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OF
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HAITIAN CENTERS COUNCIL, INC., NATIONAL :
COALITION FOR HAITIAN REFUGEES, INC., :
IMMIGRATION LAW CLINIC OF THE JEROME N. :
FRANK LEGAL SERVICES ORGANIZATION, OF :
NEW HAVEN CONNECTICUT; DR. FRANTZ :
GUERRIER, PASCAL HENRY, LAURITON GUNEAU, : MEMORANDUM
MEDILIEU SOREL ST. FLEUR, DIEU RENEL, : AND ORDER
MILOT BAPTISTE, JEAN DOE, AND ROGES NOEL :
ON BEHALF OF THEMSELVES AND ALL OTHER : 92 CV 1258
SIMILARLY SITUATED; A. IRIS VILNOR ON :
BEHALF OF HERSELF AND ALL OTHERS :
SIMILARLY SITUATED; MIREILLE BERGER, :
YVROSE PIERRE AND MATHIEU NOEL ON BEHALF :
OF THEMSELVES AND ALL OTHERS SIMILARLY :
SITUATED, :

Plaintiff, :

- against - :

GENE McNARY, COMMISSIONER, IMMIGRATION :
AND NATURALIZATION SERVICE, WILLIAM P. :
BARR, ATTORNEY GENERAL; IMMIGRATION AND :
NATURALIZATION SERVICE; JAMES BAKER, III, :
SECRETARY OF STATE; REAR ADMIRAL ROBERT :
KRAMER AND ADMIRAL KIME, COMMANDANTS, :
UNITED STATES COAST GUARD; AND COMMANDER, :
U.S. NAVAL BASE, GUANTANAMO BAY, :

Defendant. :

-----X
A P P E A R A N C E S :

FOR THE PLAINTIFFS: HAROLD HONGJU KOH, ESQ.
Yale Law School
127 Wall Street
P.O. Box 401A Yale Station
New Haven, Connecticut 06520

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SIMPSON THACHER & BARTLETT
425 Lexington Avenue
New York, N.Y. 10017

BY: JOSEPH F. TRINGALI, ESQ.
JENNIFER KLEIN, ESQ.

MICHAEL RATNER, ESQ.
Center for Constitutional
Rights
666 Broadway
New York, N.Y. 10012

LUCAS GUTTENTAG, ESQ.
JUDY RABINOWITZ, ESQ.
American Civil Liberties Union
132 West 43rd Street
New York, N.Y. 10036

ROBERT RUBIN, ESQ.
IGNATIUS BAU, ESQ.
Lawyers' Committee for Urban
Affairs
301 Mission Street
Suite 400
San Francisco, California
94105

For the Defendants:

KENNETH STARR
Solicitor General
U.S. Department of Justice
Washington, DC 20530

ROBERT BEGLEITER
SCOTT DUNN
MICHAEL J. WILDES
HARRY LITMAN
MALCOLM STEWART
Of Counsel to United States
Attorney Andrew J. Maloney

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PAUL T. CAPPUCCIO
Associate Deputy Attorney
General
U.S. Dept. of Justice
Room 411
10th & Constitution Avenues,
N.W.
Washington, D.C. 20530

LAURI STEVEN FILPPU
Office of Immigration
Litigation
Department of Justice
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044

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Johnson, District Judge:

Plaintiffs have moved on Order to Show Cause for a temporary restraining order pursuant to Fed. R. Civ. P. 65 restraining the Government from repatriating, under the May 24th Executive Order, any interdicted Haitian to Haiti whose life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. For the reasons stated below, the court declines to grant the relief sought.

BACKGROUND¹

On May 24, 1992, the United States dramatically altered its policy toward Haitian refugees fleeing the political upheaval in Haiti. The President issued an Executive Order under which any Haitian interdicted beyond the territorial waters of the United States must be returned directly to Haiti without being

¹The court assumes familiarity with the facts and issues in this case. For a more detailed discussion of the history of this litigation see Memorandum and Order dated March 27, 1992 and Memorandum and Order dated April 6, 1992.

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afforded the opportunity to undergo INS refugee screening. Plaintiffs quickly moved on Order to Show Cause for a temporary restraining order pursuant to Fed. R. Civ. P. 65 restraining the Government from acting pursuant to the May 24th Executive Order.

At a hearing on May 29, 1992, the Plaintiffs asserted that the Government's actions violate 1) the United States' obligations under Article 33 of U.N. Protocol Relating to the Status of Refugees; and 2) Section 243(h) of the Immigration and Nationality Act ("INA"). At the close of the hearing, the court reserved decision in order to consider the briefs submitted by the parties and to give careful attention to the weighty issues presented.

DISCUSSION

The Government contends that the relief sought by the Plaintiffs is tantamount to a request for a mandatory injunction. The court agrees that the relief sought is closer to a request for more permanent injunctive relief and construes Plaintiffs' application as a request for a preliminary injunction. For a court

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to issue a preliminary injunction, the moving party must demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief. Resolution Trust Corp. v. Elman, 949 F.2d 624 (2d Cir. 1991). Although the Plaintiffs undeniably makes a substantial showing of irreparable harm, the court finds that the Plaintiffs are unlikely to succeed on the merits.

Article 33 of the U.N. Protocol Relating to the Status of Refugees provides that "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 race, religion, nationality, membership of a particular social group or political opinion." On its face, Article 33 imposes a mandatory duty upon contracting states such as the United States not to return refugees to countries in which they face political persecution. Notwithstanding the explicit

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language of the Protocol and dicta in Supreme Court cases such as INS v. Cardoza Fonseca, 480 U.S. 421 (1987) and INS v. Stevic, 467 U.S. 407 (1984), the controlling precedent in the Second Circuit is Bertrand v. Sava which indicates that the Protocol's provisions are not self-executing. See 684 F.2d 204, 218 (2d Cir. 1982).

It is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it. This court is astonished that the United States would return Haitians refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so. The Government's conduct is particularly hypocritical given its condemnation of other countries who have refused to abide by the principle of non-refoulement.² As it stands now, Article 33 is a cruel hoax and not worth the paper it is printed on unless Congress enacts

²Only recently, the United States criticized Great Britain for its forcible repatriation of Vietnamese boat people, whom Great Britain have classified as 'economic migrants'. See Daniela Deane, Britain to Ignore U.S. Pleas on Return of Boat People, Washington Post, January 26, 1990, at A18.

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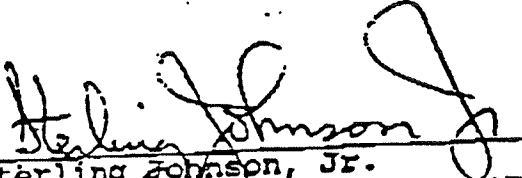
legislation implementing its provisions or a higher court reconsiders Bertrand. Until that time, however, this court feels constrained by the rationale of Bertrand and cannot grant the Plaintiffs relief on this claim.

Finally, this court concluded in an earlier decision in this case that the right to counsel under the INA did not extend to Haitian aliens who were located outside the United States as defined by the statute. See Memorandum and Order dated April 6, 1992, ¶ 26 . This issue is currently on appeal before the Second Circuit. Unless the Court of Appeals rules otherwise, the court must again conclude that the Section 243(h) is similarly unavailable as a source of relief for Haitian aliens in international waters.

CONCLUSION

Accordingly, the relief requested by the Plaintiffs is hereby denied.

So ordered.


Sterling Johnson, Jr.
UNITED STATES DISTRICT JUDGE

Dated: Brocklyn, New York
June 5, 1992