carefully straddles the twin rationales usually urged for promoting human rights abroad: the *intrinsic* rationale (“promoting human rights is right and comports with our national values”) and the *instrumental* rationale (“promoting human rights serves our national interests”).<sup>204</sup> Thus, Christopher’s rhetoric hinted that the Clinton administration had accepted the Reagan-Bush administration’s rhetorical shift away from Jimmy Carter’s intrinsic emphasis on promoting human rights *per se* toward an instrumentalist emphasis on promoting democracy—and through a “trickle down” effect, human rights—as a *means* to pursuing other national interests.<sup>205</sup>

In hindsight, the Bush administration’s instrumentalist human rights policy failed to define any vision of the proper role of human rights in the “New World Order.” Thus, while President Bush presided over human rights advances in Eastern Europe, South Africa, Central America, to name several areas, he never articulated why human rights should take consistent priority in U.S. foreign policy. During the campaign, candidate Bill Clinton recognized

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themes. The impetus for the Carter human rights policy came from Congress in 1973-1974 amid its post-Watergate, post-Vietnam disgust over the perceived amorality of the Nixon-Kissinger foreign policy. During that period, Congressman Don Fraser of Minnesota held numerous hearings before the House Foreign Affairs Committee’s Subcommittee on International Organization and Movements that led to the enactment of a series of laws designed to elevate the status of human rights in U.S. foreign policy. See generally FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 502-44 (1990).

203. In that speech, he said:

Over the course of two centuries, Americans have found that advancing democratic values and human rights serves our deepest values as well as our practical interests.

That is why the United States stands with the men and women everywhere who are standing up for these principles. And that is why President Clinton has made reinforcing democracy and protecting human rights a pillar of our foreign policy. . . .

. . . .  
. . . .

In this post-Cold War era, we are at a new moment. Our agenda for freedom must embrace every prisoner of conscience, every victim of torture, every individual denied basic human rights.

*Democracy and Human Rights: Where America Stands, Address Before the Vienna World Conference on Human Rights* (June 14, 1993), reprinted in 4 DEP’T STATE DISPATCH, No. 25, at 1.

204. For an earlier defense of the position that human rights in U.S. foreign policy serves our national interests, see Warren Christopher, Human Rights and the National Interest, BUREAU OF PUBLIC AFFAIRS, U.S. DEP’T OF STATE, Current Policy No. 206 (1980), reprinted in NEWMAN & WEISSBRODT, *supra* note 202, at 504:

A firm emphasis on human rights is not an alternative to “realpolitik,” nor is it simply a side issue in our foreign policy. It is, instead, a central part of a pragmatic, tough-minded policy. Our human rights policy serves not just the ideals but the interests of the United States.

205. This instrumentalist turn led President Reagan, for example, to appeal for *Contra* funding in the language of democracy and human rights, see Tamar Jacoby, *The Reagan Turnaround on Human Rights*, 64 FOR. AFFS. 1066 (1986), and led President Bush to use the rhetoric of human rights to rally a coalition of nations against Iraqi aggression in Kuwait, while ignoring that rhetoric in the face of nondemocratic human rights abuses by governments such as Saudi Arabia and Kuwait. For the theoretical wellspring of this policy, see Jeanne Kirkpatrick, *Dictatorships and Double Standards*, COMMENTARY, Nov. 1979, at 34.

and attacked this failing.<sup>206</sup> But it remained to be seen whether his administration could articulate and sustain a principled human rights policy that would not be jettisoned in the face of perceived competing national interests. Would Clinton's heightened rhetoric on democracy and human rights translate into intrinsic support for human rights, or constitute implicit acceptance of a limited, instrumentalist human rights agenda that aimed principally to promote market-based democracies?

At Vienna, Secretary Christopher conceded that "[i]n the battle for democracy and human rights, words matter, but what we *do* matters much more."<sup>207</sup> Although the administration's early appointments in human rights have been excellent,<sup>208</sup> the acid test of a nation's human rights policy comes when it contemplates intervention to prevent ongoing abuses.

When the United States confronts consistent patterns of gross human rights violations of the kind that have occurred in Haiti since the September 1991 coup, a range of foreign policy options are at its disposal. These options can be grouped into four levels, ranging from Level One, the least interventionistic, to Level Four, the most interventionistic. Level One, *Domestic Actions*, includes all of those policy steps our government could take at home in the United States, without the help or assistance of other nations, to condemn human rights abuses abroad. Such measures include: (1) adopting international human rights standards as U.S. domestic law by treaty or statute; (2) maintaining consistent public moral outrage and condemnation of human rights abuses abroad; (3) accurately monitoring, reporting, and certifying those abuses; and (4) providing temporary safe haven for refugees who come to our shores—not necessarily asylum, but some form of temporary refuge or protected status until the political crisis can be solved.

Level Two, *Political Intervention*, embraces more proactive policy measures, such as (1) diplomatic intervention and (2) regional political action, and so forth, for example, the "mobilization of shame" through OAS resolutions. Moving to Level Three, *Economic Intervention*, a nation can withhold carrots—deny economic benefits—or brandish sticks—impose economic sanctions. Denial of benefits includes withholding (1) trade benefits, such as Most-Favored-Nation Status, membership in the General System of Preferences, etc.; (2) multilateral loans; (3) visas; (4) export licenses; (5) air

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206. In his 1992 Wisconsin speech, *supra* note 202, Clinton declared:

Our nation has a higher purpose than to coddle dictators and stand aside from the global movement toward democracies . . . President Bush seems too often to prefer a foreign policy that embraces stability at the expense of freedom.

207. Christopher, *supra* note 204, at 1.

208. For example, Assistant Secretary of State John Shattuck, Solicitor General Drew Days, INS Commissioner Doris Meissner, and National Security staff member Morton Halperin all have substantial human rights backgrounds. It remains to be seen how much they will be actually involved in substantive policymaking. In the Haitian situation, for example, it seems clear that Shattuck's voice, at least, has been suppressed. See Steven A. Holmes, *Rebuking Aide, U.S. Says Haiti Policy Stands*, N.Y. TIMES, Dec. 16, 1993, at A6; text accompanying note 228 *infra*.

landing rights; (6) foreign aid;<sup>209</sup> or (7) anything else the target nation might hold dear—the Olympic Games, for example, in the recent case of China. Imposition of economic sanctions includes the whole range of options available under the President's unilateral or multilateral emergency economic powers, for example, (1) assets freezes, (2) trade embargoes, and (3) blockades of oil.<sup>210</sup>

Finally, when all else fails, the U.S. could theoretically pursue "Level Four" options: *Military Intervention*.<sup>211</sup> Such options would range from (1) limited forms of humanitarian rescue, to (2) military intervention to provide food and humanitarian assistance—as in Somalia, for example—to (3) limited intervention, to (4) larger-scale multilateral enforcement activities.

We need not agree on how far the U.S. should go in any particular situation to agree upon six basic propositions. First, *displaying nonneutrality* in the face of gross violations of human rights. Even if the United States is not prepared to intervene to stop the abuses, it should not act as a neutral broker between perpetrators and victims of gross human rights abuses.

Second, *keeping the pressure up*. If the U.S. government chooses to intervene, whatever it chooses to do at Level One (*Domestic Actions*) should not be relaxed as it moves up the spectrum to higher levels of sanctions. Thus, if the Haitian regime proves recalcitrant, the United States should keep the pressure constant at the low end of the intervention spectrum, then ratchet up the pressure as more leverage is needed.

Third, *avoiding doing too little, too late*. Economic sanctions will not bite if a nation freezes bank accounts after the deposits have been withdrawn; similarly, oil embargoes will not work if they are imposed after stockpiles have been built up. Democracies are fragile, and once a democratically elected government has been ousted, its ability to resume power has a very short half-life. Many Level Three sanctions will mean nothing unless they are imposed swiftly and aggressively.

Fourth, *offering safe haven*. The refugee outflow from Haiti is not the problem, but the symptom. While Aristide was in power, few Haitians fled. To solve the human rights crisis, a nation must first address the democracy crisis. But at the same time, it must show the refugees minimal compassion by offering them some form of refuge until democracy is restored.<sup>212</sup>

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209. This includes security assistance under § 502B of the Foreign Assistance Act of 1961, 22 U.S.C. § 2304 (1988), or general or country-specific development assistance under § 116 of the same act. See generally NEWMAN & WEISSBRODT, *supra* note 202, at 510-22.

210. See generally BARRY CARTER, INTERNATIONAL ECONOMIC SANCTIONS (1988).

211. By listing military intervention as a policy option, I do not necessarily advocate it for Haiti, nor do I address the domestic constitutional question of whether congressional approval would be required for such action under either the War Powers Clause of the Constitution, U.S. CONST. art. I, § 8, cl. 11, or the War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1988).

212. Ironically, this point was recognized in 1980 by then-Deputy Secretary of State Warren Christopher in a speech entitled "Human Rights and the National Interest," where he observed:

Fifth, *demanding accountability* for gross abuses. Human rights violators have no incentive to cease their violations unless they know they will be held accountable for their crimes.<sup>213</sup> Broad amnesty provisions effectively require democratically elected leaders to tolerate and coexist with killers.

Sixth and finally, *pursuing regional burden-sharing approaches* to the restoration of democracy and human rights. For example, both refugee policy and the restoration of democracy in Haiti are *American*, not exclusively United States', problems. Both issues affect all nations in the region, and should be addressed by short- and long-term multilateral solutions agreed to by the member states of Organization of American States (OAS) and the United Nations. The goal of any effective United States policy should thus be to develop long-term regional burden-sharing solutions to the democracy problems, while initiating interim measures to address the refugee problem humanely and to mobilize public and multilateral support for both efforts.

Applying these principles of intervention, what should the United States have done in September 1991, when the Aristide government was first overthrown? At the outset, the United States should have begun at Level One measures and moved quickly up the scale, keeping the pressure up and avoiding too little, too late. The United States should have aggressively criticized the Haitian regime for violating international human rights; accurately monitored, reported, and certified human rights abuses; and put into place a humane temporary safe haven policy for Haitian refugees until democracy could be restored. Applying the regional burden-sharing principle, the United States should have quickly convened regional bodies to develop a program of multilateral action toward both the Haitian military regime and the interim problem of dealing with refugee outflows. Such a program would have been authorized by the Santiago Commitment to Democracy and the various OAS resolutions urging the restoration of constitutional government in Haiti.<sup>214</sup>

As the crisis continued, our government should have kept the pressure up. Without relaxing moral condemnation, political reporting, or its safe haven policy (Level One responses), the government should have moved quickly to full-scale economic sanctions, (Level Three), while preserving limited forms of military intervention as an option. In negotiations with the coup leaders, the

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{O}ur support for human rights may offer the only long-term solution to one of the most pressing problems on the international agenda—the problem of refugees. . . . When a government respects the human rights of its citizens, refugees are a rare phenomenon. And we know that refugees are more likely to return home when the human rights situation has improved at home.

Christopher, *supra* note 204, at 506.

213. See LAWRENCE WESCHLER, *A MIRACLE, A UNIVERSE: SETTling ACCOUNTS WITH TORTURERS* 4 (1990) (accountability is the difference "between knowledge and acknowledgement . . . knowledge when it becomes officially sanctioned, when it is made part of the public cognitive scene" (quoting philosopher Thomas Nagel)).

214. See *supra* text accompanying notes 12-13.



United States should have acted not as a neutral broker, but as a backer of the democratic government, and should have flatly rejected any pleas for amnesty for gross human rights abuses.

In fact, the U.S. government did not follow these straightforward policy prescriptions. When the Haitian coup occurred in the fall of 1991, the Bush administration started at Level One, with moral condemnation and regional approaches to political solutions, but imposed economic sanctions too slowly and timidly. When boatloads of refugees started to come, the Bush administration began to view the refugees, not the regime, as the problem.

The Bush administration never fully understood that the Haitians sought *nonrefoulement*, not entry. Those with credible fears of persecution did not demand asylum, but only safe haven until order in Haiti was restored. Nor would granting safe haven within the United States have been nearly as burdensome as alarmists predicted. The United States had taken in as many as 900,000 Cubans over the past several decades.<sup>215</sup> By comparison, during six months of unregulated out-migration, with little or no political progress on restoration of democracy at home, only 34,000 Haitians fled.<sup>216</sup> Even this relatively small group of refugees could have been held lawfully in a truly humanitarian refugee camp at Guantánamo.<sup>217</sup>

In May 1992, instead of pursuing these lawful options, President Bush abandoned the safe haven principle altogether and adopted an unprecedented policy of summarily returning all Haitians directly to Haiti. Once he took this step, it became inevitable that his administration would trim its Level One intervention, relax its moral condemnation of human rights violations in Haiti, skew its monitoring and reporting of those abuses, and undercut the acceptance of international human rights standards at home.

Then-presidential candidate Clinton appropriately criticized the “Bush Administration’s cruel policy of returning Haitian refugees to a brutal dictatorship without an asylum hearing.”<sup>218</sup> Yet upon assuming office, he endorsed that policy as his own and defended the Bush repatriation policy before the Supreme Court. The Clinton administration simply did not search long or hard enough before adopting the Bush alternative of summary

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215. See Brief of *Amici Curiae* American Jewish Committee and Anti-Defamation League, *supra* note 44, at 13.

216. 113 S. Ct. at 2554.

217. The *HCC* plaintiffs never objected to the refugees’ being held on Guantánamo per se; rather, they objected to the United States military treating refugees there like prisoners of war, denying them due process rights, access to counsel, and adequate medical and living conditions. The base is 47 square miles large and does have substantial available capacity. A lawful, humanitarian safe-haven site could have been prepared at Guantánamo with the following features: shelters capable of withstanding the elements; refugees housed in family groups and allowed freedom of movement within the camp; U.S. private voluntary agencies and the UNHCR, rather than the military, assisting in the administration of the camp (e.g., religious, education, and recreational services); the U.S. Public Health Service, rather than the military, providing health care; and mail and phone access as well as ready access for press, human rights monitors, volunteer religious organizations, doctors, and lawyers.

218. See *Litigating as Law Students*, *supra* note 4, at n.61.

*refoulement*. All the Haitians asked was that the Clinton administration return to the decade-old Reagan-Bush policy of *interviewing* Haitians before returning them to their alleged persecutors. Surely with enough jawboning, and a firm commitment to the principle of regional-burden-sharing, the administration could have persuaded other nations in the region—such as Canada, Venezuela, and Mexico—to take their share of refugees while the political crisis was being negotiated. Similarly, the Clinton administration has never acknowledged that its offer of refugee processing at sites within Haiti has provided minimal relief for Haitians genuinely fearful of political persecution.<sup>219</sup> Even those rare refugees who have successfully pursued in-country processing have been arrested and held for days by the Haitian military, despite protests from the White House itself.<sup>220</sup> Nor did the administration adequately explore the “Kurdistan Solution,” that is, the possibility of forestalling dangerous sea voyages by establishing safe-haven sites *within* Haiti.<sup>221</sup>

At Governors Island last summer, these errors were compounded. Instead of keeping the pressure up, Clinton administration spokesmen urged that the trade sanctions be lifted *before* President Aristide returned to Haiti. After sanctions were lifted, the coup leaders stockpiled oil for months, giving them supplies to weather the subsequent reimposition of sanctions. In attempting to broker a neutral settlement, the Clinton envoys supported a broad grant of amnesty to the military leaders even for major human rights abuses, violating principles of accountability and effectively eliminating the junta’s incentives not to work such abuses. The United States did not insist that the key coup leaders leave Haiti, although our government had not hesitated to make similar requests in the cases of Jean-Claude Duvalier, Prosper Avril, and Ferdinand

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219. See generally Brief of *Amicus Curiae* Human Rights Watch, *supra* note 43.

220. A case in point is that of a Haitian soldier who refused to obey the military regime, fled Haiti by boat, and was summarily returned pursuant to the Kennebunkport Order. When he applied for refugee status in Haiti, United States immigration authorities finally recognized his well-founded fears of persecution and gave his application expedited status. Yet even after that application was approved, he was arrested by military officials at the airport in Haiti and held for six days, winning release only after a rare, direct protest from the White House. See Deborah Sontag, *Haiti Arrests Man on Way to Asylum in the U.S.*, N.Y. TIMES, Mar. 14, 1993, at A8.

221. See, e.g., David Martin, *Strategies for a Resistant World: Human Rights Initiatives and the Need for Alternatives to Refugee Interdiction*, 26 CORNELL INT’L L.J. 753, 766 (1993); Michael Stopford, *Humanitarian Assistance in the Wake of the Persian Gulf War*, 33 VA. J. INT’L L. 491 (1993). The Clinton administration could have asked the United Nations and/or the OAS to establish safe-haven zones at several sites inside Haiti. Such zones could have been established near the islands and coast cities known to be prime departure points for boat people seeking to flee Haiti. Alternatively, they could have been placed along the Dominican border (even, with consent, on the Dominican side) to help stop the illegal flow of goods across the border. These safe-haven zones could have been controlled or monitored by UNHCR, and protected by a multinational OAS or UN peacekeeping force, to provide refugees with food, shelter, and protection from persecution. Such zones would have provided refugees temporary safe haven inside Haiti, thereby controlling migration consistent with American interests by reducing Haitians’ incentive to take to the high seas. An international presence within Haiti would have further exerted pressure on the Haitian military junta to comply with international minimum standards. Moreover, overseas refugee processing could have taken place within the safe-haven zones in Haiti, overseen by international human rights monitors from both UNHCR and nongovernmental organizations.

Marcos, for example. When it became clear that the coup leaders were violating the terms of the Governors Island pact and engineering the killings of key Aristide supporters,<sup>222</sup> the administration did not move quickly enough to protest, or to make clear that such abuses would not be tolerated. When the administration finally resorted to full-scale economic sanctions, many of the bank accounts frozen contained only nominal sums.<sup>223</sup> Finally, when the lightly armed military personnel arrived in Haiti with the quixotic goal of “retraining” the military, only to be met by Haitian gangs, our government did not respond with resolve, but simply withdrew, clearly signaling to the junta and its supporters weak commitment to the Governors Island Accord.

After the failure at Governors Island, the U.S. Special Adviser on Haiti drafted yet another proposal, which would have required Aristide to appoint a new Prime Minister acceptable to “centrist” elements; to grant more amnesty to coup leaders, some (but not all) of whom would then “retire”; and to lift sanctions before Aristide would return, at an unspecified date.<sup>224</sup> Yet this proposal, too, violates nearly all of the basic principles sketched above, again showing how little the United States government has learned from the debacle thus far. First, by suggesting that Aristide appoint a “centrist” Prime Minister, the administration violated the nonneutrality principle, effectively acting as a broker between Aristide’s majority supporters (nearly 70% of the Haitian people) and the minority coup leaders who illegally overthrew the democratic government. By proposing to lift sanctions before President Aristide returned, the proposal violated the basic principle of keeping the pressure up. By urging more amnesty, failing to require departure of all coup leaders, and specifying no date for Aristide’s return, the proposal offended both principles of accountability and avoiding too little, too late. The plan said and did nothing to ensure safe haven for refugees, nor did it speak to regional burden-sharing or otherwise provide for any kind of international mission to protect Aristide upon his return.

At this writing, our Haiti policy remains in a state of confusion.<sup>225</sup> The ironies in the *refoulement* policy have become painfully manifest. United States warships currently enforce an economic blockade off the coast of Haiti,

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222. See French, *supra* notes 36, 69 (describing deaths of Antoine Izmary and Minister of Justice Guy Malary).

223. One U.S. bank account of a Haitian general contained less than five dollars. See *Hearing on U.S. Policy Toward Haiti: Hearing Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations*, 103d Cong., 2d Sess., Transcript of March 8, 1994 hearing, at 122 (testimony of Michael Barnes, Counsel to President Aristide) (“[The general] is not a fool. They have been warned for 2 years that their bank accounts might be frozen, so they have put their funds elsewhere.”).

224. Bob Herbert, *Pretty Words on Haiti*, N.Y. TIMES, Mar. 23, 1994, at A21.

225. Under intense criticism—and faced with evidence of mounting human rights abuses in Haiti—the administration now admits that its policies have failed. It has finally imposed a total embargo and is considering military force and relaxing the refugee policy. See Douglas Jehl, *Clinton’s Options on Haiti: Ever Harsher Choices Ahead*, N.Y. TIMES, May 6, 1994, at A10.

alongside Coast Guard cutters that intercept and return unarmed boat people.<sup>226</sup> The Clinton administration concedes that the threat of violence renders it too unsafe for armed American soldiers to land in Port-au-Prince, yet Coast Guard cutters continue to send unarmed boat people back to the same Haitian thugs who arrest and punish them upon return.<sup>227</sup> When John Shattuck, the Clinton administration's top human rights official, returned from Haiti in mid-December and suggested that a review of our Haitian policy might be necessary, an anonymous official said that Shattuck's statement, *but not our policy*, "was completely wrong and outrageous."<sup>228</sup> Most tragic, Haiti presented a textbook opportunity for the Clinton administration to implement its foreign policy of promoting democracy and human rights, which the administration has dealt with by relaxing its pursuit of both objectives.

What lessons does the Haiti Paradigm carry for U.S. human rights policy in other trouble spots of the world, such as Bosnia, Somalia and China? None of these illustrate the paradigmatic human rights crisis as clearly as Haiti, but some of the same basic lessons still apply. In brief, Bosnia illustrates three problems: neutrality toward human rights abusers; too little, too late; and failure to impose accountability. Although the Clinton administration campaigned on a platform of "lift and strike"—lifting the arms embargo and striking at Serbian positions—upon taking office it did not pursue those policies for more than a year, standing neutral while massive "ethnic cleansing" occurred and looking away while countless civilian casualties mounted.<sup>229</sup>

Similarly, in Somalia, the United States fell prey to neutrality in the face of human rights abuses; too little, too late; failure to keep the pressure up; and failure to establish accountability. The Carter, Reagan, and Bush administrations all failed to criticize human rights abuses by the Siad Barre regime from 1977 to 1989, until the regime's massacres became too blatant to ignore. When Siad Barre lost control of Mogadishu, President Bush first opposed U.N. action, then offered air support, and eventually, after losing the 1992 election, moved directly to military intervention. Once they entered the fray, the U.N. forces became party to human rights abuses themselves, made no effort to establish forms of accountability, became preoccupied with seeking vengeance for their own dead, and finally beat an ignominious retreat.<sup>230</sup>

The Clinton administration's human rights policies in China likewise reveal that even the most basic lessons have not been learned. Correctly abandoning the Bush administration's cautious neutrality with regard to human

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226. Apple, *supra* note 37, at A1, A4.

227. Howard W. French, *Boat People Face Prosecution*, N.Y. TIMES, Oct. 30, 1993, at A5.

228. Holmes, *supra* note 208, at A6.

229. See *The Abdication*, THE NEW REPUBLIC, Feb. 28, 1994, at 7; Carla A. Robbins, *Americans' Inaction on Bosnia Stirs Critics To Debate and Despair*, WALL ST. J., Mar. 18, 1994, at A1.

230. HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1994, at 40-45 (1993).

rights abuses, the Clinton administration issued generally strong Level One and Two condemnations of human rights abuses in China.<sup>231</sup> The administration condemned human rights abuses in its first annual State Department report, linked future extension of MFN status to a series of human rights conditions, met with dissident leaders, and (with some exceptions) kept the pressure up in the face of Chinese recalcitrance.<sup>232</sup> While Secretary Christopher delivered the message to a hostile Chinese leadership that China's failure to make "overall significant progress" by June 1994 would mean the loss of China's MFN status, numerous critics urged the administration to de-link trade and human rights.<sup>233</sup> At this writing, we are approaching a crucial test. Will the United States expressly delink trade and human rights in China; skew its Level One and Two responses by disingenuously certifying that China has made "overall significant progress" in human rights in order to renew MFN status; or keep the pressure up, signify nonneutrality, and stand by the Level Three principles outlined above and withdraw trade benefits—gradually or otherwise—based upon a certified lack of overall significant progress in human rights?<sup>234</sup> Whichever option the administration chooses, it has still failed to adopt a meaningful safe haven policy to protect Chinese boat people fleeing the abuses it is sanctioning, yet another example of its failure to learn the most basic lessons of the Haiti Paradigm.<sup>235</sup>

## V. CONCLUSION

During the campaign, Governor Clinton declared that "United States foreign policy simply cannot be divorced from the moral principles we believe in."<sup>236</sup> Most Americans believe that our nation should support elected democracies, promote human rights, exert moral leadership, and pursue a humanitarian, yet realistic, policy toward refugees. The Haitian refugee situation presented the Clinton administration with both a challenge and an

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231. *Id.* at 155-57.

232. See generally U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993, at 604-20 (Feb. 1994) (report submitted to House Comm. on Foreign Affairs & Sen. Comm. on Foreign Relations, 103d Cong., 2d Sess.).

233. Thomas L. Friedman, *U.S. Signals China It May End Annual Trade-Rights Battles*, N.Y. TIMES, Mar. 24, 1994, at A1.

234. I would advocate the third approach. For others making the same policy recommendation, see Robert L. Bernstein & Richard Dicker, *Human Rights First*, 94 FOR. POL'Y 43 (1994); Holly Burkhalter, *Squeeze China—By Degrees*, N.Y. TIMES, Mar. 29, 1994, at A23 ("Instead of the 30 to 60 percent tariff increase that is believed to be inevitable, the Administration could hike tariffs by, say, 10 percent at the outset, with further increases if Beijing kept dragging its feet on human rights.").

235. See Grover J. Rees, *Boat People Deserve Better*, N.Y. TIMES, July 26, 1993, at A15 (suggesting international resettlement as the solution for both Haitian and Chinese boat people). The administration's actions have already triggered a transnational public lawsuit. See *Yang v. Maugans*, No. 94-7060 (3d Cir. argued Mar. 24, 1994) (appeal of dismissal of class action on behalf of *Golden Venture* refugees).

236. Governor Bill Clinton, *A New Covenant for American Security* (Dec. 12, 1991) (address at Georgetown University) (transcript reprinted in Fed. News Serv., available in LEXIS, News Library, Arcnws File).

opportunity: the challenge of succeeding where its predecessor had failed and the opportunity to do so in a way that would signal a return to—not a rejection of—our most fundamental American values. Thus far, the administration has neither met the challenge nor grasped the opportunity.

The Haitian crisis of the early 1990's revealed the possibilities and limits of transnational public law litigation, the continuing dysfunction in our foreign policy decisionmaking structure, and recurrent defects in the making of United States human rights policy. However the current Haitian situation is eventually resolved, the crisis should be remembered as a paradigmatic case study in both human rights policymaking and transnational legal process: a test of whether and how international law really matters in the conduct of global affairs.