

REPORT N° 28/93
CASE 10.675
UNITED STATES
DECISION OF THE COMMISSION AS TO THE ADMISSIBILITY(*)
October 13, 1993(*)

I. BACKGROUND INFORMATION ON WHY HAITIANS FLEE THEIR COUNTRY:

1. Both prior to and since the 1986 fall of the Duvalier dictatorship, the Haitian people have suffered from a systematic and pervasive pattern of gross human rights violations perpetrated by the military and paramilitary forces under the authority of a series of military dominated governments. These governments have ruthlessly repressed dissent and sabotaged the electoral process on several occasions. Democratic government and the rule of law are in eclipse. Under the Duvalier dictatorship, political opponents of the government were regularly disappeared, tortured, and killed; freedom of speech and assembly were arbitrarily denied and labor unions and peasant organizations systematically suppressed. The Tonton Macoutes, an approximately 50,000 nation-wide armed paramilitary corps, in the service of the dictatorship, intimidated, assaulted, tortured, and assassinated real and perceived opponents of Duvalier.

2. After an on-site visit to Haiti in August 1988, this Commission issued its findings, which are summarized as follows:

i. The result of the almost three year old democratization process has been the entrenchment of the military in power.

ii. Numerous arbitrary killings of a politically motivated nature have occurred during the period under consideration. The politically-motivated nature of the violence is evidenced by the fact that it can be turned on and off by the military authorities. The failure of the military to investigate and punish anyone responsible for these death-squad like killings has been a matter of continuing concern to the Commission, and leads it to conclude that these death squads function because of the impunity granted to them by the military.

(*) Commission member Prof. Michael Reisman abstained from participating in the consideration and voting on this report.

iii. The military regime, by means of the coup d'etat, attempted to nullify the 1987 Constitution, which was massively approved by popular referendum on March 29,

1987. The use of force by the military to thwart the will of the people is condemned by democratic nations and the respective instruments of international law.

iv. All fundamental human rights in Haiti are under serious strain, limited by the Army's monopoly over the use of force. The Army, functioning as a police force, does not serve to protect Haiti from external threats to its security, it functions to repress those persons or groups who attempt to change the deplorable conditions under which the majority of Haitians live. (Report on the Situation of Human Rights in Haiti, IACHR, OAS, 1988, OEA/Ser.L/V/II.74, Doc.9 rev.1, pp.5-6, paragraphs 16(3), 16(5), 16(6), and 16(7).)

3. This persistent pattern of human rights abuses, and continuing cycle combined with the extreme poverty attributable to the policies of the dictatorship, compelled the flight of thousands of Haitian refugees who risked their lives (many have drowned) to flee Haiti in small, frail boats, seeking a safe haven in the United States and other countries.

II. ALLEGATIONS IN PETITION DATED OCTOBER 1, 1990:

1. On October 1, 1990, the petitioners filed a complaint against the United States Government's Haitian Migrant Interdiction Program. The petition was filed on behalf of the Petitioning Organizations: Haitian Centre For Human Rights, Port-Au-Prince, Haiti; Centre Karl Leveque, Port-Au-Prince, Haiti; the National Coalition For Haitian Refugees, New York, N.Y., U.S.A.; the Haitian Refugee Center, Inc., Miami, Florida, U.S.A.; the Haitian Centers Council, New York, N.Y., U.S.A.; the Haitian-Americans United For Progress, Cambria Heights, U.S.A., the Washington Office on Haiti, and unnamed Haitian nationals who have been and are being returned to Haiti against their will and in violation of international law by agents of the United States government following "interdiction" of their vessels on the high seas by the United States Coast Guard.

2. The petition alleges that the Haitian boat people have been and continue to be interdicted and returned to Haiti pursuant to (a) the Haitian Migrant Interdiction Program established by Proclamation 4865 and Executive Order 12324 issued by President Ronald Reagan on September 29, 1981, and (b) a cooperative agreement between the U.S. Administration and the Duvalier regime entered on September 23, 1981, through an exchange of diplomatic notes.

3. It further alleges that many of these boat people had a reasonable fear that they would be persecuted if returned to Haiti, but were denied a proper forum and processing procedures for resolution of their claims. This denial is in violation of the U.S. Government's obligation not to return a refugee in any manner whatsoever to the frontiers of a territory where his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. That despite promises made by the Haitian government (in diplomatic exchange of letters) that returnees would not be punished for leaving Haiti, boat people involuntarily interdicted and returned by the United States Government have been routinely detained upon their return

to Haiti.

4. On May 7th, 8th, and 13th, 1990, forty-three (43) returnees, including some Haitians who had been detained in Immigration and Naturalization Service's (INS) Krome Detention Center in Miami, Florida, were immediately arrested by Haitian military authorities upon their arrival in Port-au-Prince. They were held in the National Penitentiary, some for longer than one week, before being released. On June 5th, 1990, another group of thirty-one (31) Haitians deported from Krome were arrested upon arrival in Haiti, and they allege that they were told that their whereabouts would thereafter be closely monitored by the Government. Military authorities stated that at least 16 of the group were boat people. The Petitioning Organizations are informed and believe that boat people who departed in whole or in part because their lives or freedom were threatened almost always face an even greater threat following their interdiction and forcible return to the military authorities in Haiti. The affidavit of a dissident involved in organizing demonstrations against the military regime in Haiti states that in 1987, after he decided it was too dangerous to remain in Haiti, he fled but was interdicted and returned to Haiti by the Coast Guard. He declares that:

"The immigration inspector who interviewed me declared that since there was a new government, they will return me to Haiti. They refused to admit that I had good reasons to leave Haiti and that death threats were still hanging on my head...Since my return to Haiti I have been forced to move from house to house, never sleeping in the same place in order to ensure that the Army never learns of my whereabouts and arrests me."

5. The petition further alleges that Haitians, still flee their country in large numbers, just as they did while President-for-Life Duvalier ruled the country. That even as the U.S. Department of State and human rights organizations report that widespread politically motivated killing, torture, and arbitrary arrests continue in Haiti, the interdiction program continues unabated. In the 12-month period following the bloody outcome of the November of 1987, elections, when reportedly 500 civilians died as a result of political violence perpetrated by the Haitian Army and the Tonton Macoutes, interdictions continued. That of the 1,000 Haitian boat people interdicted during that time, not one was brought to the United States and granted political asylum.

6. That on September 29th, 1981, President Reagan stated that, "having found that the entry of undocumented aliens, arriving at the borders of the United States from the high seas, is detrimental to the interests of the United States," proclaimed that "the entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens." (Presidential Proclamation 4865 of September 29., 1981, FR 28829, 46 Fed Reg.48,107, reprinted in 8 U.S.C. Sec. 1182 app. at 820 (Supp. V. 1981)(hereinafter "Proclamation 4865"). According to this Proclamation it was alleged by the United States Government, that the migration of undocumented immigrants arriving by sea had reached significant proportions by 1981 "which severely strained the law enforcement resources of the INS" and "threatened the welfare and safety of communities" in the southeastern United States. (Proclamation

4865.) However, according to government figures at the inception of the interdiction program, Haitians made up only 2% of all undocumented migrants in the United States. (Refugee Refoulement: The Forced Return of Haitians under the U.S.-Haitian Interdiction Agreement, Report of the Lawyers Committee for Human Rights, February, 1990, p.17, hereinafter "Refugee Refoulement.")

7. In issuing the Proclamation, the President relied for his authority on Sections 212(f) and 215(a)(1) of the Immigration and Nationality Act("INA"). INA Sec. 212(f) provides that: "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. "Sec. 215(a)(1) provides that: "When the United States is at war or during the existence of any national emergency proclaimed by the President...and the President shall find that the interests of the United States require that restrictions and prohibitions... be imposed upon the departure of persons from and their entry into the United States...it shall until otherwise ordered by the President or the Congress, be unlawful...for any alien to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe."

8. On September 29th, 1981, the President also issued Executive Order 12324, (FR Doc.81-28829, 46 Fed Reg.48,109, reprinted in 8 U.S.C.Sec.1182 app.at 819-20, Supp.V. 1981, hereinafter, "Exec.Order 12324.) directing the Secretary of State to enter into "cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by the sea." On September 23rd, 1981, the United States and the Duvalier dictatorship entered into such an arrangement pursuant to an exchange of diplomatic letters between Ernest Preeg, U.S.Ambassador to Haiti, and Edouard Francisque, Haitian Secretary of State for Foreign Affairs. (T.A.I.S.No.10,241, hereinafter "Exchange of Letters.") The agreement states in part that:

"Having regard to the need for international cooperation regarding law enforcement measures taken with respect to vessels on the high seas and the international obligations mandated in the Protocol Relating to the Status of Refugees done at New York 31st January 1967, the United States government confirms with the government of the Republic of Haiti its understanding of the following points of the agreement."

9. The Haitian Government agreed to "stop the clandestine migration of numerous residents of Haiti to the United States" in return for a promise by the United States to assist the Haitian Government with the enforcement of its emigration laws. In addition, Haiti authorized United States authorities to board Haitian flag vessels on the high seas and make certain inquiries regarding the condition and destination of such vessels and the status of those on board. The petition further alleges that none of the boats which the Haitians use fly the Haitian flag, in fact, they expressly disclaim Haitian registry and sovereignty. The agreement further provided that if the Coast Guard

determines that the vessel is bound for the United States, the vessel and the persons aboard may be returned to Haiti, and the United States further agreed to the presence of a representative of the Haitian Navy aboard any United States vessel engaged in the Haitian interdiction program.

10. The agreement also provided that it is "understood that the United States, having regard for its international obligations pertaining to refugees, does not intend to return to Haiti any Haitian migrants the United States determines qualify for refugee status." The Government of Haiti assured the United States "that Haitians returned to their country and who are not traffickers in illegal migration will not be subject to prosecution for illegal departure." (Exchange of Letters.)

11. It is further alleged in the petition that until 1986, only a very small percentage of follow-up interviews were conducted by U.S. Embassy personnel to ascertain whether the returnees had been punished for leaving Haiti illegally. Such interviews were discontinued after President Duvalier's overthrow on the recommendation of the U.S. Embassy in Port-au-Prince, the Embassy stating that "any legitimate expectation that persecution might occur...was removed when the National Governing Council succeeded President Duvalier and immediately made several key changes in Haiti's human rights policy, most notably the dissolution of the Tonton Macoutes militia." (Refugee Refoulement, p.22-23, relating interview with Michael Bajek, Second Secretary, United States Embassy, Port au Prince, Haiti, December 14, 1989; see also U.S. Embassy, Port au Prince telegram, "Terminating of HMIO follow up program," June 26, 1986 at p.1.)

12. Executive Order 12324 also directed the Secretary of Transportation to order the Coast Guard to interdict "any defined vessel carrying Haitian aliens." (Note 13.) The "defined vessel includes vessels from foreign nations" with which the United States has arrangements authorizing it to board such vessels -- i.e. vessels from Haiti. The Secretary of Transportation was also ordered to direct the Coast Guard to "return the vessel and its passengers to the country from which it came, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist."

13. The Executive Order further provided that "no person who is a refugee will be returned without his consent" and that "the Attorney General, in consultation with the secretaries of State and Transportation shall take appropriate steps to ensure the fair enforcement of our laws relating to immigration and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland." (Executive Order 12324.)

14. It is further alleged that to implement the arrangement with Haiti, agents of the U.S. Immigration and Naturalization Service (INS) were assigned to the Coast Guard vessels engaged in the interdiction program. The INS promulgated unpublished, informal guidelines setting forth the procedures to be followed during the interdiction operations. (Immigration and Naturalization Service, INS Role in and Guidelines for Interdiction at Sea,

October 6, 1981.) The guidelines provide that "if it is deemed safe and practicable within the opinion of the commanding Coast Guard officer," each person aboard the interdicted Coast Guard vessel shall be interviewed to determine his or her name, nationality, documentation and reason for leaving Haiti.

15. The petition further states that this policy actually places in the discretion of a Coast Guard officer the initial decision as to whether the interdictees will be interviewed at all to determine refugee status. The INS officials assigned to the vessels have responsibility for ensuring that: "the United States is in compliance with its obligations regarding actions towards refugees, including the necessity of being keenly attuned during any interdiction program to any evidence which may reflect an individual's well founded fear of persecution by his or her country of origin for reasons of race, religion, nationality, membership in a particular social group, or political opinion."(Guidelines p.1.)

16. The Guidelines further provide that "INS officers shall 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 Protocols." If there is such indication, INS officials shall conduct a second interview, "out of hearing of the other person," and keep "individual records" or all interviews regarding possible qualification for refugee status. If the interview suggests that a legitimate claim to refugee status exists, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged. (Guidelines p.3.)

17. The petitioners allege that since the inception of the program, over 361 boats carrying 21,461 Haitians have been intercepted, and only six Haitians have been allowed to come to the U.S. to file asylum claims. To the best of their knowledge, only one vessel was taken to Port-au-Prince and turned over to the authorities. All the others were destroyed as "hazards to health and navigation" by the U.S. Coast Guard. (Refugee Refoulement, p.32.) According to interviews with Haitian returnees conducted by the Lawyers Committee for Human Rights: "the interviews may not be conducted so as to elicit an indication of refugee status. The interviews may not be private; the Haitians may be hungry, are definitely ill-at-ease and have no idea why they are being asked questions." (Refoulement, p.37.)

18. It is further alleged that the initial interviews last only a few minutes, during which the examiner asks approximately eight basic questions concerning sex, name, place of birth, date of birth, address, reason for leaving, fear of return. The interviews are not private, but held within eyesight and sometimes within the hearing of other Haitian passengers. There are no independent observers from, for example, the office of the United Nations High Commission on Refugees to witness the interviews in order to ensure that principles of non-refoulement (non-return) are followed. When former U.S. Congressman Claude Pepper, and a group of Miami community leaders asked the U.S. Justice Department to be allowed to board one of the Coast Guard cutters and witness the interdiction program to ensure the refugees were given due process, the group's request was denied.

19. On October 3rd, 1991 the petitioners submitted an "Emergency Application For Provisional OAS Action To Halt The United States' Policy Of Interdicting And Deporting Haitian Refugees."(Emergency Application) The Emergency Application states that both the United States Government and Petitioners have filed statements regarding the admissibility of the Petition. It further states that during the pendency of the petition filed before the Commission on October 1, 1990, in the above case, the United States Government has continued interdicting Haitian asylum seekers and expelling those who entered the United States.

20. It states that the allegation that the interdiction policy deprives Haitians of a fair opportunity to articulate and substantiate claims to political asylum is concretely established by the results of the program. That an interdicted Haitian's likelihood of being considered to possess a legitimate claim is approximately .005%. A Haitian who avoids interdiction and arrives in the United States has at least a 5% chance of being considered to possess a legitimate asylum claim. The strength of the asylum claims does not suddenly change once Haitian boat people get around the interdiction program -- instead, what changes is the opportunity to be heard.

21. It further alleges that when the military brutally seized power in Haiti on September 30, 1991, the democratically elected President Jean-Bertrand Aristide was forced to leave the country. Because of these events, the United States Government cannot possibly now guarantee the physical integrity of Haitians it interdicts or deports. Given the complete breakdown of social and political order in Haiti, the Haitian Migrant Interdiction Program and the deportation of Haitians from the United States to Haiti now represent a serious violation of The American Declaration of the Rights and Duties of Man.

22. On February 6th, 1992, the petitioners filed an "Emergency Application for Provisional OAS Action to Halt the United States Government's Policy of Returning Haitian Refugees Interdicted since the Military Coup of September, 30, 1991." It alleges that during the pendency of the petition, the United States Government has maintained its policy of interdicting Haitian asylum seekers and expelling those who enter the United States. This process has continued despite the brutal and violent military coup in Haiti on September 30, 1991, which ousted democratically elected President Jean-Bertrand Aristide and plunged Haiti into a cycle of political violence which has claimed over 1,500 lives.

23. That responding to the escalating violence in Haiti and a previous Emergency Application filed in this case on October 3, 1991, the Inter-American Commission on Human Rights of the Organization of American States (OAS), on October 4, 1991, sent a cablegram to the United States Secretary of State, James A. Baker III, urging that the United States immediately cease its policy of interdicting and deporting Haitian refugees, pending the restoration of lawful order in Haiti. That the cablegram stated in part: (The IACHR urges that) for humanitarian reasons (the United States Government) suspend its policy of interdiction of Haitian nationals who are attempting to seek asylum in the United States and are being sent back to Haiti, because of the danger

to their lives, until the situation in Haiti has been normalized. To the best of the petitioners' knowledge, the United States Government has ignored this request altogether.

24. That it is concretely established that the maintenance of the interdiction program despite the coup has deprived Haitians fleeing the military junta of a fair opportunity to articulate and substantiate claims of political asylum. According to information provided to petitioners' counsel in a telephone conversation with a INS Press Officer on February 5th, 1992, the Immigration and Naturalization Service (INS) estimates that since November of 1991, 15,081 Haitians have been interdicted. That historically only 1.8% of those Haitians permitted to present asylum claims, will actually be given asylum. See Refugee Reports, Vo. XII, No. 12, Dec. 30, 1991 at 12.)

25. That this figure appears very low to international human rights groups and concerned nongovernmental organizations, which have reported over 1,500 deaths, 300 arrests, and a wholesale persecution of the pro-Aristide movement which has forced over 200,000 people into hiding. See Haiti, The Human Rights Tragedy: Human Rights Violations since the Coup, Amnesty International, January 1992 at 5-6. Human rights groups estimate that the number of Haitians with colorable claims to asylum is closer to 60 or 70% of those interdicted, roughly five times higher than the number of interdicted Haitians permitted by INS to enter the United States to seek asylum. See Haitian Refugees: Current Facts and Prevailing Law, San Francisco Lawyer's Committee for Urban Affairs, Feb. 3, 1992 at 2 n.1.

26. That the interdiction program's failure to accurately evaluate asylum claims is easily explained. According to sworn declarations on file in the case of Haitian Refugee Center v. Baker, No 91-2635-CIV-Atkins (C.D.Fla. 1991), INS personnel interview the Haitian interdictees while they are sick, exhausted and malnourished; the interviews routinely last only a few minutes, much of which is taken up in translation; the interviewers are often hostile, fail to identify themselves or their purpose, and refuse to follow up on explanations of political persecution; and some interviewers have told the interdictees that no matter what they say, they will be returned to Haiti.

27. That numerous interdictees, including several of the plaintiffs in Haitian Refugee Center v. Baker, have been designated for summary return to Haiti despite their claims that as a result of their political activities they were targeted for persecution by the police or military after the coup. This failure to fairly evaluate Haitian asylum claims is nothing new. The New York based Lawyers Committee for Human Rights reported in 1990, that "the interdiction program is part of a pattern of discrimination practiced against Haitians by the U.S. Government since the late 1970's. Through improper screening and arbitrary detention, the Government has consistently demonstrated its bias against Haitians." Refugee Refoulement: The Forced Return of Haitians under the U.S.-Haitian Interdiction agreement, Lawyers' Committee for Human Rights (March 1990).

28. That despite the entirely inadequate screening of interdicted Haitians, and the obvious inability of the United States Government to reasonably ensure the safety of

Haitians interdicted and repatriated, the United States Supreme Court ruled on January 31, 1992, that Haitian interdictees may be forcibly returned to Haiti. Since then, over 380 Haitians have been returned, and the Government plans to return the rest as soon as possible. See the New York Times, Feb. 2, 1992, at A1 col.3. Given the ongoing violence in Haiti, the inability of the interdiction program (or the refusal of those implementing it) to fairly identify those with legitimate claims of asylum, and the inability of the United States Government to meaningfully ensure that the Haitians returned will not be harmed, the Haitian Interdiction Program represents a serious violation of several provisions of international law. (Articles allegedly violated listed in part III of this report).

29. On February 11th, 1992, the Commission received a Supplemental Filing in support of the Emergency Application filed by the petitioners on February 6th, 1992. They allege that the United Nations officers conducted four interviews at the United States Governments' Naval base in Guantanamo, and that the interviews allegedly removed all doubt that Haitian interdictees forcibly repatriated by the United States Government have been, and will be brutalized by the military government upon their return to Haiti. The petitioners allege that government soldiers were present at the docks when the interdictees were repatriated, and asked for the names and addresses of repatriated interdictees after they had been processed by the Haitian Red Cross.

30. That later many of the repatriated interdictees were arrested at home. Some never made it home and were arrested at pre-established roadblocks. Several of those arrested were later found shot to death. Some were beaten in public by the military, which forced people, at gunpoint, to identify the repatriated Haitians. Others were taken to the National Penitentiary where they were beaten daily and not fed, and some were tortured to death in prison. Detainees were told by at least one prison guard that they were being tortured for having fled Haiti, and that others would suffer the same fate. Others were informed that a local judge had issued arrest warrants for repatriated interdictees because they had left Haiti and criticized the military government.

III. THE PETITIONERS REQUEST THAT:

1. With regard to the Petition, dated October 1st, 1990, that the Commission resolve:
 - (i) To seek immediate, interim relief from the United States Government in the form of temporary suspension of the Haitian Migrant Interdiction Program while the Inter-American Commission on Human Rights takes the present Petition under advisement;
 - (ii) To declare that the Haitian Migrant Program constitutes a serious violation of Articles XXVII (the right to asylum,) XXIV(the right to petition) and XVIII (right to effective remedy) of The American Declaration of the Rights and Duties of Man;

- (iii) To declare that the Haitian Migrant Interdiction Program constitutes a violation of the human rights instruments listed herein protecting human rights in the Inter-American system as well as customary international law;
- (iv) To require that the United States Government terminate the interdiction program because it constitutes a violation of internationally recognized human rights binding on the United States, or, if such relief is denied, in the alternative to insist that the United States Government implement policies and procedures which ensure that the program will provide access and equal protection of the laws in the presentation and consideration of their claim to persecution and requests for asylum.

2. With regard to their Emergency Application for Provisional OAS Action to Halt the United States' Policy of Interdicting and Deporting Haitian Refugees, filed October 3rd, 1991, the petitioners respectfully urge that the Commission, pursuant to its powers under Article 29.2 of the Regulations of the Inter-American Commission on Human Rights:

- (i) Immediately take provisional measures to seek a temporary halt to the United States Government's returning interdicted Haitians to Haiti and deporting Haitians present in the United States. Such action should remain in effect pending the restoration of lawful order in Haiti and the subsiding of the grave personal danger that now faces all Haitians from random and state-sponsored violence.
- ii) To communicate to the United States Secretary of State, James A. Baker III, requesting that the United States Government immediately suspend the interdiction and return to Haiti of Haitians and the deportation of Haitians from the United States to Haiti pending the restoration of circumstances which allow for the Haitians to return without reasonably fearing for their personal safety.

3. With regard to the Emergency Application to Halt the United States' Return of Interdicted Haitian Nationals, filed February 6th, 1992, the petitioners request that the Commission resolve:

- (i) To seek interim relief from the United States Government in the form of an immediate temporary suspension of the forcible repatriation of Haitian nationals pursuant to the Haitian Migrant Interdiction Program pending the restoration of lawful order in Haiti.
- (ii) That if the United States Government refuses to suspend forcible repatriations of interdicted Haitian nationals, to urge that it assists the interdictees in the preparation of requests for political asylum.
- (iii) That if the United States Government refuses to suspend forcible

repatriations of interdicted Haitians, to permit them a reasonable opportunity to apply for entry into third countries prior to their forcible return to Haiti.

- (iv) That if the United States Government refuses to suspend forcible repatriations of interdicted Haitians, to permit them a full and fair opportunity to present and have recorded their claims for asylum, to have such claims reviewed and decided in a competent, objective and non-discriminatory manner, and to receive reasonable explanations of the basis for the decisions in their cases.
- (v) To declare that the forcible repatriation of Haitian nationals during the current period of widespread Government-sponsored condoned violence in Haiti violates or may violate internationally recognized rights. (Articles allegedly violated, listed in part III of this report.)
- (vi) Request that the United States Government respond to any requests made by the Commission, and keep the Commission informed regarding developments in its interdiction, and repatriation activities.
- (vii) Conduct, as soon as possible, a fact-finding visit to Haiti to evaluate the level of political violence taking place there and the ability of third-party countries to ensure the safety of Haitians forcibly repatriated.

4. With regard to the Supplemental Filing in Support of the Emergency Application received by the Commission on February 11th, 1992, the petitioners stated that they would be satisfied if the Commission would resolve to urge the United States Government, if it refuses to suspend the forcible repatriation on Haitian refugees, to:

- (i) Permit legal counsel to consult with the interdictees in the preparation of their requests for political asylum.
- (ii) Permit the interdictees a reasonable opportunity to apply for entry into third countries.
- (iii) Give the interdictees a full and fair opportunity to present their claims for asylum.
- (iv) Respond to any requests made by the Commission.

5. With regard to petitioners' reply of December 31st, 1992, they urge that:

"an emergency communication be sent from the Commission to the U.S. Government requesting that interdictions and repatriations be temporarily suspended under the May 1992 Kennebunkport Order until the situation in Haiti is normalized or the Commission has had an opportunity to decide the

admissibility of the petition, and, if it rules the petition admissible, has had the opportunity to review the merits of petitioners' claims and the position of the U.S. Government regarding those claims."

6. That such a communication would be entirely appropriate given that the U.S. Supreme Court, at the urging of the U.S. Government, has stayed the decision in the case of Haitian Centers Council v. McNary, brought on behalf of Haitian boat people, in thereby allowing continuation of interdictions followed by repatriations without any interviews to determine whether the Haitians being forcibly returned to Haiti possess legitimate claims to refugee status.

7. At a hearing held at the petitioners request on February 26th, 1993, before the Commission at its 83rd period of sessions, they requested that the Commission:

1. As quickly as possible, send an urgent communication to the President of the United States.

- (A) Requesting that summary repatriations to Haiti under the May 1992 Kennebunkport Order be immediately terminated.
- (B) Requesting that until the situation in Haiti is normalized or the Commission has had an opportunity to decide the matters raised in this petition, no person should be involuntarily returned to Haiti.
- (C) Expressing particular concern that people interdicted should not be forcibly returned to Haiti without individual and fair interviews to determine whether they face persecution following repatriation, and that decisions on their claims should be made in conformity with applicable standards which preclude repatriation of persons to countries where they face persecution. People interdicted in international waters should be brought to safe ports outside of Haiti to be processed and interviewed.
- (D) Urging that under no circumstances shall "in country processing be the sole method for Haitians to seek asylee or refugee status. Furthermore, "in country" processing of applications for refugee status filed by Haitians living in Haiti be modified so that (i) safer and more secure locations are provided, (ii) locations in rural areas are made available, (iii) local Haitians are not employed in the offices processing refugee applications, (iv) Haitians in hiding are not forced to come out of hiding in order to seek refugee status, and (v) applicants may receive assistance from the United Nations High Commissioner for Refugees or appropriate voluntary agencies.
- (E) Urging that humanitarian steps immediately be undertaken to release from detention the interdicted Haitians who have tested HIV positive and are presently detained in Guantanamo Bay.

2. Declare that the return of President Aristide to office in Haiti is an essential step towards resolving the refugee crisis caused by human rights practices of the de-facto regime.

3. Make all possible efforts to monitor observance of human rights in Haiti by conducting an on-going on-site investigation there until the restoration of the democratic Government.

III. IN THIS CONNECTION THE APPLICANT ALLEGES VIOLATIONS OF:

1. Articles I, XVIII, XXVII, XXIV, XVII, of the American Declaration of the Rights and Duties of Man (American Declaration).
2. Articles 22(2)(7)(8); 24 and 25 of the American Convention on Human Rights (American Convention) as supplemented by Article 18 of the Vienna Convention on the Law of Treaties.
3. Articles 55 and 56 of the U.N. Charter.
4. Articles 3, 16(1) and 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("U.N. Refugee Convention).
5. The United Nations Protocol Relating to the Status of Refugees (U.N. Refugee Protocol), opened for signature January 31, 1967, entered into force for the United States November 1, 1968, 19 U.S.T. 6224, T.A.I.S. No. 6577.
6. Articles 8, 13(2) and 14 of the United Nations' Universal Declaration of Human Rights (Universal Declaration.
7. Customary international law which enjoins the United States from preventing the departure of people from their countries, or returning refugees to persecution or danger to life or freedom, and guaranteeing the right to an effective remedy.

IV. PROCEEDINGS BEFORE THE COMMISSION

1. Upon receipt of the petition of October 3rd, 1990, and up to Friday October 1st, 1993, the Commission acting through its Secretariat, complied with all the procedural requirements of Articles 30 to 35 of its Regulations. It communicated with the petitioners and the United States Government, it studied, considered and examined all information submitted by the parties.

2. During this period the Commission sent several notes, including the pertinent parts of the petition, emergency applications for OAS action, and all supplemental filings to the United States Government with a request that it supply information which it deemed appropriate to the allegations of the complaint, and which addressed the issue of exhaustion of domestic legal remedies. The Commission qualified the request by stating that "the request for information did not constitute a decision as to the admissibility of the communication."

3. Among the notes transmitted by the Commission to the United States Government was a telex dated October 4th, 1991, addressed to the former United States Secretary of State James A. Baker II, during its 80th period of sessions, which stated that "it has decided pursuant to paragraph 4 of Resolution 1/91 of the Ad Hoc Meeting of Ministers of Foreign Affairs, entitled "Support to the Democratic Government of Haiti, to request for humanitarian reasons that the United States Government suspend its policy of interdiction of Haitian nationals who are attempting to seek asylum in the United States and are being sent back to Haiti, because of the danger to their lives, until the situation in Haiti has been normalized."

4. On February 6th, 1992, the Commission sent a note (included in the notes mentioned above, signed by the Chairman of the Commission, to the former United States Secretary of State James A. Baker III, stating that "the Inter-American Commission on Human Rights notes that the return of the Haitians from the United States recommenced on February 3, 1992, and that the implementation of the present policy will result in the transfer of some 12,000 Haitians. Given the uncertain situation in Haiti, the Members of the Commission unanimously and respectfully request the United States Government to suspend, for humanitarian reasons, the return of Haitians."

5. On March 12th, 1993, the Commission approved a report in response to a request for precautionary measures, at a hearing held before it on February 26th, 1993, wherein it issued the following precautionary measures:

1. it called 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 under the Protocol Relating to the Status of Refugees, or as asylum-seekers under the American Declaration of the Rights and Duties of Man.
2. it called upon the United States Government to ensure that Haitians who are already in the United States are not returned to Haiti without a determination being made as to whether they qualify for refugee status, under the Protocol Relating to the Status of Refugees, or as asylees under the American Declaration of the Rights and Duties of Man.
3. it placed itself at the disposal of the parties concerned with a view to

reaching a friendly settlement of this matter on the basis of respect for the human rights recognized in the American Declaration of the Rights and Duties of Man.

4. it stated that this request is without prejudice to the final decision in this case.

6. During this period the Commission received several notes from the United States Government, which included a response to the original petition filed, stating that the petition was not timely filed, and that the Commission should find the petition inadmissible pursuant to Articles 52, and 38 of the Commission's Regulations, and Article 46 of the Inter-American Convention on Human Rights. The Government added that it "will not address the interpretations of law and factual assertions presented in the petition."

7. Another note contained the United States Government's second submission to the Commission. It argued that the petitioners have failed to exhaust domestic remedies, that the complaint should be dismissed under Articles 37 and 41(a) of the Commission's Regulations, and that Article 37(2) is inapplicable to the petitioners' claim. The Government further stated that the "United States reserves the right to address more fully the merits of petitioners' substantive arguments in the event there is a need to do so, and that because it believes that the complaint is inadmissible, this communication does not address in detail the interpretations of law and factual assertions presented in the petition." A later note contained the Government's argument, (reiterating the argument contained in note two above) and a request that the hearing scheduled for February 26th, 1993, be postponed.

8. The United States Government submitted various documentary materials containing its position with regard to its Haitian Policy. The Government's final argument was submitted at a hearing held at its request on March 5th, 1993, before the Commission, requesting that the Commission find the petition inadmissible because the petitioners had not exhausted domestic remedies, because of the then pending Supreme Court's decision in the case of Sale v. Haitian Centers Council Inc., ET AL. No.92-344. Argued March 2nd, 1993, and decided on June 21st, 1993. Included in its submission were various exhibits supporting the Government's policy with regard to the Interdiction Program, press releases containing the efforts made by the Government to expedite the processing of "in country refugee claims" in Haiti, the restoration of constitutional government and the return of President Aristide to Haiti, and two declarations. One of the declaration was made by Bernard W. Aronson, the Assistant Secretary of State for Inter-American Affairs, supporting the Interdiction Program, and the other declaration was made by Dudley G. Sippelle Consul General at the United States Embassy in Port-au-Prince Haiti, who declared that it was determined after investigation that an interdictee who was returned to Haiti had not been persecuted upon her return.

9. During this period the Commission also sent several notes to the petitioners, including the pertinent parts of the United States Government's submissions, and received

several notes from the petitioners, which included the original petition, an amendment to petition to include JEANNETTE GEDEON who had been interdicted and summarily returned to Haiti without being provided a reasonable opportunity to apply for political asylum, an emergency application for OAS action, supplemental filing in support of emergency application for OAS action, and their two responses to the United States Government's submission.

10. At a hearing held at the petitioners request on February 26th, 1993, before the Commission, the petitioners reiterated their arguments contained in their submissions, that the petition is admissible, made several requests to the Commission, presented documentary evidence as to the health conditions of those interdictees held at Guantanamo bay, and presented two witnesses who testified before the Commission. One of the witnesses testified as to the persecution he faced after he was interdicted and returned to Haiti. He further testified that after leaving Haiti for the second time and upon being given a reasonable opportunity to present his claim, he acquired refugee status in the United States. The other witness testified as to why "in country processing" was not working in Haiti.

11. The petitioners final submission was a copy of the Supreme Court's decision in the case of Sale v. Haitian Centers Council decided on June 21st, 1993.

V. SUBMISSIONS OF THE PARTIES

A. Argument in Support of the Original Petition with Regard to International Human Rights Violated by the United States Government's Haitian Interdiction Program

1. As a member state of the Organization of American States (OAS), the United States is bound by the Charter of the OAS (Bogota, 1948) as amended by the Protocol of Buenos Aires, ratified by the United States on April 23, 1968. As a consequence of this treaty, other instruments and resolutions of the OAS on human rights acquire binding force on OAS members. Those instruments and resolutions approved with the voice of the U.S. Government are as follows: (1) the 1948 American Declaration of the Rights and Duties of Man (ADRMN); and (2) the Statute and Regulations of the IACHR.

2. Both Statutes provide that, for the purpose of such instruments, the IACHR is the organ of the OAS entrusted to effectuate the observance of, and respect for human rights. For the purpose of the Statute, human rights are understood to be the rights set forth in the American Declaration in relation to states (such as the United States) which are not parties to the American Convention. (See articles I & II of the 1960 Statute and Article II of the 1979 Statute.)

3. That the Commission should also consider other multilateral human rights treaties in the determination of the violations alleged in this Petition. As the Inter-American Court of Human Rights has declared in its Advisory Opinion addressing the jurisdiction of

the Court and/or this Commission:

The need of the regional system to be complemented by the Universal Declaration finds expression in the practice of the Inter-American Commission on Human Rights and is entirely consistent with the object and purpose of the Convention, the American Declaration, and the Statute of the Commission. The Commission has properly invoked in some of its Reports and Resolutions other treaties concerning the protection of human rights in the American States regardless of their bilateral or multilateral character, or whether they have been adopted within the framework or under the auspices of the Inter-American System. (Advisory Opinion No. OC-1/82 of September 24, 1982, "Other treaties" Subject to the Consultative Jurisdiction of the Court, requested by Peru, p.12.)

4. Petitioners allege that the challenged Haitian Interdiction program violates Articles XVIII (the right to an effective remedy), XXXVII (the right to asylum) and XXIV (the right to petition) of the American Declaration of the Rights and Duties of Man, to which the United States is bound by virtue of its membership in the Organization of American States (OAS) and its ratification of the Charter of the OAS.

5. That while being interdicted on the high seas, there is no effective right to seek political asylum, nor is there any right to petition or to seek an effective remedy. The claims of boat people cannot be effectively made or evaluated while they are handcuffed, exhausted, tired, hungry, and afraid on a foreign law enforcement vessel on the high seas. The declarations filed herewith, and Congressional testimony indicate that Haitian boat people are often not questioned at all about their political asylum claims, or are questioned "en masse."

6. That while they do not know that statistically their chances of not being forcibly returned to Haiti are about .003%, or, stated another way, their chances of being involuntarily returned to Haiti are about 99.997%, boat people obviously know that their chances of being believed, or of having their claims seriously considered, are very small. Under these circumstances, it would take an extremely brave -- perhaps foolish -- person to articulate all the reasons why he or she fled Haiti.

7. That the boat people have little reason to believe that what they say will be held confidential by the U.S. Government since the entire interdiction program is carried out as a cooperative and joint project of the U.S. and Haitian Governments. (The U.S.-Haiti agreement specifically allows for Haitian officers to board interdicted vessels.)

8. The U.S. Government's interdiction program violates Articles 22(2),(7),(8), 24 and 25 of the American Convention on Human Rights, O.A.S. Treaty No. 36, signed by the United States but not ratified, as supplemented by the customary obligation recognized in Article 18 1155 U.N.T.S. 331. The signature of the United States on the American Convention obliges it "to refrain from acts that would defeat the object and purpose of the

treaty." Article 18. Vienna Convention on the Law of Treaties.

9. That the Convention provides that "every person has the right to leave any country freely, including his own." Article 22(2). The interdiction program clearly violates this fundamental right, one that the United States Government has loudly defended in support of nationals of countries with communist-dominated governments attempting to leave those countries.

10. That the interdiction program also violates Article 22(7) of the Convention in that it does not provide the interdicted boat people the "right to seek" asylum in a foreign territory. The interdiction program results in the mass and forcible detention of boat people and their involuntary return to Haiti before any reasonable proceedings are conducted to determine whether protection from return (non-refoulement) is required under international law.

11. The interdiction program violates Articles 24 and 25 of the Convention in that it denies the Haitian boat people "equality before the law," and "the right to simple and prompt recourse, or any other effective recourse to a competent court or tribunal for protection against acts that violate their fundamental rights..."
The determination of whether the Haitian boat people possess legitimate claims to asylum is made in a highly discriminatory manner, and, while on the high seas, there is no recourse at all to a competent tribunal for protection against violations of their rights.

12. The interdiction program violates Articles 8, 13(2) and 14 of the United Nations Universal Declaration on Human Rights. Article 13 of the UDHR provides that: (1) everyone has the right to seek and enjoy in other countries asylum from persecution, and (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the principles of the United Nations.

13. The interdiction program does not provide Haitian boat people with an effective remedy, nor does it reasonably permit them to seek asylum in the United States or a third country. Article 13(2) of the UDHR provides that "everyone has the right to leave any country, including his own..." The interdiction program violates the right of Haitians to depart their country without forcible interference.

14. As a member state of the United Nations, the United States, in accordance with Articles 55 and 56 of the U.N. Charter (ratified by the United States), expressly pledged itself to take action to achieve universal respect for and observance of human rights and fundamental freedoms as enumerated in the Universal Declaration of Human Rights. The interdiction program, not only violates fundamental principles of international law regarding refugee protection, but also the right of Haitian people to leave their devastated country, is not "action" aimed at achieving "universal respect for and observance of human rights and fundamental freedoms" as enumerated in the Universal Declaration of Human Rights, and therefore is in violation of Articles 55 and 56 of the U.N. Charter.

15. The Haitian interdiction program violates Articles 3, 16(1) and 33 of the United Nations Convention Relating to the Status of Refugees. Article 3 states that: "the Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." Article 16 of the Convention requires that refugees have free access to the courts of law in the territories of all contracting states. Article 33 sec. 1 of the Convention states that: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territory where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion."

16. That the interdiction program clearly violates the above provisions. It blatantly discriminates against Haitian people who make up a small percentage of those seeking asylum in the United States but are the only group subject to an interdiction program. It further discriminates by failing to provide Haitians with anything close to a fair opportunity to present their claims of persecution. That while Haiti is a land steeped in political violence, the United States Government has found only six (6) out of 21,000 Haitian boat people who it did not forcibly return to Haiti, and allowed to claim political asylum in the U.S. At the same time the United States Government determined that over 50% of all Nicaraguans had a legitimate claim to political asylum.

17. That at the same time, the United States Government has also determined that the vast majority of asylum seekers from Communist countries possess a legitimate claim to asylum. There can be no doubt that petitioners will be able to establish in these proceedings that the United States Government has persistently engaged in massive discrimination against Haitian boat people in violation of Article 3 of the United Nations Convention Relating to the Status of Refugees.

18. That the Miami Herald reported that the U.S. Government picked up 16 Cubans from waters off the Florida coast. "All the Cubans were reported to be in good health and were brought to the United States and turned over to the Immigration and Naturalization Service," Their names were even listed in the Herald. At the same time, the report states, "a fishing vessel with 136 Haitians was turned back to Haiti by a coast Guard cutter that encountered the vessel 500 miles southeast of Miami..."(Miami Herald,p.e.B, Sept.28, 1990.) The petitioners further argue that the racial and national origin discrimination practiced by the United States Government is plain.

19. That the interdiction program equally clearly violates the Haitian boat people right of access to the courts under Article 16 of the United Nations Convention. There are no courts on the high seas to which the boat people can turn for a review of the decision that they lack meritorious claims for protection from return to Haiti. The interdiction program violates Article 33 sec.1 in that it has permitted and continues to permit agents of the United States Government to expel or return ("refouler") Haitian refugees or potential refugees to Haiti where their lives or freedom are threatened on account of, among other things, their political opinions.

20. The petitioners further argue that the United States accepted special obligations toward refugees, or persons claiming to be such, when it became a party to the United Nations Protocol Relating to the Status of Refugee, 19 U.S.T. 6224, T.A.I.S. No. 6577, (Refugee Protocol), opened for signature January 31, 1967, entered into force for the United States November 1, 1968. The Refugee Protocol obligates parties to give effect to the substantive provisions of the United Nations Convention Relating to the Status of Refugees.

21. That the methods utilized by the U.S. Government to establish refugee status also fall far short of the standards recommended by the Office of the United Nations High Commissioner on Refugees in its authoritative "Handbook On Procedures and Criteria for Determining Refugee Status." The Handbook states that:

It may be mentioned that basic information is frequently given to determine refugee status in the first instance, by completing a standard questionnaire. Such basic information will normally not be sufficient to enable the examiner to reach a decision, and one or more personal interviews will be required. It will be necessary for the examiner to gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings. In creating such a climate of confidence it is of course of the utmost importance that the applicants' statements will be treated as confidential and that he be so informed. (Geneva, September 1979, the "U.N. Handbook," at pp 46, 198 & 200.)

22. That the Handbook additionally provides that the asylum applicant "should be permitted to remain in the country pending a decision on his initial request by a competent authority..."(U.N. Handbook page 192.) The normative character as well as the extensive state practice of the principle of non-refoulement authoritatively evidences its status as a customary norm of international law. The United States Supreme Court has ruled that the United States government is bound by the principles of customary international law. (See *The Paquete Habana*, 175 U.S. 677, 700 (1900.) The Court held in that case that: "international Law is part of our law, and must be ascertained and administered by the Courts of Justice of appropriate jurisdiction... For this purpose, where there is no treaty, and no controlling legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."

23. The petitioners argue further that the requirements of Article 37 of the Commission's Regulations are met by them, because they are without further redress under United States Law to protect their rights which they allege are being violated. They contend that the issues raised in this petition have been raised, and rejected in the United States Federal Courts. That the petitioner the Haitian Refugee Center, and two of its members filed suit in the United States District Court for the District of Columbia challenging the legality of the Haitian interdiction program under United States Law (the Refugee Act of 1980), the Due Process Clause of the Fifth Amendment of the United States Constitution, and international law. That the international law claim alleged, as do

petitioners here, that the Interdiction Program violated Article 33 of the 1967 Protocol Relating to the Status of Refugees and the United Nations Universal Declaration of Human Rights.

24. That in Haitian Refugee Center v. Gracey, 600 F.Supp.1396(D.D.C. 1985), the United States District Court rejected all of the plaintiffs claims, ruling that the U.S. Refugee Act did not protect persons, who like plaintiffs, were outside the territorial waters of the United States; the Due Process clause of the U.S. Constitution provided no Fifth Amendment rights to interdicted Haitians classified as excludable aliens; the Protocol was not a self executing treaty, and thus had no force as domestic law; and, the Declaration is merely a non-binding resolution. See HRC v. Gracey, 600 F.Supp at 1404-1406. On appeal, the United States Court of Appeals for the District of Columbia was even less receptive to the plaintiffs' claims. The Court affirmed the dismissal of the case, ruling further that the plaintiffs lacked standing to bring the lawsuit. Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987). That it is clear that domestic remedies cannot vindicate the rights under international law that the petitioners raise in this petition.

B. United States Government's Reply to Petition of October 1, 1990, Concerning the Haitian Migrant Interdiction Program and Cooperative Agreement between the United States and the Government of Haiti Submitted on January 25th, 1991.

1. That the petitioners assert that their remedies under United States law were exhausted with the 1987 decision of the U.S. Federal Court of Appeals in the case of Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987).

2. That assuming, without conceding, the alleged exhaustion of domestic remedies, petitioners had notice of the final judgment of their claim under domestic law over three years ago. The petitioners thus failed to lodge their petition within six months from the date they were notified of the final judgment of their claim under domestic law, as required by Articles 52 and 38 of the Regulations of the Commission. (Article 46 of the Inter-American Human Rights Convention, which the United States has signed but not ratified, contains an identical six-month time period for the submission of a petition.)

3. That the United States therefore requests that the Commission find the petition inadmissible, and, as a result, will not address the interpretations of law and factual assertions presented in the petition.

C. Petitioners' Reply To Government's Argument Regarding Admissibility submitted April 29, 1991.

1. The petitioners reiterated their arguments contained in their Original petition, Emergency Application for OAS Action, and Supplementary Application in support of their emergency application for OAS action with regard to the interdiction program, its implementation, (which is still being continued), and the various international instruments

allegedly violated by the United States Government. (Argument omitted.)

2. Petitioners stated that neither Article 38 nor 52 precludes the admissibility of the petition in this case. That only one of the seven petitioning parties, the Haitian Refugee Center, attempted to exhaust domestic remedies, and by doing so it firmly established the uselessness of such remedies. Without conceding its correctness or legality, United States law by its own terms precludes domestic judicial review of the Haitian interdiction program. The key applicable regulation, Article 38 of the ICHR, states: "The Commission shall refrain from taking up those petitions that are lodged after the six-month period following the date on which the party whose rights have been violated has been notified of the final ruling in cases where the remedies under domestic law have been exhausted."

3. Petitioners argued that Article 38 is not a bar to the admissibility of this petition because this is not a case "Where Remedies Under Domestic Law Have been Exhausted" and petitioners have not received final decisions. The petitioning parties do not, as claimed by the United States Government, "assert that their remedies under United States law were exhausted with the 1987 decision of the U.S. Federal Court of Appeals in the case of Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987)." What petitioners do claim is that the Gracey case firmly established that there are no effective domestic remedies to be exhausted. Only one of the seven petitioning parties in this case, the Haitian Refugee Center, filed suit in the United States District Court for the District of Columbia challenging the legality of the Haitian interdiction program under United States law (the Refugee Act of 1980), the Due Process Clause of the Fifth Amendment of the United States Constitution, and international law.

4. That in Haiti Refugee Center v. Gracey, 600 F. Supp.1396 (D.D.C. 1985), the United States District Court refused to reach the merits of the plaintiffs' claims, ruling that (1) the U.S. Refugee Act did not protect persons who were outside the territorial waters of the United States (i.e. people who had not made an "entry"); (2) the Due Process clause of the U.S. Constitution provided no Fifth Amendment rights to interdicted Haitians who had not yet completed an "entry" into the United States; and (3) the Protocol was not a self-executing treaty and thus had no force as domestic law. See HRC V. Gracey, 600 F. Supp at 1404-1406.

5. That on appeal, the United States Court of Appeals for the District of Columbia was even less receptive to plaintiffs' claims. The Court affirmed the dismissal of the case, ruling further that the plaintiffs lacked standing to bring the lawsuit. Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987). The Court of Appeal's decision was based upon well-established and deeply entrenched law in the United States, including federal statutes enacted by Congress and judicial doctrines. Just as the United States Government successfully argued in Gracey, it is clear that domestic remedies cannot vindicate, indeed will not even address, the claims that petitioners raise in this petition. The Haitian Refugee Center is the only party in this petition which even attempted to exhaust its domestic remedies. However, as stated in the petition, the

plaintiffs' claims in Gracey were denied without an examination of the merits.

6. That the Haitian Refugee Center, recognizing that under United States law no domestic remedy was available to address the legality of the interdiction program, did not appeal the adverse decision in the Gracey case to the United States Supreme Court. It would have been futile to have done so. The Haitian Refugee Center did not, therefore, fully exhaust its domestic remedies because such exhaustion would have accomplished nothing. The Haitian Refugee Center neither sought nor obtained a "final" decision on its claims. None of the other six petitioning parties attempted to exhaust their domestic remedies in the United States because to do so would have been completely futile. Furthermore, none received notification of a "final ruling." Article 38 of the ICHR therefore has no application to them at all.

7. That the petitioning parties were not required to exhaust the domestic remedies. Article 37 of the Regulations present petitioners with two alternatives in order to avoid a finding of inadmissibility on ground of failure to exhaust domestic remedies: (1) petitioners "remedies under domestic jurisdiction must have been invoked and exhausted in accordance with general principles of international law," Article 37(1), or, (2) petitioners may claim an exemption to exhaustion requirements if they can demonstrate that domestic remedies cannot be exhausted because they are not available as a matter of law or as a matter of fact as specified in 37(2). (See IA Court HR, Advisory Opinion of August 10, 1990, Exceptions to the Exhaustion of Domestic Remedies.)

8. Article 37(2)(a) states that exhaustion requirements shall not be applicable when: the domestic legislation of the state concerned does not afford due process of law for protection of the right or rights that have allegedly been violated. Under Article 37(2)(b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them. In this case United States law "does not afford due process of law for protection of the right or rights that have allegedly been violated," and "the parties alleging violation of their rights have been denied access to the remedies under domestic law..." See Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987) (The Haitian Refugee Center is the only party in this petition which even attempted to exhaust its domestic remedies.

9. That no Haitian boat person can make a claim for protection under U.S. asylum legislation until that person has made an "entry" under the U.S. immigration laws or unless there is a specific statutory grant of a right independent of the Fifth Amendment to the United States Constitution. See Jean v. Nelson, 727 F.2d 957, 968 (11th Cir.1984).

That as non-U.S. citizens seeking admission to the United States, the Haitian boat people on behalf of whom this petition is filed are presently considered as having no Constitutional rights. Jean Nelson, 727 F.2d 957, 968 (11th Cir. 1984), aff. on other grounds, Jean Nelson 472 U.S. 846; see also Landon v. Plascencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking admission to the United States requests a privilege and has no constitutional rights regarding his application, for the

power to admit or exclude aliens is a sovereign prerogative" (emphasis added); Knauff v. Shaughnessy, 338 U.S. 537, 544, 70 S.Ct. 309, 313 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned ...Petitioner had no vested right of entry").

10. Therefore, the unnamed Haitian interdictees whom the petitioners in this case seek to represent and assist are afforded no standing in the United States courts -- they are deemed "excludable aliens" not within the protection of the federal statutes or the Fifth Amendment to the United States Constitution. See Kwong Hai Chew v. Colding, 344 U.S. 590-600 (1953). Of course, the inability of the interdictees to assert due process rights to gain consideration as asylees under U.S. law is not surprising. Documents describing the Haitian interdiction program demonstrate that its essential purpose is precisely to prevent Haitian refugees from entering the United States so that they may have their applications for political asylum considered. For this reason the program is conducted on the high seas rather than in U.S. territorial waters where interdictees could enter the political asylum process.

11. That the Haitian interdiction program is intended to and does constitute a cordon around INS's asylum procedures and the U.S. courthouses precisely to prevent Haitian refugees from gaining access to domestic remedies. One would literally have to fight off a Coast Guard Cutter to access domestic remedies. Under these circumstances exhaustion of such remedies clearly cannot be demanded. It should also be pointed out that no person or organization in the United States has third-party standing to assert the rights of those Haitian refugees who have been interdicted. As the court held in Gracey, the plaintiffs could not make the independent showing required for recognition of third-party standing to raise the non-constitutional rights of third parties, because none of the laws that the interdiction program is alleged to violate are substantive protections of a relationship between Haitian aliens and appellants (or anyone else). The program is alleged primarily to violate such Haitians' procedural rights. Gracey, at 809.

12. That the U.S. legislation does not afford due process of law for protection of the rights of Haitians having claims to refugee or asylee status who are interdicted by the U.S. Coast Guard on the high seas. The "domestic legislation" which constitutes a denial of due process is the interdiction program itself, which acts to cut off from the legal system Haitians with genuine refugee claims who would otherwise be eligible to apply for asylum and have their applications considered under the terms of applicable domestic law. The Inter-American Court has stated that: "adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted." Velásquez Rodríguez Case, Judgment of January 20, 1989 IA Court HR, Series C No.,4, para. 64, 66 9 HRLJ 222 (1988).

13. That in its recent Advisory Opinion on the subject of exhaustion of domestic remedies, the Inter-American Court, quoting the landmark Velásquez Rodríguez case,

declared that: "when it is shown that remedies are denied . . . without an examination of the merits; or if there is proof of the existence of a practice or a policy ordered or tolerated by the government the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others . . . resort to those remedies becomes a senseless formality." That the exceptions of Article 46(2) of the American Convention containing the exact language of 37(2) applying to States such as the United States which have not ratified the Convention would be fully applicable in those situations and would discharge the obligation to exhaust domestic remedies since they cannot fulfill their objective in that case. IA Court HR, Advisory Opinion of August 10, 1990, (Exceptions to Exhaustion of Domestic Remedies, para 34, quoting Velasquez Rodriguez, Judgement of January 20, 1989, IA Court HR, Series C No.4, para. 68; 9 HRLJ 223 (1988).

14. That in recent cases in El Salvador, Peru, and Suriname the Commission found that the remedies were not effective and that petitioners need not exhaust them. (All resolutions reported in 1989-90 Annual Report, Inter American Commission on Human Rights (IACHR Report). Given the Gracey court's position that no one has standing to challenge the interdiction program, and, that even if someone did, the courts do not possess jurisdiction over such a challenge, the Haitian Refugee Center did not seek further review in the United States Supreme Court and the six other petitioning parties did not seek to exhaust domestic remedies at all because to do so would have been a "senseless formality."

15. The petitioners further stated that "it is clear that domestic remedies cannot vindicate the rights under international law that petitioners raise in this petition." The United States Government cannot disagree with this statement because this is precisely what it argued in the Gracey case. Conclusion: from the plain language of Article 38, the six-month deadline for the presentation of petitions only applies "in cases where the remedies under domestic law have been exhausted." Article 38, Regulations of the Inter-American Commission on Human Rights. In this case the petitioning parties have not exhausted domestic remedies in the United States because under U.S. law they have no standing and the courts have no jurisdiction. HRC v. Gracey, 809 F.2d 794 (D.C. Cir. 1987). Further resort to the U.S. courts would clearly be a "senseless formality."

D. Argument in Support of Emergency Application Filed by
Petitioners on October 3rd, 1991, For Provisional
OAS Action to Halt United States' Policy of Interdicting And Deporting
Haitian Refugees

1. Petitioners argue that pursuant to Title II, Chapter I, of the Regulations of the Inter-American Commission on Human Rights that: "in urgent cases, when it becomes necessary to avoid irreparable damage to persons, the Commission may request that provisional measures be taken to avoid irreparable damage in cases where the denounced facts are true." That Article 29.2 authorizes the Commission to take the action petitioned for: "to request that the United States Government take provisional measures in the form of a suspension of the interdiction and deportation of Haitians to avoid irreparable harm

they may face if returned to Haiti under the present circumstances of violence which prevail in that country."

2. That measures almost identical to those requested here were taken in another Haitian interdiction case No. 3228. In that case, in which petitioners were also represented by the same counsel, then OAS Executive Secretary Edmundo Vargas Carreño sent a cablegram to former Secretary of State Cyrus Vance requesting that "for humanitarian reasons the United States refrain from any action which would result in the deportation of the Haitian citizens." (See cablegram from Edmundo Vargas Carreño to Cyrus Vance, dated April 7, 1980.) The situation presented now even more urgently calls for efforts by the Inter-American Commission to protect the fundamental human rights of Haitians who face interdiction and deportation to Haiti. Action by the OAS pursuant to Article 29.2 is necessary to avoid irreparable if not fatal injuries to persons facing return to Haiti by the United States Government authorities.

E. Argument in Support Of Petitioners' Emergency Application for Provisional OAS ACTION to Halt the United States Policy of Returning Haitian Refugees Interdicted Of Submitted February 6th, 1992

1. The petitioners reiterated their argument regarding the various international human rights instruments allegedly violated by the United States Government, in particular Articles of the American Convention. (Argument omitted, same as in part A of "Submission before Commission.") They further argued that the Commission has the authority to take precautionary measures under Article 29.2 of the American Convention, (Argument omitted contained in part C of submission before the Commission.)

2. The petitioners further argue that it is clear that the interdiction program is failing to identify those Haitians with legitimate claims to asylum. They argue that the most recent detailed and compelling record of this has been made in the lawsuit of Haitian Refugee Center v. Baker, No. 91-2635-CIV-Atkins (C.D.Fla. 1991). In that case the United Supreme Court recently ruled that the United States Government could commence expulsions to Haiti. The Second Amended Complaint in Haitian Refugee Center v. Baker details at length the circumstances leading to the flight of fifteen Haitians who are the named plaintiffs, and summarizes their INS interviews upon interdiction. All of the interdictees were politically active. All were sought by the military government following the coup. Many had family members killed by the government. Almost all were sick and malnourished during their asylum interviews. Many were not told why they were being interviewed by the INS, and were afraid to answer fully. Most of the interviews lasted five minutes or less, which included time for translation. Many of the interviewers were hostile, and told the interdictees that they would be returned regardless of what they said. Almost all of the interviewers failed to follow up on indications of political persecution.

3. That none of the fifteen individuals was determined to have a plausible claim for asylum. All were subject to immediate forced repatriation. So compelling was the testimony of these Haitians that the federal district court judge hearing the case concluded

that the INS "procedures presently in place appear substantially inadequate" to ensure the fair presentation of the Haitian's asylum claims. The court concluded that the "INS screeners are failing to follow the INS's own guidelines" -- specifically, that interviews shall be conducted to ensure a full presentation of asylum claims.

4. No appellate court contradicted these factual findings. The testimony of numerous human rights group confirms them. See "Haiti, The Human Rights Tragedy: Human Rights Violations Since the Coup." Amnesty International, January 1992 at 2 ("Amnesty International believes that the U.S. refugee screening procedure lacks certain essential safeguards which must be allowed to asylum-seekers and which are required by international standards"). See also "Refugee Refoulement: The Forced Return of Haitians under the U.S.-Haitian Interdiction Agreement." Lawyers Committee for Human Rights, Mar. 1990 at 20-23, 49-53. There is thus a great likelihood that the interdiction program has failed to identify those Haitians with legitimate claims to asylum, and that Haitians who legitimately fear political persecution will be forcibly returned to a hostile military junta.

5. The petitioners argue that it is clear that the safety of persons deported to Haiti cannot be reasonably ensured. Following the violent ouster and exile of President Aristide, the chaos restrained during seven months of democratic rule has returned to Haiti. This violence has not subsided in the five months since the coup. To the contrary, the following picture of death and disorder now rampant in Haiti is being painted by the media, human rights observers, and the Haitian Consulate in New York:

- i. Extrajudicial executions remain commonplace. At least 1,500 people have been killed since the coup. The removal of bodies from morgues by the Haitian Government indicates that more may have been killed and buried in secret mass graves.
- ii. The military has systematically targeted President Aristide's political supporters, grassroots organizations, women's groups, peasant development groups, trade unions, church groups, and youth movements. On the anniversary of the December 16, 1990 elections, police killings and arrests of Aristide supporters were reported throughout the country. A meeting held by Aristide's prime minister designate was stormed by plainclothes policemen. The continuing nature of the threat is evident in that arrests for pro-Aristide activities have been reported as recently as February 2, two days after the United States began forcibly repatriating Haitian interdictees. As a result of these persecutions, an estimated 200,000 people have been forced into hiding.
- iii. Detention without warrant is common, along with torture, denial of medical care, and the failure to provide food to prisoners. The fate of those detained is often not clarified by the government. Families who go to prisons and detention centers to search for their relatives are often intimidated by soldiers. Over 300 people have been arrested since the coup. Among those

arrested have been the mayor of Port-au-Prince, the wife of President Aristide's Prime Minister, and numerous financial and political supporters of the exiled President. One interdictee said, "we can't even stand around talking without the soldiers coming and beating the crap out of you."

- iv. Brutal and corrupt rural chiefs known as "chefs de section" have been re-armed and reinstated by the military regime. They have been reported to perpetrate killings and beatings of Aristide supporters who had disempowered them.
- v. The military regime has issued decrees granting amnesty to anti-Aristide militants. The ruling junta has freed those who participated in earlier coups designed to prevent President Aristide from taking power after he won the elections.
- vi. Restrictions on the press and freedom of speech and assembly in place in Haiti since the coup have made it extremely difficult and dangerous to fully investigate reported human rights violations. Members of the Catholic Church, journalists, human rights monitors and others have been threatened and intimidated by members of the security forces. As Amnesty International reports, even its own figures "could substantially underestimate the extent of the human rights crisis in Haiti: problems in communications and the climate of fear and repression have meant that many human rights violations remain unreported." The result is that the true state of affairs in Haiti may be much worse than what is reported.
- vii. So bad are conditions in Haiti that the United States Government has recalled its ambassador to Haiti, Alvin P. Adams, for a policy review, has made efforts to evacuate all non-essential United States personnel, has issued a travel advisory to Americans planning visits there, and continues to refuse to recognize Haiti's ruling military junta. (Reference made to Amnesty International, 1992 Report discussed above, the case of Haitian Refugee Center v. Baker discussed above, telephone interview with Public Affairs Officer of Haitian Consulate in New York, and newspaper reports of the Haitian situation, citations omitted.)
- viii. The United States Government started deporting Haitians only hours after the Supreme Court lifted the injunction preventing their forced repatriation. It did this despite the fact that the safety and well-being of those Haitians returned cannot be guaranteed. In one widely publicized incident, Haitians who voluntarily returned from Venezuela on December 3, 1991, were thoroughly questioned, searched and taken to police headquarters, where they were finger-printed and photographed. That others may be placed under the care of the Haitian Red Cross cannot be credited. That organization is not a member of the International Red Cross, and it is not

independent of government pressure.

6. The petitioners further argue that arrests of Aristide supporters have been reported as occurring after the United States began forcibly repatriating Haitian refugees on February 1st. That there is no evidence to indicate that returned Haitians will be treated any better than those who never left. They state that to the contrary there is every reason to believe they will be treated worse, and that the intervention of the OAS is urgently needed.

7. The petitioners submitted copies of interviews from Haitian interdictees forcibly repatriated by the United States Government upon their return, in support of their emergency application for OAS action filed on February 6th, 1992.

F. The United States' Second Submission of August 28th, 1992, Regarding the Inadmissibility of Petition

1. The United States Government argues that the petitioners' complaint should be dismissed under Articles 37 and 41(a) of the Commission's Regulations because they have not exhausted available remedies under domestic law. That the policies and practices of the United States Government which form the basis of petitioners' complaint before the Commission are the subject of ongoing litigation in the domestic courts of the United States.

2. That the action currently pending, Haitian Centers Council, Inc. v. McNary, was filed in the Eastern District of New York on March 18, 1992. Two of the petitioners before the Commission, Haitian Centers Council, Inc., and the National Coalition for Haitian Refugees, Inc., are also plaintiffs to this lawsuit. The events and the United States Government policies described in the original petition and subsequent filings with this Commission are similar or identical to those which give rise to the pending lawsuit.

3. That the original focus of the lawsuit was a claim based in part on the First Amendment of the United States Constitution. Plaintiffs challenged, inter alia, the absence of legal counsel during the Administrative screening of interdicted Haitians who had been diagnosed as carrying the AIDS virus. On March 27, 1992, the District Court granted plaintiffs' temporary restraining order, which was upheld in part by the Federal Court of Appeals for the Second Circuit on June 10, 1992. Under the Court's order, the United States Government is prevented from interviewing, processing, or repatriating the affected Haitians without providing access to legal counsel.

4. That as these issues were being decided, separate litigation began on a different issue in reaction to President Bush's revocation of Executive Order 12324, and issuance of new direct return of interdictees to Haiti, and instituted a policy of "in-country" refugee processing. Plaintiffs sought a temporary restraining order on May 28, 1992, barring implementation of the direct return policy. That request was denied by the District Court on June 5, 1992. On July 29, 1992, this decision was reversed by the Federal Court

of Appeals for the Second Circuit, which remanded the case to the District Court to issue an immediate injunction barring the return of any interdicted Haitian whose life of freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group or political opinion. The District Court issued such an injunction the next day. On July 30, 1992, the Second Circuit stayed the injunction in order to allow the Government to pursue an orderly appeal to the Supreme Court. The Supreme Court stayed the injunction on August 1, 1992, pending a filing of a petition for a writ of certiorari. Such a petition was filed on August 24, 1992, and is currently pending before the Court. If the Court grants the writ, it will hear the case and make a decision on the merits during its next term.

5. That if the Supreme Court were to rule against the U.S. Government and uphold the Second Circuit's decision, the Government would be barred from continuing to implement the President's Executive Order. While it is the view of the United States Government that the 1951 Refugee Convention does not apply extraterritorially, this issue is currently before the Courts. Furthermore, the Government is already barred by the court order from screening or returning to Haiti those relatively few Haitians who currently remain at the Guantanamo Naval Station without first providing them access to legal counsel. In other words, those remedies which petitioners are seeking before the Commission have already been granted or are within their reach in litigation currently pending before the United States judiciary. Domestic remedies are far from "useless" as alleged by petitioners. At this critical juncture of these complicated proceedings, it would be highly intrusive and inappropriate for the Commission to fail to dismiss this petition. Such action would not accord with the requirements of Article 41(a) of the Commission's Regulations.

6. That the exceptions to the exhaustion requirement contained in Article 37(2) are inapplicable to petitioners' claim. That petitioners' original complaint, and their response dated May 6, 1991, were both filed prior to the initiation of the current lawsuit. Since that time, the fallacies of petitioners' arguments have become clear. Petitioners' assertions that "there are no effective remedies to be exhausted" and that the parties involved "have been denied access to the remedies under domestic law" are clearly inaccurate in light of the litigation pending today in the Supreme Court of the United States on the merits of petitioners' claims. Petitioners' efforts to exhaust domestic remedies are far more than a "senseless formality." Furthermore, petitioners have not been denied access to remedies under domestic law. No less than four separate cases, challenging various United States policies toward Haitian migrants and involving countless judicial proceedings, have been filed in the past twelve years. Clearly, there is access to domestic remedies. The exceptions of Article 37(2) and (b) are thus inapplicable.

7. That there has been no unwarranted delay in these proceedings within the meaning of Article 37(2)(c). Although several cases regarding the Government's policy toward Haitian migrants have been filed by numerous plaintiffs over the last few years, each has revolved around distinct and complex issues of domestic and international law. Furthermore, both phases of the present litigation have proceeded through the United

States judicial system in an expeditious manner. The second phase of the present case - plaintiffs' challenge to Executive Order 12807 - has progressed to the very highest level of the United States judicial system within a mere two months.

8. That since the petitioners' claims are currently being adjudicated in the domestic courts of the United States, they clearly have failed to fully exhaust judicial remedies available in this country. Therefore, the petition fails to satisfy the exhaustion requirement of Article 37, and the United States respectfully requests the Commission to declare the petition inadmissible, in accordance with Article 41(a). The United States Government qualified their submission by stating that notwithstanding any reference to the merits of petitioners' complaint mentioned in this communication, the United States reserves the right to address more fully the merits of petitioners' substantive arguments in the event there is a need to do so.

Because the United States believes that the complaint is inadmissible, this communication does not address in detail the interpretations of law and factual assertions presented in the petition.

G. Petitioners' Response to United States Government's Request That The Commission Dismiss the Complaint under Articles 37 and 41(a) Of The Commission's Regulations Submitted December 31, 1992

1. The petitioners argue that in stark contrast to the U.S. Government's suggestion before the Commission that there are "available remedies" under domestic law, in the domestic courts the U.S. Government has repeatedly and successfully argued that there are no available domestic remedies because the courts may not "intrude into this delicate area of the Nation's foreign policy." Petition for Writ of certiorari, McNary v. Haitian Centers Council, No. 92-344 (Aug. 1992), p.3.

2. That never before has a Government of the Western world "interdicted" fleeing refugees on the high seas and returned them to a country where they face persecution. While the U.S. Government has called upon the dictatorship in Haiti to comply with resolutions of the OAS, it has ignored the communication from this Commission dated October 4, 1991, requesting that the return of Haitians be temporarily suspended until the situation in Haiti is normalized. While the U.S. Government has condemned "in principle and in practice" the British policy of forcibly repatriating Vietnamese boat people fleeing to Hong Kong, N.Y. Times, Jan. 25, 1990, at p. A6, it continues to this day to involuntarily repatriate Haitian boat people fleeing widespread political violence, bloodshed, hunger, death, and disappearances.

3. That as required by Article 37, petitioners have exhausted their domestic remedies. The U.S. Government incorrectly concludes that the issues presented in this petition are "similar or identical" to those which the U.S. Supreme Court will shortly consider in McNary v. Haitian Centers Council, No. 92-444, and that the "remedies which petitioners are seeking before the Commission have already been granted or are within their reach in the McNary v. Haitian Centers Council litigation ..." U.S. Reply. Neither of

these assertions is accurate.

4. The petitioners state that the challenged interdiction program was initiated in 1981 pursuant to a September 23, 1980, bilateral executive agreement signed with the Haitian Government of dictator Jean Claude Duvalier. Agreement effected by Exchange of Notes, U.S.-Republic of Haiti, Sept. 23, 1981, 33 U.S.T. 3559, T.I.A.S. No. 10,241. The agreement purports to authorize the U.S. to return "detained vessels and persons to a Haitian port," while exempting from return Haitians "determined to qualify for refugee status." To implement the agreement in domestic law, President Reagan issued Executive Order 12324. 46 Fed. Reg. 48,109 (1981).

5. That over the next ten years U.S. Coast Guard cutters interdicted more than 25, 000 Haitians fleeing their country. That to implement Executive Order 12324, Immigration and Naturalization Service (INS) agents conducted brief "screening" interviews to determine whether interdictees made a credible showing of refugee status. That, as was described in detail in petition, interviews took place while the Haitians were handcuffed on the decks of the cutters, cold, hungry, afraid and completely without access to legal assistance or review of a decision to repatriate. That not surprisingly, all but 20 of the 20,000 interdicted Haitians were forcibly and involuntarily returned to Haiti. (The petitioners restated some of the international human rights articles violated, by the interdiction program, and the various emergency applications filed due to the escalation of violence during the filing of the petition up to the present time, and the Commission's actions, argument omitted.) That to the best of the petitioners' knowledge, the United States Government ignored the Commission's request to suspend its interdiction policy for humanitarian reasons, that because of the danger to their lives, the Haitians should not be repatriated until the situation in Haiti has been normalized.

6. That on November 19, 1991, the Haitian Refugee Center, Inc. (HRC), and others filed an action (HRC v. Baker) in the U.S. District Court for the Southern District of Florida contending that the interdiction program violated domestic and international law. HRC v. Baker challenged the procedural sufficiency of the "screening interviews" conducted by INS agents on Coast Guard cutters. See Haitian Refugee Center v. Baker, 953 F.2d 1498, 1502-03(11th Cir.) per curiam), cert. denied, 112 S.Ct. 1245 (1992). Plaintiffs alleged that: (1) the rights of HRC attorneys under the First Amendment to the U.S. Constitution to meet with Haitians held at Guantanamo were violated, (2) both international and U.S. law prohibited the forced repatriation of Haitians, and (3) the screening procedures to determine refugee status violated the interdiction agreement, were arbitrary, and constituted an abuse of discretion under domestic law (the Administrative Procedures Act).

7. That the United States District Court issued several injunctions temporarily halting repatriations to Haiti. That the U.S. Government successfully appealed each injunction to the Eleventh Circuit Court of Appeals; all court orders temporarily halting repatriations were dissolved. See HRC v. Baker, 953 F.2d 1498, (11th Cir.)(per curiam), cert. denied 112 S.Ct. 1245 (1992). That on February 24, 1992, the U.S. Supreme Court

denied plaintiffs' applications for a stay of the mandates, and denied plaintiffs' petition for a writ of certiorari. That at that point the plaintiffs had fully and unsuccessfully exhausted their domestic remedies.

8. That the Miami-based Haitian Refugee Center, Inc., a plaintiff in HRC v. Baker, and one of the petitioning parties in this case, has fully exhausted its domestic remedies. It took its case to the U.S. Supreme Court which, at the urging of the U.S. Government, refused to hear the matter. The Haiti-based petitioning human rights groups clearly would have even less standing than the U.S.-based Haitian Refugee Center to challenge the interdiction program in the U.S. courts. That petitioner JEANNETTE GEDEON, a Haitian interdicted and summarily returned to Haiti in October 1991, has no standing to somehow magically pursue domestic remedies in the U.S. The petitioners have either exhausted or further exhaustion would be utterly futile.

9. That on March 17, 1992, several Haitian advocacy groups, including Haitian Centers Council, and the National Coalition for Haitian Refugees, two of the petitioning parties in this case, filed a new action in the United States District Court for the Eastern district of New York, focusing on the rights of Haitian interdictees who had been "screened in" (i.e., determined to meet the threshold test of credible fear of return), and were being subjected to second interviews at the Guantanamo facility without benefit of counsel. Their second interviews were to determine whether to grant waivers of grounds of exclusion relating to positive tests for the HIV virus. See Haitian Centers Council v. McNary, 969 F.2d 1326, 1331 (2nd Cir. 1992).

10. That on March 27, the Federal District Court granted plaintiffs a temporary restraining order blocking the forcible repatriation of 3, 446 Haitians remaining at Guantanamo who, the District Court judge declared, "may face torture or death if repatriated to Haiti." Haitian Centers Council v. McNary, 92-CV-1258, pp. 28-29 (E.D.N.Y. apr 6, 1992). Relying on the First Amendment and the Due Process Clause of the U.S. Constitution, the District Court granted plaintiffs a preliminary injunction which (1) required the INS to grant the plaintiff organizations "access" to individual interdictees who previously had been "screened in," and (2) enjoined the INS from re-interviewing or repatriating interdictees who previously had been "screened in," without first allowing them to communicate with counsel. The Court certified a class of "screened in plaintiffs" entitled to that relief. That about two weeks later, on April 22, 1992, at the request of the U.S. Government, the U.S. Supreme Court stayed the District Court's order pending review of that order by the Second Circuit Court of Appeals. That on June 10, 1992, the Court of Appeals issued its decision. It reversed and vacated the preliminary injunction requiring "access" to interdictees for the plaintiff organizations, but affirmed the injunction that the several hundred remaining interdictees in Guantanamo who had communicable diseases could not be repatriated without being provided access to counsel. Haitian Centers Council v. McNary, 969 F.2d 1326 (2d Cir. 1992). The U.S. Government did not appeal that limited order.

11. That in May 1992, while the appeal of the first preliminary injunction was still

pending before the Court of Appeals, the U.S. Government claimed that the number of people leaving Haiti by boat "surged dramatically." See McNary v. Haitian Centers Council, petition for a Writ of Certiorari, etc., supra. The U.S. Government stated that nearly 10,500 Haitians were intercepted by the Coast Guard in the first 20 days of the month. Id. The temporary tent camp at Guantanamo was "nearing capacity." Id. The U.S. Government explained to the U.S. Supreme Court that: "At this juncture the President had limited options. In light of the saturation of Guantanamo and the Coast Guard cutters, the unwillingness of third countries to accept any significant numbers of Haitian migrants, and the continuing massive outflow and attendant result of loss of life, the only practical alternatives were either to bring all Haitian migrants directly to the United States for screening or repatriate them all to Haiti immediately upon interdiction without an interview."

12. That the Bush Administration opted for the latter approach. Executive Order No. 12807 was issued from President Bush's home on May 24, 1992 (known as the "Kennebunkport Order"). It permits the summary return of Haitian refugees, entirely eliminating the interview previously conducted to determine whether Haitians would be "screened in" for further consideration of their asylum claims. The Executive Order also provides for processing of applications for refugee admission to the U.S. at the U.S. Embassy in Port-au-Prince. Over 10,000 Haitians have applied for refugee visas. Only a handful have been granted.

13. That while the Executive Order does not require screening interviews, it states that "the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent." Section 2(c)(3), 57 Fed. Reg. 23,134, 57 Fed. Reg. 23,133 (1992). Under Coast Guard instructions, an interdictee will not be repatriated immediately to Haiti if the commanding officer believes that repatriation "would place the interdictee in an immediate and exceptionally grave physical danger, based on either the officer's observation or compelling statements by the individual." McNary v. Haitian Centers Council, Petition for a Writ of Certiorari, supra. The petitioning parties in this case and their counsel do not know any cases in which this exception has been invoked. That it is therefore clear that Coast Guard captains are granted autocratic, boundless and unreviewable power over life-and-death decisions affecting Haitian interdictees. Yet, the Haitian interdictee is not granted any participation in the process of that decision, nor is the decision subject to review by anyone. Thousands of Haitian boat people have been interdicted and summarily repatriated to Haiti under the Kennebunkport Order.

14. That on May 28, 1992, the plaintiffs in Haitian Centers Council v. McNary applied for a temporary restraining order to bar implementation of the President's May 24 Executive Order. The District Court reluctantly denied the request, but condemned the change in the U.S. policy in the harshest possible terms, holding that "plaintiffs undeniably make a substantial showing of irreparable harm..." The court also wrote that:

It is unconscionable that the United States should accede to the United Nations 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.

15. That while outraged at the result, the District Court felt it was powerless to order a remedy precisely because of the success the U.S. Government had in HRC v. Baker case in convincing the Court of Appeals and the U.S. Supreme Court that Haitians injured by the interdiction program possess no remedies in the domestic courts (the opposite of the position that the U.S. Government suggests in this case).

16. That the plaintiffs appealed, and two months later the U.S. Court of Appeals for the Second Circuit reversed and ordered the District Court to enter a preliminary injunction stopping implementation of the Kennebunkport Order. The Court of Appeals stated that Title 8, United States Code, section 1253(h), and the ratified Protocol Relating to the Status of Refugees, create parallel rights of non-repatriation -- they bar the U.S. Government from returning any migrant, wherever located, to the conditions of persecution. That people cannot be summarily repatriated without a determination regarding their asylum claims. The Coast Guard was essentially told to return to its ten-year-old practice under Executive Order 12324 of providing a "screening" interview prior to repatriation.

17. That on July 29, 1992, the District Court entered a preliminary injunction in accordance with the Second Circuit's decision, barring repatriation to Haiti of "any interdicted Haitian" whose life or freedom would be threatened on account of his or her political opinion. See McNary v. Haitian Centers Council, petition for a Writ of Certiorari, supra. However, at the request of the U.S. Government, the U.S. Supreme Court, on August 1, 1992, granted a stay, allowing interdictions and returns to continue pending the U.S. Supreme Court's review of the injunction.

18. That for Haitians interdicted today there are no domestic remedies to exhaust. Haitians are seized on the high seas and immediately are returned to Haiti. They cannot stop the repatriation by requesting transportation to Miami so they may exhaust some domestic remedies. That members and clients of the petitioning organizations are today suffering forcible return to Haiti because of the stay order issued by the U.S. Supreme Court in McNary v. Haitian Centers Council. They have no further domestic remedies to exhaust in order to stop the irreparable injury suffered through involuntary repatriation.

19. That the issue the Supreme Court will decide in McNary v. Haitian Centers Council focuses on the narrow question of the legality of repatriation without an interview. That is not the issue presented in this petition. That here, as in HRC v. Baker, petitioners are challenging the entire interdiction program, including the manner in which interviews are conducted and the rights of interdictees during interviews. That the remedies which petitioners seek in this case are not, as stated by the U.S. Government, "within their reach" in the Haitian Centers Council case now pending before the U.S. Supreme Court. U.S.

reply at 3. Furthermore, because the U.S. Supreme Court granted the U.S. Government a stay in Haitian Centers Council, Haitians now being interdicted and repatriated will receive no benefit from a decision in Haitian Centers Council even if the decision finally goes in favor of the plaintiffs and against the U.S. Government. As the District Court stated in Haitian Centers Council, that some Haitian forcibly returned "face political persecution and even death upon their return." Haitian Centers Council v. McNary, 969 F.2d 1326, 1332-33 (2nd Cir. 1992).

20. Therefore, the petition satisfies the exhaustion requirement of Article 37, and the petitioning parties respectfully request the Commission to declare the petition admissible. The U.S. Government should be requested to address in detail the interpretations of law and factual assertions presented in the petition.

H. The Response of the United States Government to Petitioners' Argument submitted Feb. 10th, 1993

1. The United States Government reiterated its argument as contained in its second submission above. It argued that the petition should be dismissed because it is inadmissible under Article 37 of the Commission's Regulations, that the case of Haitian Centers Council, Inc., et al. v. McNary is scheduled for oral argument in the Supreme Court on March 2nd, 1993, which is the substance of the petitioners' argument, and therefore the petitioners have not exhausted domestic remedies. (Full argument omitted.) The Government also requested that the hearing scheduled before the Commissioner's on February 26th, 1993, be postponed.

V. THE LAW:

Two threshold issues are raised in this petition:

1. Have domestic remedies been exhausted, pursuant to Article 37 of the Commissions Regulations?.
2. Was the petition timely filed pursuant to Article 38 of the Commission's Regulations?.

VI. ANALYSIS:

1. DOMESTIC REMEDIES HAVE BEEN EXHAUSTED PURSUANT TO ARTICLE 37 OF THE COMMISSION'S REGULATIONS

There are several petitioning parties in this case. Based on the alleged facts these are:

1. The Haitian Centre for Human Rights, Port-au-Prince, Haiti.
 2. Centre Karl Leveque, Port-au-Prince, Haiti.
 3. The National Coalition for Haitian Refugees, New York, N.Y., U.S.A.
 4. The Haitian Refugee Center, Inc., Miami, Florida, U.S.A.
 5. The Haitian Centers Council, New York, N.Y., U.S.A.,
 6. The Haitian-Americans United for Progress, Cambria Heights, U.S.A.
 7. The Washington Office of Haiti.
 8. JEANNETTE GEDEON
 9. Unnamed Haitian nationals who have been and are being returned to Haiti against their will.
2. Article 37 provides that:
- 37(1) "for a petition to be admitted by the Commission, the remedies under domestic jurisdiction must have been invoked and exhausted in accordance with the general principles of international law."
 - 37(2) "the provisions of the preceding paragraph shall not be applicable when:
 - (a) the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
 - (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them;
 - (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."
 - 37(3) "when the petitioner contends that he is unable to prove exhaustion as indicated in this Article, it shall be up to the government against which this petition has been lodged to demonstrate to the Commission that the remedies under domestic law have not

previously been exhausted, unless it is clearly evident from the background information contained in the petition."

3. In this case the petitioners contend that the following rights which are protected by the American Declaration of the Rights and Duties of Man have been breached by the United States of America:

1. Article I, which provides that "every human being has the right to life, liberty and the security of the person."
2. Article II provides that, "all persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."
3. Article XVII provides that, "every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights."
4. Article XVIII provides that, "every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights."
5. Article XXIV provides that, "every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon."
6. Article XXVII provides that, "every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements."

4. It is quite clear that in light of the decision of the Supreme Court on June 21st, 1993, in the case of Sale, Acting Commissioner, Immigration And Naturalization Service, ET AL. v. Haitian Centers Council, INC., ET AL., NO. 92-344, (this case was formally under the nomenclature of Haitian Centers Council, Inc., et al. b. McNary, 969 F.2d 1326, 1332-33 (2nd Cir. 1992), in the appellate proceedings.) that domestic remedies have been exhausted. In summary, the Supreme Court held in that case that there was no limitation on the President's power to repatriate undocumented aliens intercepted on the high seas and, and that the right to non-refoulement applies only to aliens who are physically present in the host country. The effect of this decision from the highest court in the United States of America, is that the petitioners have no remedy.

2. THE PETITION IS TIMELY FILED PURSUANT TO ARTICLE 38 OF THE COMMISSION'S REGULATIONS

This argument is now moot in light of the fact that the most recent decision in this matter, is the Supreme Court's decision in Sale v. Haitian Centers Council, No. 92-344, which was decided on June 21st, 1993.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECLARES:

1. That the petition is admissible in relation to the petitioners listed on page 40, Section VI, paragraph 1.
2. That the merits of the petition will be considered at the 85th, period of sessions, together with any additional submissions by the parties.
3. That the Commission places itself at the disposal of the parties with a view to arriving at a friendly settlement in this case, on the basis of respect for the human rights recognized in the American Declaration of the Rights and Duties of Man.
4. That the Precautionary Measures issued by the Commission on March 12th, 1993, and referred to on pages 15 & 16, Section IV, paragraph 5, of this report, remain in force.
5. To order publication of this report.