The Legal Adviser
Washington, D.C. 20520

December 11, 1991

Mr. Timothy E. Flanigan
Acting Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
10th and Constitution Avenue, N.W.
Rm. 5224
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Re: Haitian Refugee Center, Inc. v. Baker

Dear Tim:

I am writing to provide you with the formal opinion of the Department of State on the question whether the non-refoulement obligation of Article 33 of the 1951 U.N. Convention Relating to the Status of Refugees ("the Refugee Convention")[1/] imposes obligations on the United States with respect to refugees outside United States territory. We have previously and publicly taken the position that the obligation applies only to persons within the territory of a Contracting State. This remains our firm view. For the reasons indicated below, the Department respectfully requests that you reconsider and withdraw the apparently contrary legal conclusion reflected in the opinion of the Office of Legal Counsel of August 11, 1981. In view of the importance of this conclusion to the litigation noted above, we request that you provide us with your views in as expeditious a manner as possible.

1/ The United States never became a party to the Refugee Convention. In 1967, the United Nations completed a Protocol to the Refugee Convention that incorporated Articles 2-34 of the Convention and removed the temporal and geographic limitations on the definition of "refugee" contained in Article 1 of the Convention. The United States acceded to the Protocol on November 1, 1968, and as a result is bound by Article 33 of the Refugee Convention. 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

The relevant principles for interpreting a treaty are accurately reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, U.N. Doc. A/Conf.39/27 (1969) ("Vienna Convention"). Although the United States has not ratified the Vienna Convention, it is a signatory. A number of U.S. courts have applied those articles in interpreting treaties in cases before them. Day v. Trans World Airlines, Inc., 528 F.2d 31, 36 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976); Coplin v. United States, 6 Cl. Ct. 115 (1984), rev'd on other grounds, 761 F.2d 688 (Fed. Cir. 1985); Acrilicos v. Regan, 617 F. Supp. 1082, 1086 n.15 (Ct. Int'l Trade 1985); Denby v. Seaboard World Airlines, Inc., 575 F. Supp. 1134, 1138 (E.D.N.Y. 1983), rev'd on other grounds, 737 F.2d 172 (2d Cir. 1984).

Under Article 31 of the Vienna Convention, the starting point of treaty interpretation is "the ordinary meaning" of the terms of the treaty in their context, and in light of the object and purpose of the treaty. The context includes, among other things, "[a]ny agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty." Also to be considered is the subsequent practice in applying the treaty if the practice "establishes the agreement of the parties" regarding the treaty's interpretation. Under Article 32, the negotiating history of a treaty may also be consulted, either to confirm the results of an analysis under Article 31 or if the analysis under Article 31 leaves the meaning ambiguous or leads to an absurd or unreasonable result. These principles all lead to the conclusion that Article 33 of the Refugee Convention did not create obligations on States with respect to refugees outside their territory.

The Text and Negotiating History of Article 33

Article 33 provides as follows:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a social group or political opinion.
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> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The word "expel" in Paragraph 1 clearly refers to the treatment of refugees in a State's territory. Paragraph 2 also clearly refers to refugees in a State's territory in excluding certain refugees from the protection of Paragraph 1.

Article 33 also uses the word "return." The French term for the word "return" is included in the official English version of the treaty, a drafting device indicating that the word "return" is to be understood as synonymous with the French "refouler."[2/] The French was included in the English text for the express purpose of ensuring that the word "return" would be understood as applying only to refugees within a State's territory. During the final negotiating session for the Refugee Convention in July 1951, the Conference of Plenipotentiaries (representing 26 States, including the United States) directly confronted the question of how the word "return" in Article 33 (which was then Article 28) would be interpreted. At the session of July 11, the Swiss representative noted that the French word "refoulement" had some ambiguity, but that it "could not . . . be applied to a refugee who had not yet entered the territory of a country." The Swiss representative also expressed concern that Article 33 would be read to "impl[y] the existence of two categories of refugees: refugees who were liable to be expelled, and those who were liable to be returned." He therefore thought it essential that the drafting States "take a definite position with regard to the meaning to be attached to the word 'return,'" and stated his government's understanding that the word "return," like the word "expel," in fact "applied solely to refugees who had already entered a country, but were not yet resident there."

The Swiss representative made clear that his country's assent would depend on being assured of this reading, one implication of which would be that Article 33 would not require a state "to allow large groups of persons claiming refugee status to cross its frontiers." The representative of France affirmatively agreed with this interpretation and indicated

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2/ The French text of article 33(1) reads as follows:

> Aucun des Etats Contractants n'expulsera ou ne refoulera, de quelque maniere que ce soit, un refugie sur les frontieres des territoires ou sa vie ou sa liberte serait menacee en raison de sa race, de sa religion, de sa nationalite, de son appartenance a un certain groupe social ou de ses opinions politiques.

that "[i]t was only the idea of what was generally meant by 'expulsion' that should be retained." The negotiating record for that day reflects no disagreement with this view.[3/] U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (16th mtg.) at 6, U.N. Doc. A/CONF.2/SR.16 (1951).

The limited meaning of the word "return" in Article 33 was reaffirmed at the second and final reading of the draft Convention, on July 25, 1951. The negotiating record for that day records that the Dutch representative recalled the earlier discussion as follows:

> The Swiss representative had expressed the opinion that the word "expulsion" related to a refugee already admitted into a country, whereas the word "return" ("refoulement") related to a refugee already within the territory but not yet resident there.

The Dutch representative went on to say that this was an important point for his government because of its implications with respect to "large groups of refugees seeking access to its territory." Noting that the representatives of Belgium, Germany, Italy, the Netherlands, and Sweden, as well as Switzerland, had supported this interpretation, he asked that it be placed on the record.

The President of the Conference ruled that the interpretation should be placed on the record since no objection had been expressed. The British delegate added that the word "return" had been chosen as the nearest equivalent to "refoulement," and that he understood that the word "return" in this context had no broader meaning -- i.e., no meaning broader than the French, which had already been clarified as applying only to a refugee within the territory. The President then suggested that the French word be included in brackets whenever the word "return" was used. U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless

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3/ At an earlier and lower level stage in the drafting, when the Convention was being considered by an Ad Hoc Committee, the expert from the United States expressed the view that Article 33 should cover non-admittance at the frontier. The United States had different representation at the Conference of Plenipotentiaries and this view was apparently not reasserted by the United States. In any event, this view was not adopted by the Conference.

Persons (35th mtg.) at 21-22, U.N. Doc. A/CONF.2/SR.35 (1951). The final text of Article 33 was adopted by a vote of 20 for, 0 against, and 3 abstentions. Id. at 25.

In short, the negotiating history reflects a deliberate consideration of the meaning of the word "return," a clear understanding that it referred only to refugees within the State's territory, and a related understanding that Article 33 created no obligations with respect to refugees outside the territory, including no obligation to refugees massing at the border. A number of countries whose support for the Convention was of critical importance would never have agreed to Article 33 but for the explicit rejection of the possibility of reading "return" to apply to refugees outside their territory.

This record is dispositive, whether it is taken under Article 31 of the Vienna Convention to reflect an "agreement relating to the treaty" made between all the parties in connection with its conclusion, to confirm an "ordinary meaning" analysis, or to resolve an ambiguity.[4/]

In Haitian Refugee Center, Inc. v. Gracey, 809 F.2d 394 (D.C. Cir. 1987), Judge Edwards, the only judge to have considered the issue, concluded unequivocally -- and with specific reference to the Haitian interdiction program at issue here -- that "Article 33 in and of itself provides no rights to aliens outside a host country's borders." Id. at 840 (Edwards, J., dissenting in part and concurring in part). The other judges did not reach the merits, voting to dismiss on standing grounds.

Furthermore, the Supreme Court has observed that the United States acceded to Article 33 based upon the view that existing U.S. immigration legislation already provided the protections required by it; that Article 33 could be implemented through the then existing section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h) (1976); and that section 243(h) applied only to deportation of refugees already in the United States. See INS v. Stevic, 467 U.S. 407, 415, 417-18 (1984).

4/ Reading "return" as applying to refugees outside the territory would lead to the absurd result that a refugee on the high seas would have more protection than a refugee already in the territory of a State, since Article 33(2)'s exception to the non-refoulement obligation for a refugee who is a danger to the State can only be invoked if the refugee is in the country.

Subsequent Practice

The protracted and unsuccessful international effort to supplement the Refugee Convention with a Convention on Territorial Asylum, a central goal of which was to codify a prohibition against rejection of refugees at the frontier, further evidences an understanding of the limitations of the Refugee Convention and demonstrates the reluctance of the international community to broaden its legal commitments in the area of refugees and immigration.

The effort to draft a territorial asylum convention was preceded by adoption of the non-binding Declaration on Territorial Asylum by the U.N. General Assembly in December 1967. Paragraph 1 of Article 3 of the Declaration carried forward Article 33's usage of the words "expel" and "return" to refer to persons within the territory of a State. Paragraph 1 is broader than Article 33, however, in that it also includes an explicit prohibition against rejection at the frontier:

> 1. No person [entitled to seek and enjoy asylum from persecution] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State in which he may be subjected to persecution.
>
> 2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967).

It was clearly understood that the Declaration's non-binding "prohibition" on rejection at the frontier, even as limited, went beyond the Convention's Article 33 obligation. See Weis, The United Nations Declaration on Territorial Asylum, 7 Can. Y.B. Int'l L. 92, 142 (1969). Thus, one distinguished commentator said that, "Article 3(1) of the Declaration on Territorial Asylum, 1967, corresponds to Article 33 (1) of the Refugee Convention, but it extends the rule to include the prohibition of rejection at the frontier as well." A. Grahl-Madsen, An International Convention on Territorial Asylum 33 (2d ed., rev., 1976) (emphasis added).

Work on principles of asylum continued after 1967 with a view toward a binding instrument that would, among other

things, extend the precept of non-refoulement to protection against rejection at the frontier. Private sector drafting efforts eventually resulted in a draft convention being submitted to the U.N. High Commissioner for Refugees and subsequently to the U.N. Economic and Social Council and, finally, the General Assembly ("UNGA"). The UNGA established a Group of Experts that met in 1975 and then called a Conference of Plenipotentiaries to meet in 1977.

The draft text submitted to the Group of Experts included an obligation for States to use their "best endeavours to grant asylum" to refugees (defined somewhat more broadly than in the Refugee Convention). Article 2 also included the following proposed provision:

> No person shall be subjected by a Contracting State to measures such as rejection at the frontier, return, or expulsion, which would compel him to return directly or indirectly to, or remain in a territory with respect to which he has well-founded fear of persecution, prosecution or punishment . . . .

U.N. Group of Experts on the Draft Convention on Territorial Asylum, Draft Convention on Territorial Asylum at 4, U.N. Doc. A/AC.174/CRP.1 (1975). A later draft continued the separate treatment of the concepts of "rejection at the frontier" and "return" or "expulsion". See U.N. GAOR Office of the United Nations High Commissioner for Refugees, Elaboration of a Draft Convention On Territorial Asylum, Report of the Secretary-General at 1, U.N. Doc. A/10177/Corr.1 (1975).

The Group of Experts had difficulties with this Article, which it recognized as the most important provision in the draft convention. It settled on a proposed re-wording that became Article 3 and read in part as follows:

> No person entitled to the benefits of this Convention who is in the territory of a Contracting State shall be subjected by such Contracting State to measures such as return or expulsion which would compel him to return to a territory where his life or freedom would be threatened. Moreover, a Contracting State shall use its best endeavours to ensure that no person is rejected at its frontiers if there are well-founded reasons for believing that such rejection would subject him to persecution, prosecution or punishment . . . .

The proposed revision went on to provide for exceptions similar to those contained in Article 33 of the Refugee Convention. U.N. Group of Experts on the Draft Convention on Territorial

Asylum, Report at 16, 34, U.N. Doc. A/AC.174/MISC.3/GE.75-6119 (1975); Elaboration of a Draft Convention on Territorial Asylum, Report of the Secretary General at 1, U.N. Doc. A/10177/Corr.1 (1975).

Significantly, the initial proposal to reword this provision came from the United States, which took the position that "the principle of non-refoulement . . . should only apply to persons in the territory of a Contracting State" and that "with regard to rejection at the frontier, the principle of non-refoulement should not be expressed in absolute terms but that the words 'use their best endeavours' should be employed." Report at 14, U.N. Doc. A/AC.174/MISC.3/GE.75-6119. Compare Proposal by the Expert of the United States, U.N. Doc. A/AC.174/Informal Working Paper No. 4 (1975) with Report at 14-16, U.N. Doc. A/AC.174/MISC.3/GE.75-6119. See also 1975 Digest of United States Practice in International Law 156-58.

Efforts to conclude the convention were eventually abandoned, as the Conference on Plenipotentiaries on the Draft Convention on Territorial Asylum failed to adopt the Convention. This record clearly demonstrates that States -- including the United States -- did not regard Article 33 of the Refugee Convention as protecting refugees outside their territory, and that they were unwilling to assume such an obligation as a matter of international law.

The United States Understanding at the Time of Ratification

When President Johnson sent the Protocol to the Senate in 1968, he stated that it would require no changes in domestic law. Special Message to the Senate Transmitting the Protocol Relating to the Status of Refugees, 2 Pub. Papers 428 (1968). The Report of the Secretary of State, which accompanied the President's message to the Senate, specifically indicated that Article 33 of the Refugee Convention was comparable to section 243(h) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1253(h) (1976), and that it could be "implemented within the administrative discretion provided by existing regulations." S. Exec. K, 90th Cong., 2d Sess. VIII (1968). Section 243(h) at that time explicitly applied only to refugees within the United States:

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

(emphasis added). In short, it was clearly understood at the time of ratification that Article 33 imposed an obligation only with respect to refugees already within the United States.

Subsequent Interpretive Statements

U.S. obligations under the Convention and Protocol were reviewed after a November 1970 incident in which a Lithuanian seaman (Kudirka) jumped ship in U.S. territorial waters but was turned back to the Soviets by the U.S. Coast Guard. This review culminated in the issuance of new guidelines by the Department of State for the treatment of defectors. These guidelines contained a statement that, as a party to the Protocol, "the United States has an international treaty obligation for its implementation within areas subject to the jurisdiction of the United States." Department of State Bulletin 124-25 (Jan. 31, 1972) (emphasis added).

The limited territorial applicability of Article 33 was recalled again in connection with consideration of what became the Refugee Act of 1980. The bill as it emerged from the Senate and the House of Representatives in 1979 contained proposed amendments to Section 243(h) of the I.N.A. that essentially tracked the language of Article 33. The House report noted, in explaining the amendment, that the U.N. Protocol "seeks to insure fair and humane treatment for refugees within the territory of the contracting states," and said that the House amendment "conforms United States statutory law to our obligations under Article 33 . . . ." House Comm. on the Judiciary, The Refugee Act of 1979, H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979) (emphasis added).

A similar understanding of the territorial limits of Article 33 was expressed by the Department of State to Congress in 1980 during hearings on the situation in Liberia and the question of diplomatic asylum. At these hearings, the Deputy Legal Adviser for the Department testified, "The obligation of a party to the Protocol . . . is not to return an applicant for asylum who presents his claim for asylum inside the territory of the United States." The Situation in Liberia, Spring 1980-Update: Hearing before the Subcomm. on Africa of the House Comm. on Foreign Affairs, 96th Cong., 2nd Sess. 10 (1980) (testimony of William T. Lake, Deputy Legal Adviser, U.S. Dep't of State).

For reasons unclear, in connection with institution of the Haitian Interdiction Program, the Office of Legal Counsel appears to have concluded that Article 33 applied outside U.S.

territories. The issue, however, was not thoroughly analyzed in that opinion.[5/]

In 1985, in connection with the filing of the brief for the United States as defendant-appellee in Haitian Refugee Center, Inc. v. Gracey, 809 F.2d 794 (D.C. Cir. 1987), the Department reviewed, elaborated, and concurred in arguments made by the Department of Justice to the effect that Article 33 does not protect refugees outside the territory of the United States.

In 1989, the Department of State testified before the House Committee on the Judiciary Subcommittee on Immigration, Refugees and International Law concerning the Haitian Interdiction Program, and again stated its view that Article 33 does not impose obligations on States with respect to refugees outside their territory. Haitian Detention and Interdiction: Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 36-43 (1989) (statement of Alan J. Kreczko, Deputy Legal Adviser, Dep't of State). Later that year the United States also stated this position clearly on the record at the annual meeting of the Executive Committee of the U.N. High Commissioner for Refugees. This statement was reported in the official record of the meeting as follows:

> As a matter of practice the United States authorities did not return persons who were likely to be persecuted in their countries of origin, and on their arrival at the border they were all given the opportunity to make an asylum claim. That was the practice, and in fact the policy of the United States, and not a principle of international law with which it conformed. . . .
>
> Although the United States was pursuing a policy based on humanitarian considerations, that policy was not inspired by any international obligation. It did not consider that the non-refoulement obligation under article 33 of the Convention included an obligation to admit an asylum-seeker. The obligation contained in the Convention pertained only to persons already in the country and not to those who arrived at the frontier or who were travelling with the intention of entering the country but had not yet arrived at their destination. Furthermore, there was nothing to suggest that an obligation to admit

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5/ See Proposed Interdiction of Haitian Flag Vessels, 5 Op. Off. Legal Counsel 242, 248 (1981).

asylum-seekers had ripened into a rule of customary international law.

Executive Committee of the High Commissioner's Programme, Summary Record of the 442nd Meeting at 16, U.N. Doc. A/AC.96/SR.442 (1989). No disagreement with this view was expressed.

Our view is not changed by the fact that the U.N. High Commissioner for Refugees ("UNHCR") now advocates recognition of an extraterritorial norm of non-refoulement.[6/] UNHCR was established by the U.N. General Assembly even before the Refugee Convention was completed, and has never been charged with a definitive role in the interpretation of the Convention. That role is given to the International Court of Justice by Article 38 of the Convention and by Article IV of the Protocol. Similarly, the consensus-based Executive Committee ("EXCOM") of UNHCR (comprised of States both party and non-party to the Refugee Convention, and of States party to additional, more expansive conventions) has no authority to interpret legal obligations of States. UNHCR itself has recognized that the EXCOM conclusions have no legal effect, but instead provide guidance for States in developing their policies on refugee issues. Statement of Mr. Arnaout, Director, Division of Refugee Law and Doctrine, UNHCR, in Executive Committee of the High Commissioner's Programme, Summary Record of the 431st Meeting at 11-12, U.N. Doc. A/AC.96/SR.431 (1988).

Summary

Article 33 of the Refugee Convention was completed on the understanding that it would not have extraterritorial effect. This understanding has been confirmed by subsequent practice by States party to the Convention and Protocol, particularly in the context of considering the draft Convention on Territorial Asylum. The United States has repeatedly recognized the limited scope of Article 33, including in 1968, at the time of

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6/ Prince Sadruddin Aga Kahn recognized during his tenure as U.N. High Commissioner for Refugees that there was no obligation of non-refoulement with respect to refugees outside a State's territory. S. Aga Kahn, Lectures on Legal Problems Relating to Refugees and Displaced Persons given at the Hague Academy of International Law (August 4-6, 1976) 25-26. See also G. Goodwin-Gill, The Refugee in International Law 75 & n.26 (1983).

accession to the U.N. Protocol; in 1972, after the Kudirka incident; in 1975, while considering the draft Convention on Territorial Asylum; in 1979-80, during consideration of the Refugee Act of 1980 and the situation in Liberia; and consistently since 1985. Contrary interpretations apparently made in 1981 are in error. Again, in light of the pending litigation, we would appreciate receiving the views of your office as soon as possible.

Sincerely yours,

Edwin D. Williamson