TESTIMONY

OF

ALAN J. KRECZKO
DEPUTY LEGAL ADVISER
U.S. DEPARTMENT OF STATE

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION, REFUGEES
AND INTERNATIONAL LAW
HOUSE OF REPRESENTATIVES

CONCERNING

INTERDICTION AND DETENTION OF HAITIANS

ON

JUNE 8, 1989

Mr. Chairman, and members of the Subcommittee on Immigration, Refugees and International Law, I am pleased to be here to testify concerning the compatibility of the Haitian Migration Interdiction Program with international law. I am accompanied by Richard Aherne from the Bureau of Human Rights and Humanitarian Affairs, David Zweifel from the American Regional Affairs Bureau and Richard Redmond from the Bureau for Refugee Programs.

The Haitian Migration Agreement and the INS guidelines for implementing the agreement are entirely consistent with international law, including the law of the sea and refugee law. I will touch on both aspects, with emphasis on refugee law, because that is the area in which some legal commentators have faulted the interdiction program.

The Haitian Migration Interdiction Program was initiated on the basis of an executive agreement between the United States and Haiti concluded on September 23, 1981, T.I.A.S. No. 10241. Under the agreement, Haiti permits the U.S. Coast Guard to board any Haitian flag vessel on the high seas or in Haitian territorial waters which the Coast Guard has reason to believe may be involved in the irregular carriage of passengers outbound from Haiti, to make inquiries concerning the status of those on board, to detain the vessel if it appears that an offense against United States immigration laws or appropriate Haitian laws has been or is being committed, and to return the vessel and the persons on board to Haiti. The assent of Haiti

to U.S. enforcement actions against Haitian vessels on the high seas and in Haitian territorial waters was necessary because otherwise such actions would violate customary international law codified in Article 6(1) of the Geneva Convention on the High Seas, April 29, 1958 (13 U.S.T. 2312; T.I.A.S. No. 5200) and article 92(1) of the 1982 U.N. Convention on the Law of the Sea, which generally provide for exclusive flag-State jurisdiction over vessels on the high seas, as well as violate Haitian sovereignty over its territorial sea.

The agreement also states that "[h]aving regard to . . . the international obligations mandated in the Protocol Relating to the Status of Refugees done at New York 31 January 1967," the United States Government "does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status." To implement this provision, guidelines were developed directing INS officers on board the Coast Guard interdiction vessels to monitor Coast Guard interviews of interdicted Haitians, and, in cases where indications of a claim to refugee status might arise, to conduct further interviews themselves. The guidelines further provide that if the INS interview suggests that a bona fide claim to refugee status may exist, the individual shall be brought to the United States so that he or she may apply for political asylum.

Finally, it is worth noting that, in the context of the agreement, Haiti provided assurances that it would not prosecute for illegal departure Haitians returned to Haiti who are not traffickers.

The provisions of the agreement and the INS implementing guidelines go well beyond what the United States is obligated to do under the U.N. Refugee Protocol. The obligation of non-refoulement set forth in Article 33 of the U.N. Convention Relation to the Status of Refugees (which is incorporated in the Protocol) extends only to persons who have gained entry into the territory of a Contracting State.

Article 33 provides:

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

While it might be tempting to read the words "expel" and "return" as applying to different categories of refugees -- "expel" to refugees in the contracting country, and "return" to

refugees outside -- this reading is not tenable. The second paragraph of Article 33 makes clear that paragraph 1 applies only to persons actually in the territory of a State party when it makes an exception for an individual who is a "danger to the security of the country in which he is" or "a danger to the community of that country." Moreover, the negotiating history of the Convention demonstrates that the drafters of the Convention took deliberate measures to ensure that Article 33 of the Convention would not be interpreted to apply to persons outside their territory.

During the final negotiating session for the Convention, in July 1951, the delegates 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 expressed concern that the Article 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 thought it essential that the negotiating States make clear 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." This was consistent with the use of the French word "refouler," which the Swiss representative noted "could not . . . be applied to a refugee who had not yet entered the territory of a

country." He made clear that his country's assent depended on being assured 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; no one disagreed. U.N. Doc. A/CONF.2/SR.16 at 6 (July 11, 1951). The limited meaning of the word "return" in Article 33 -- that it did not cover "the possibility of mass migrations across frontiers or of attempted mass migrations" -- was reaffirmed at the second and final reading of the draft Convention, on July 25, 1952, when the President of the Conference ruled that the interpretation should be placed on record since no objection had been expressed. U.N. Doc. A/CONF.2/SR.35, pages 21-22.

In short, the delegates who negotiated the Convention expressly precluded the application of Article 33 to the very situation involved in the Haitian Migration Interdiction Program -- the mass illegal migration of Haitians into the United States. Indeed, it is clear from the negotiating record that at least some countries would never have agreed to Article 33 had it been intended to impose obligations with respect to refugees outside their territory who were seeking entry. Numerous commentators have acknowledged that Article 33 applies only to refugees who have gained entry, not to those who are

seeking entry. E.g., Robinson, Convention Relating to the Status of Refugees: A Commentary, at 163 (1953); Grahl-Madsen, The Status of Refugees in International Law, ii at 94 (1972); Weis, The United Nations Declaration on Territorial Asylum, 7 Can. Y. Int'l L. 92, at 123-24 (1969).

The interpretation of Article 33 was also briefed extensively for the U.S. Court of Appeals for the D.C. Circuit in litigation challenging the interdiction program. Only one judge, Judge Harry Edwards, felt it necessary to reach this issue, but he ruled squarely that Article 33 did not apply:

> ". . . it seems clear that the Haitian interdictees are not protected by the Protocol. The negotiating history of the Convention it incorporates leads inescapably to the conclusion that certain compromises were essential to agreement and that the ideal of unconditional asylum was diluted by the need for other practical guarantees."

Haitian Refugee Center v. Gracey, 809 F.2d 794, 841 (D.C. Cir. 1987).

That Article 33 addresses only those refugees who have already entered a state's territory is confirmed by subsequent, unsuccessful, efforts to broaden the requirement not to expel or return refugees in one's territory to include a prohibition against rejection of refugees at the frontier. The international community in the United Nations Declaration on Territorial Asylum endorsed this more inclusive obligation as a

goal to be sought, but not as an existing international obligation. It also made clear that cases of mass migration might provide an exception. G.A. Res. 2312, 22 U.N. GAOR, Supp. (No. 16) 81, U.N. Doc. A/6716 (1967). Article 3 of the Declaration provides in part:

> "1. No person referred to in Article 1, para. 1 [a refugee], 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."

The debate preceding adoption of the resolution made clear that the declaration was not intended to propound legal norms, but to lay down broad humanitarian and moral principles. Nor was the declaration meant to give rise to legal obligations or to affect existing international undertakings or national legislation. See Official Records of the General Assembly, Twenty-second Session, Annexes, agenda item 89, document A/6912. It was clearly understood that the Declaration's reference to 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, 123-124, 142 (1969).

In the mid-1970s, the international community considered whether to go beyond the Declaration to draft a binding instrument incorporating under the precept of non-refoulement protection against rejection at the frontier. Significantly, the Conference of Plenipotentiaries on the Draft Convention on Territorial Asylum failed to adopt the Convention, and the various versions of the Draft Convention's provision on non-refoulement continued to treat separately the concepts of "rejection at the frontier" and "return" or "expulsion". See Elaboration of a Draft Convention on Territorial Asylum, Report of the Secretary-General, August 29, 1975, Doc. A/10177. In fact, at the insistence of the United States, an initial draft of the Convention distinguished between the mandatory obligation not to return or expel refugees who were in the territory of a contracting state and the considerably weaker requirement to use "best endeavors to ensure" refugees were not rejected at the frontier. See ibid; 1975 Digest of United States Practice in International Law at 156-158. These distinctions obviously would not have been drawn had it not been understood that the words "expel or return" in Article 33 of the Convention did not apply to refugees at the frontier.

Despite the evidence that countries have refused to accept a legal obligation of non-refoulement with respect to persons outside their territory or not to reject refugees at the

frontier, some legal commentators assert that such an obligation has crystallized under customary international law. Often this alleged obligation is described as "temporary refuge," an obligation to accept asylum-seekers into one's territory. For a norm of customary international law to exist, however, there must be general and consistent practice of states followed by them from a sense of legal obligation. 1 Restatement of Foreign Relations (Third) § 102(2). Those who put forth this view do not seriously attempt to establish general and consistent state practice, let alone one followed out of a sense of legal obligation. Rather, they summon forth numerous non-legally-binding resolutions, recommendations, and self-referring statements of legal scholars as alleged proof of the illusory norm. In the world of international law, saying that a principle is or should be customary international law does not make it so. Only States' practice and statements can make it so, and they are far from uniform in this area. In fact, the unsuccessful effort to conclude a multilateral convention on territorial asylum demonstrates definitively that States are not willing to take on this obligation.

I do not want to suggest by the above legal analysis that the Executive Branch ignored humanitarian concerns in designing the interdiction program. That is demonstrably not the case. Although the U.S. Government was not legally obligated to do

so, it decided to give Haitians interdicted by the Coast Guard on the high seas or in Haitian territorial waters an opportunity to express any fears they might have of returning to Haiti, and to afford persons with credible claims to refugee status an opportunity to apply for asylum in the United States. It also sought and received Haitian assurances that returned Haitians would not be prosecuted for their attempts to leave Haiti illegally.

My testimony can perhaps be summarized as saying that debates over the Haitian Migration Interdiction Program cannot legitimately be framed in terms of whether the program comports with international law: it does. The focus should be on the policy merits of the program, which this Administration wholeheartedly supports.

I would be glad to answer your questions on the international law basis for the program. My colleagues can answer questions in their various bailiwicks.