

# INTERNATIONAL LAW AND OTHER CONSIDERATIONS ON THE REPATRIATION OF CUBAN BALSEROS BY THE UNITED STATES<sup>1</sup>

By Maria C. Werlau

The Cuban government prohibits leaving the national territory without prior government authorization. “Illegal exit” is punishable with one to three years in prison and financial penalties.<sup>2</sup> The term *balseiro* (“rafter”) typically depicts Cubans who escape or attempt to escape from their island-country usually in makeshift rafts, small boats, and other primitive vessels. Some are able to command seaworthy vessels, often owned by the State, and in recent years, a growing number of escapees have been leaving in fast boats operated by smugglers. For the sake of simplification, this paper refers to any person who flees Cuba by any sea-faring means as a *balseiro*.

The phenomenon of Cuban *balseros* greatly increased after 1989, when Cuba’s economy took a nosedive with the collapse of Soviet Communism and the loss of massive Soviet economic support for its ailing socialist, centrally-planned economy. The number of

desperate Cubans willing take to sea even in the most precarious of vessels grew progressively as the economy spiraled downwards.<sup>3</sup> From 1989 onwards, the number of arrivals to the U.S. jumped exponentially from the 239 who had arrived in the entire period 1983-1988. The total peaked in 1994 with a mass exodus of over 37,000, encouraged by the Cuban government, after which Migration Accords between Cuba and the United States brought new rules into play that have impacted the nature of the sea exodus as well as arrivals.

Many Cubans who attempt to escape by sea are apprehended by Cuban patrols, while most who evade capture face harrowing experiences, drifting for days in the middle of the ocean with little food and water, suffering severe dehydration, their vessels capsizing, with them drowning or being eaten by sharks. In recent years, smuggling activity has grown consider-

---

1. Note from the editor: Due to space limitations, a very rich bibliography prepared by the author is not included. It is available from the author on request.

2. Cuban Penal Code, Law 62 of 1987, Chapter XI, Article 216.

3. Reports vary, but it is generally accepted that between 1989 and 1993, the Cuban economy shrunk by at least one third; some analysts believe the decline was much larger. Although the economy has been growing slowly since 1994, it will take many years of sustained economic growth for GDP to reach the 1989 level, when scarcity was already acute and the country’s huge external debt was in default. As a result, essential services, food, and even the most basic consumer goods are acutely scarce for most of Cuba’s citizens.

ably.<sup>4</sup> Smuggling operations tend to be well-run and well-equipped, the journeys are made in 27 to 32 foot vessels that can hold 25-30 people and able to reach speeds of 35 to 40 knots, equipped with cell phones, satellite phones, and night vision equipment.<sup>5</sup> However, even these more sophisticated exit attempts entail risks and are known to incur in loss of life—smuggling boats are reportedly overloaded and their human cargo abandoned on remote keys if in danger of being detected by U.S. authorities or encounter other problems.<sup>6</sup> The U.S. Coast Guard reports that smugglers leave people, including children, behind with little food or water, demonstrating that they “have no regard for the well-being of their human cargo, only their own financial gain.”<sup>7</sup> The fact is that, according to the U.S. Coast Guard, all of these exit attempts “are inherently dangerous and regularly

result in injuries and deaths during voyage attempts on both homemade vessels and boats used by migrant smugglers.”<sup>8</sup> As a result, it is not surprising that in the last four decades anywhere from 77,000 to over 100,000 Cubans of all ages are believed to have perished at sea trying to escape.<sup>9</sup>

In 1994 and 1995, to halt a mass sea exodus, the United States entered into two migration agreements with Cuba whereby it regularly interdicts and returns to the island *balseros* who have not made it to U.S. territory or dry land. Other countries neighboring Cuba—such as Bahamas, Grand Cayman (a British territory), Honduras, Jamaica, and Mexico—also routinely return Cuban asylum-seekers arriving mostly as *balseros*. Many other countries, notably European nations where Cubans arrive by other means,

4. Kevin Whitaker, Coordinator for Cuban Affairs at the U.S. State Department actually reports that “most” of the *balsero* activity is currently through smuggling. (E-mail of January 12, 2004.) Other sources contradict this, but is impossible to corroborate either way, as systematic recording of *balseros* who perish at sea has never been systematically or successfully undertaken, inside or outside of Cuba, due to state censure and persecution. In any event, it is plausible to conclude that smuggling activity has been fueled by the “dry foot” practice, to be discussed later in this paper, which allows Cubans who make it to land to remain in the United States, while those interdicted at sea are returned. Arguably, this has fueled the need to find more effective ways to make it to shore instead of being caught at sea and returned to Cuba. See, for example, Ted Henken, “*Balseros, Lancheros, and El Bombo: Cuban Immigration to the United States since the 1994 Rafter Crisis and the Persistence of Special Treatment*,” prepared for presentation at the symposium “The Balseros Ten Years Later: No Longer Adrift?,” Cuban Research Institute, Florida International University, Miami, July 16-17, 2004.

5. “Calmer seas bring rise in number of Cuban migrants,” Miami, Reuters, June 5, 2001. According to this source, smugglers charge \$4,000 to \$8,000 for a trip; this makes it an option available almost exclusively to those with relatives abroad willing and able to take on this expense.

6. See cases of *balseros*’ deaths attributed to smuggling operations in “Calmer seas bring rise in number of Cuban migrants”; Sofia Santana and Luisa Yanez, “Bodies found in Gulf Stream linked to migrant smuggling,” *The Miami Herald*, August 28, 2002; Alfredo Tedeschi, “Cubans weep for migrants missing in Florida Straits,” *Bahia Honda, Cuba*, Reuters, August 27, 2002; and Jennifer Babson, “Investigan la muerte de 4 *balseros* en alta mar,” *El Nuevo Herald*, 5 de marzo de 2001.

7. United States Coast Guard Cutter Monhegan, “Migrants abandoned on desolate island,” Release No. 12-15, Key West, Florida, December 26, 2002, citing USCG Lt. Tony Russell, Coast Guard Seventh District Public Affairs Officer. U.S. Cuba Policy Report, September 30, 2003. <<<http://www.uscg.mil/d7/units/grukeywest/monhegan/mon%20web%20news%20release.htm>>

8. “Coast Guard, Customs stop 35 migrants, 3 suspected smugglers,” United States Coast Guard Cutter Monhegan, Key West, Florida, Release No. 12-01, December 4, 2002. Also see “Coast Guard repatriates 79 Cuban migrants,” United States Coast Guard Cutter Monhegan, Key West, Florida, Release No. 01-11, January 27, 2003, citing USCG Lt. Tony Russell, Coast Guard Seventh District Public Affairs Officer. <<http://www.uscg.mil/d7/units/grukeywest/monhegan/mon%20web%20news%20release.htm>>

9. Armando Lago, Ph.D., has derived an estimate of 77,814 such victims from data obtained in studies by the Oceanographic Institute of the University of Miami and the University of Havana. (Telephone interview of October 2003 with Armando Lago, Ph.D., Project Director of the Truth Recovery Archive on Cuba, [www.CubaArchive.org](http://www.CubaArchive.org). This data is from his upcoming book *The Human Cost of Social Revolution: The Black Book of Cuban Communism*.) Another study, using available estimates of survival rates, estimated in 1995 that over 100,000 may have perished from 1959 to 1994. (Holly Ackerman and Juan Clark, “The Cuban Balseros: Voyage of Uncertainty,” Miami: Cuban American National Council, 1995.) Francisco Chaviano, who attempted to collect this information inside Cuba, was sentenced to 15 years in prison in 1995. There are many media and anecdotal reports of deaths, but the identity of victims is rarely established and a systematic recording of bodies found at sea does not exist. (See, for example, P. Abusleme Hoffman, “Mueren dos mujeres en travesía de Cuba a la Florida,” *El Nuevo Herald*, 24 de febrero de 2001.) The exact number of victims, or even an accurate estimate, is simply impossible to know under the current circumstances and, in fact, may never be known precisely.

have returned an undetermined number of asylum-seekers to the island while providing political asylum in certain circumstances.<sup>10</sup> The erratic and inconsistent nature of these practices point to unresolved international legal issues—with respect to refugee law as well as in relation to human rights and humanitarian law—and to other considerations that merit exploration. This paper will address this matter primarily in terms of the United States, with due reference to implications for the international community.

**THE UNITED STATES, CUBANS' SAFE HAVEN OF PREFERENCE**

Since Cuba's struggle for independence from Spain, the United States has provided refuge to Cubans who, at one time or another, have opposed their government. The first significant migration of Cubans to the U.S. began during the second half of the 19th century. By 1890, 20,000 Cubans had settled there; by 1910, this number had doubled to 40,000. Between 1950 and 1958, years that encompass the Batista dictatorship in Cuba, 50,950 Cubans were said to be living in the U.S.<sup>11</sup> Yet, Cuba had been a nation that took in immigrants, including from the United States, at a much higher rate than its people emigrated until January 1, 1959, when Fidel Castro came to power after dictator Fulgencio Batista fled the country. Instead of holding promised free elections and restoring the 1940 Constitution, Castro initiated a rapid and violent transformation of Cuba's society, economy, and political system into Communist totalitarianism. Fleeing the country quickly became, and has remained, a primary pursuit of many of Cuba's citizens. Between 1959 and 1999, 1,079,000 Cubans are reported to have left for different countries. Today, the total Cuban population residing abroad is estimated to surpass 1.4 million (compared to the current island population of

around 11 million<sup>12</sup> and over 6 million when Castro came to power).

The United States has been, by far, the safe haven of preference for Cubans. According to the 2000 U.S. census, in that year approximately 842 thousand Cubans had been welcomed and offered asylum by the United States since 1959 (Table 1). Geographical proximity, a close historic relationship, and strong cultural ties, together with the United States' humanitarian disposition, its strong anti-Communist stance, and an "open arms" policy of taking in all Cubans fleeing Communism, explain this. The availability of more resources for refugees, the existence of better overall opportunities, and a large Cuban exile community make the United States the most appealing destination for Cuban emigration. In addition, due to the nature of currents in the Florida Straits, the majority of Cuban *balsaeros* can position themselves to drift towards the U.S. mainland, with Key West, Florida, a mere 90 miles from the closest point in Cuba.

**Table 1. Cubans in the U.S. by Year of Immigration - 2000 Census**

Before 1950	14,311	1.70%
1950-1959	43,777	5.20%
1960-1969	304,754	36.20%
1970-1979	121,228	14.40%
1980-1989	153,219	18.20%
1990-2000 est.	204,572	24.30%
Total	841,861	100.0%

Source: Thomas Boswell "A demographic profile of Cuban Americans," Miami, September 2002, Table 11, p.32.

Because of the large Cuban-origin population in South Florida, it has also been difficult to control U.S.-based persons from going by boat to pick up loved ones when the Castro regime has allowed it.

10. See, for example, Rassi, Reynold. "Devuelve Jamaica a 10 inmigrantes ilegales cubanos," *Granma*, Octubre 29, 2001; "Spain moves to end asylum requests from Cubans," Madrid, Spain, Associated Press, March 14, 2002; Rui Ferreira, "Niegan asilo a los 3 cubanos en Francia," *El Nuevo Herald*, 15 de septiembre de 2000; Wilfredo Cancio Isla, "Repatrian a 35 cubanos detenidos en Bahamas," *El Nuevo Herald*, 28 de noviembre de 2001; and Alberto Núñez Betancourt, "Devueltos 160 emigrantes ilegales en lo que va de año," *Granma*, 4 de Junio de 2001.

11. Rolando García Quiñones, Director del Centro de Estudios Demográficos (CEDEM), Universidad de La Habana, "International Migrations in Cuba: persisting trends and changes," Seminar on Migration and Regional Integration, August 1- 2, 2002.

12. García Quiñones.

This was the case during the Mariel exodus, which quickly became a U.S. “problem” even though it started as an asylum crisis at the Peruvian Embassy.<sup>13</sup> Most of the undocumented Cubans who arrive are allowed to stay in the United States and adjust to permanent resident status under the Cuban Adjustment Act of 1966, as amended.<sup>14</sup> This is an opportunity that no other group or nationality enjoys.<sup>15</sup>

In the early 1960s, hundreds of thousands of Cubans left by air, mostly to the United States,<sup>16</sup> but also settling in small but significant groups in Spain, Vene-

zuela, Puerto Rico, and Mexico, and scattering throughout many other countries. Between 1965 and 1971, some 260,000 left the country in the so-called “Freedom Flights” that Castro allowed to the United States.<sup>17</sup>

In 1980, the traumatic mass sea-bound migration from Cuba known as the Mariel boatlift brought over 124,000 undocumented Cubans to the United States,<sup>18</sup> including a number of “undesirables” (mostly criminals and persons with psychiatric illnesses<sup>19</sup>) purposefully shipped off by the Cuban govern-

---

13. A. Larzalere describes the U.S. government’s mostly unsuccessful attempts to stop Cuban exiles from leaving for Cuba to pick up relatives and family. See Alex Larzalere, *The 1980 Cuban Boatlift: Castro’s Ploy—America’s Dilemma*, Washington, D.C.: National Defense University Press, 1988.

14. The Cuban Adjustment Act (CAA), adopted by the U.S. Congress on November 2, 1966, under the Administration of Lyndon Johnson, provides a special procedure under which Cuban citizens and their accompanying spouses and children may obtain a haven in the United States as lawful permanent residents. The CAA gives the Attorney General the discretion to grant permanent residence to Cuban citizens seeking adjustment of status if they have been present in the United States for at least one year after admission or parole and are admissible as immigrants. (Bureau of Citizenship and Immigration Services, U.S. Department of Homeland Security, [www.immigration.gov](http://www.immigration.gov).) Refugees may be admitted into the country (granted lawful entry) or paroled (allowed to travel within the country for limited purposes). The 1980 Refugee Act contains a provision prohibiting parole of an alien who is a refugee unless “compelling reasons in the public interest with respect to that particular alien” require parole instead of admission in refugee status, and since then, people who meet the statutory definition of *refugee* are not paroled. However, Cuban aliens were issued parole under the Attorney General’s parole authority as per the usual practice until the CAA was passed. See Report to Congress, Use of the Attorney General’s Parole Authority Under the Immigration and Nationality Act, Fiscal Years 1998-1999. <<http://uscis.gov/graphics/aboutus/repstudies/parolept9899.pdf>>

15. Ruth Ellen Wassem, “Cuban Migration Policy and Issues,” CRS Report for Congress, Congressional Research Service, Library of Congress, Washington, D.C., February 14, 2000. By the end of 2002, 688,639 Cubans had been granted lawful permanent resident status since 1966, of which 654,149 had been granted that status as per the Cuban Adjustment Act of 1966. See Tables 22 and 23 of the *2002 Yearbook of Immigration Statistics*, Bureau of Customs and Immigration Services, <http://uscis.gov/graphics/shared/aboutus/statistics/index.htm>.

16. For more on Cuban-American demographics see, for example: Thomas Boswell “A demographic profile of Cuban Americans,” Miami, September 2002; and Silvia Pedraza, “Cuba’s Refugees: Manifold Migrations,” *Cuba in Transition—Volume 5*, Association for the Study of the Cuban Economy, Washington, D.C., 1995.

17. “Cuba: Migration,” U.S. State Department webpage, [www.state.gov/www/regions/wha/cuba/migration.html](http://www.state.gov/www/regions/wha/cuba/migration.html). In the Fall of 1965, a chaotic period ensued when hundreds of boats left from Miami for the Cuban port of Camarioca, where they picked up thousands of relatives to come to the United States. To normalize Cuban immigration, for eight years until 1972, the United States and Cuban governments administered an orderly air bridge, known as the *Freedom Flights*. These brought Cubans from Varadero to Miami, processing and resettling the refugees quickly through the Cuban Refugee Program, dispersing them throughout the United States. See Pedraza, 1995.

18. Between April and September 1980, 124,776 undocumented Cubans arrived in Florida, putting tremendous strain on facilities. “Mariel Boatlift,” U.S. Coast Guard, Alien Migrant Interdiction—Coast Guard Office of Law Enforcement. <[www.uscg.mil/hq/g-o/g-opl/mle/mariel.htm](http://www.uscg.mil/hq/g-o/g-opl/mle/mariel.htm)>.

19. The Castro government also considered homosexuals “undesirable,” and had a policy of encouraging homosexuals to emigrate during the Mariel exodus. The regime had aggressively persecuted homosexuals in the earlier years of the Revolution. The author has received several anecdotal accounts to this effect and conducted an extensive personal interview of a Mariel émigré who left Cuba pretending he was homosexual. Personal interview of 12/31/03 with William Villalobos, who left during the Mariel exodus at age 22, and is a resident of New Jersey currently working as an executive of a New York publishing company.

ment.<sup>20</sup> As a result, the United States suspended normal immigration until 1984, when an agreement was negotiated whereby Cuba would take back a number of Mariel migrants found to be “excludable” under U.S. law and the U.S. would allow up to 20,000 Cubans into the U.S. each year through “orderly” and “legal” immigration channels.<sup>21</sup> This was the first time the “open arms” policy that had existed since 1959 was officially modified. Cuba suspended this agreement in May 1985 following the initiation of Radio Marti (Voice of America) broadcasts by the United States to the island, but it was reinstated in November 1987.

A mass sea-bound exodus in the summer of 1994 led to a second significant change in the “open arms” policy: the regular interdiction and return by the U.S. Coast Guard of Cuban *balseros*. In August 1994, riots erupted in Havana, fueled by food shortages, prolonged electricity blackouts, growing num-

bers fleeing by sea, and an attempted ferry hijacking. The Cuban government, eager as in the past to defuse explosive internal discontent through emigration, announced it would not stop those who wished to set sail for the United States and managed to find the way to do so. Around 34,000 Cubans left mostly in makeshift rafts and unsafe boats, which resulted in an undetermined number of deaths at sea.<sup>22</sup> The refugees picked up at sea by the U.S. Coast Guard were sent to the U.S. Naval Base at Guantánamo, Cuba, where they were detained in tent cities for a very long period. Eventually, they were settled into the U.S. under the 20,000 annual quotas—all within approximately two years.<sup>23</sup>

The crisis prompted the Clinton Administration to enter into two Migration Accords with Cuba to end the mass exodus. A September 1994 agreement “to direct Cuban migration into safe, legal and orderly channels” committed the U.S. to issue travel docu-

---

20. Some Latin American and European countries took in a small number of Cuban asylum-seekers who had entered the Peruvian embassy. See Larzalere, 1988.

21. An incident of April 9, 1980 in Havana, had provided the setting for the Mariel Boatlift. Six Cubans commandeered a bus and crashed the gate of the Peruvian Embassy in Havana to seek asylum. Cuban guards opened fire on the bus and a ricocheting bullet killed one of the guards. When the Peruvians refused to turn the asylum-seekers over to the Cuban authorities, Fidel Castro announced that those who wanted to leave could do so. Several thousand Cubans descended on the Peruvian and Venezuelan embassies in a matter of hours. The Peruvian government initially turned to other Andean Pact countries for assistance in putting together an international relief effort. Castro manipulated events to involve the United States and opened the Mariel port, west of Havana, to allow relatives to come by boat to pick up families. The Cuban population was mobilized to denounce, intimidate, harass, and even attack those who chose to leave. In addition, the Cuban government took advantage of the boatlift to “deport” a sizable number of people considered undesirable (primarily common criminals and persons with mental conditions). For a detailed account of the Mariel exodus, see Larzalere, 1988. According to the State Department’s Coordinator for Cuban Affairs at the time of the 1994 mass sea exodus from Cuba, the 20,000 quota led to confusion on the part of the Cuban government. This was a numerical limit the United States placed on migrants from any single country of the world that was applied to Cubans after the Mariel exodus of 1980. The Cuban government had interpreted this to be a guaranteed amount, yet the number was never reached until then. Ambassador Dennis Hays, Washington, D.C., telephone interview 12/3/03. Presumably, at the time of the 1994 rafters’ crisis, the Cuban government had pent-up frustration regarding an expected level of yearly migrations that had not materialized.

22. Before Castro’s announcement that all who wished to leave could do so, for weeks increasing numbers of *balseros* had been arriving and were being processed into the U.S. After Castro’s announcement, *balseros* picked up at sea were sent to the Guantanamo U.S. Naval Base. Hays interview.

23. For more on this, see, for example, Fact Sheet “U.S.-Cuba Relations,” U.S. Department of State, Bureau of Western Hemisphere Affairs, Washington, D.C., May 1, 2001. According to INS statistics, 116,604 Cuban refugees and asylees were granted lawful permanent resident status in the United States from 1991 to 2000. See *2002 Yearbook of Immigration Statistics*. For the entire period 1961-2000, 654,149 Cuban asylees and refugees were granted lawful permanent resident status in the United States.

ments to a *minimum* of 20,000 Cuban migrants each year<sup>24</sup> while Cuba pledged to discourage irregular and unsafe departures. The agreement also called for regularly reviewing the migration situation and the implementation of the accords. A May 1995 companion accord established that Cubans interdicted at sea or entering the U.S. Naval Base at Guantánamo (considered “wet foot”) are returned if they do not have “a demonstrable and well-founded fear of persecution.” Interdicted Cubans who meet the criteria are resettled in third countries as refugees.<sup>25</sup> Refugees reaching U.S. soil or dry land (“dry foot”) are typically paroled (considered for special admission) into the United States as per the Cuban Adjustment Act of 1966.<sup>26</sup> As part of the agreements, Cuba agreed to reintegrate returnees into Cuban society, with no action to be taken against the returned migrants for their attempt to emigrate illegally. The U.S. Interests Section was to monitor Cuba’s compliance with that provision, which it did until March 2003 through

regular visits to the homes of returnees throughout the island.

From January 1, 1995 to November 4, 2003, the U.S. Coast Guard interdicted 7,993 Cuban migrants at sea.<sup>27</sup> (See Table 2). Most were returned to Cuba. In addition, it removed and returned to Cuba rafters arriving in the Bahamas under an agreement with the Bahamian government.<sup>28</sup> Those that have faced or fear persecution in Cuba may apply for admission to the U.S. through the in-country refugee processing unit at the U.S. Interests Section in Havana.<sup>29</sup> From 3,500 to 4,000 refugees and family members are admitted to the United States through this program each year.<sup>30</sup>

#### LEGAL AND PRACTICAL IMPLICATIONS OF RETURNING CUBAN BALSEROS

Legal scholars, the United Nations High Commissioner on Refugees, and leading international human rights organizations maintain that countries returning Cuban asylum-seekers, including *balseros*, are

24. Under the Special Programs for Cuban Migration the U.S. Interests Section in Havana has held lotteries to randomly select winners from among applicants. Qualified winners do not receive visas, but rather receive transportation letters authorizing them to enter the United States under the special parole authority of the United States Attorney General. Certain family members of Cuban visa recipients may receive similar paroles. The U.S. Interests Section is not currently accepting entries to the Cuban lottery. Applicants are currently being processed based on entries submitted in the 1998 lottery, the last one held to date. “The Special Program for Cuban Migration (Cuban Lottery or *Sorteo*),” U.S. Interests Section, Havana, (<http://usembassy.state.gov/havana/wwwhconsvisaivpparoleeng.html>) and Immigrant visa/Parole Unit, United States Interest Section, Havana, Cuba, (<http://usembassy.state.gov/havana/wwwhconsvisaivgeneralinfoeng.html>).

25. Executive Order 12807 of May 24, 1992 (signed by President George H. Bush) authorized the U.S. Coast Guard to interdict migrants at sea outside of U.S. territorial waters and return them to their home countries. It also directed the Secretary of State to undertake to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments to prevent illegal migration to the United States by sea. This Executive Order followed Executive Order 12324—Interdiction of Illegal Aliens, of September 29, 1981, signed by Ronald Reagan, that had authorized the Coast Guard to interdict migrants in high seas.

26. For more on the 1994 and 1995 Accords, see “Cuba: Migration,” U.S. State Department, and Fact Sheet: Cuba-U.S. Migration Accord, released by the Bureau of Western Hemisphere Affairs, U.S. Department of State, August 28, 2000.

27. “Coast Guard Migrant Interdictions At Sea: Calendar Year 1982—2004, (Table), U.S. Coast Guard, Alien Migrant Interdictions. <<http://www.uscg.mil>>

28. The U.S. Coast Guard is given jurisdiction by the government of Bahamas when a member of the Bahamian Navy is aboard a U.S. vessel, and, thus, is able to repatriate to Cuba any *balseros* found in Bahamian territorial waters. Telephone interview with LTJG Kevin J. Puzder, Office of Law Enforcement (G-OPL), Migrant Interdiction Division, U.S. Coast Guard, November 20, 2003. See, for example, Wilfredo Cancio Isla, “Repatriar a 35 cubanos detenidos en Bahamas,” *El Nuevo Herald*, 28 de noviembre de 2001.

29. This is authorized by Presidential determination and consultation with Congress. For FY 2002, persons from Vietnam, Cuba, and the former Soviet Union could, if otherwise qualified, be considered refugees for the purpose of admission to the United States within their countries of nationality or habitual residence. See Department of State, Washington File, \*EPF501 11/23/2001, Text: Presidential Declaration on Refugees and Migration (Bush authorizes admission of 70,000 refugees in FY 2002) (720), <http://usembassy-australia.state.gov/hyper/2001/1123/epf501.htm>.

30. “Cuba: Migration.”

**Table 2. U.S. Coast Guard Cuban Migrants Interdictions at Sea, Calendar Years 1982–2003**

1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992
0	47	23	37	27	44	63	368	430	1936	2336
1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
3687	37191	617	391	394	1118	1463	928	777	931	1374

**Source:** “Coast Guard Migrant Interdictions At Sea: Calendar Year 1982–2003,” Migrant Interdiction Statistics, U.S. Coast Guard, Alien Migrant Interdiction, Coast Guard Office of Law Enforcement.

breaching the principle of *non-refoulement*, a fundamental tenet of international law of near universal acceptance. *Non-refoulement*, a French word meaning “no return,” is enshrined in numerous international treaties and conventions, starting with the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.<sup>31</sup> It provides asylum-seekers the right to not be returned to a country where he or she is likely to face persecution or might be at risk of serious human rights violations.<sup>32</sup>

The United States and most countries neighboring Cuba are parties to the Convention on Refugees and/or its Protocol<sup>33</sup> as well as to the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>34</sup> Most, if not all, are also signatories of the 1969 American Convention on Human Rights, whose Article 22 also provides for *non-refoulement*.<sup>35</sup> The CAT, in fact, offers even broader no-return protection than the Con-

vention on Refugees. It contains an explicit provision that makes *non-refoulement* an absolute right. Article 3 provides that “no State Party shall expel, return (*refouler*), or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Torture is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining ... information or a confession, punishing, ... intimidating or coercing, ... or for any reason based on discrimination of any kind.” The Convention further states that competent authorities, in determining if there are grounds for fear of torture, “shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

31. United Nations Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137 and United Nations Protocol Relating to the Status of Refugees (31 January 1967) 606 UNTS 297. The 1967 Protocol removed geographical and temporal restrictions from the Convention.

32. An important distinction must be made. The principles of *non-refoulement* and that of asylum are two different principles that *can* both apply to asylum claimants (as per the Refugee Convention), but are not necessarily applicable in all cases. *Asylum* is the admission to residence and lasting protection against the jurisdiction of another State and is an exercise of the *sovereignty* of a State. An individual has no right to asylum and cannot claim that asylum *must* be given. On the other hand, as per Article 33 of the Refugee Convention, *non-refoulement* does create an individual right to not be returned to a state where persecution or torture is likely. A State party to the Refugee Convention is under no obligation to grant permanent residence status in the country of refuge or asylum. See Prof. dr. Dirk Vanheule, *The Principle of Non-Refoulement in the 1951 Geneva Refugee Convention*, Faculty of Law, University of Antwerp, 2002.

33. 141 countries have signed the Convention on Refugees and/or its Protocol. See UNHCR, United Nations High Commissioner for Refugees, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol.

34. Convention against Torture or other Cruel, Inhuman or Degrading Treatment (10 December 1984) 1465 UNTS 113. Entered into force on 26 June 1987. Honduras, Mexico, the United Kingdom, and the United States have all ratified the Convention. Bahamas and Jamaica are not signatories. Office of the U.N. High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties as of 7/7/03.

35. Sir Elihu Lauterpracht and Daniel Bethlehem, “The scope and content of the principle of *non-refoulement*: Opinion,” in Erika Feller, Turk Volker and Frances Nicholson, editors, *Refugee Protection in International Law*, UNHCR’s Global Consultations on International Protection, U.N. High Commission for Refugees. Cambridge, U.K., Cambridge University Press, 2003, pp. 165–170.

Persecution can take many forms, but many experts agree, “human rights law establishes a strong baseline of fundamental rights whose systematic violation might be considered *per se* persecution.”<sup>36</sup> Persecution might be defined as the systematic violation of any of the basic rights enunciated in the Universal Declaration of Human Rights. In addition, the United Nations High Commissioner for Refugees’ *Handbook on Procedures and Criteria for Determining Refugee Status* advises that serious violations of human rights constitute persecution and that “the various international instruments relating to human rights” should be referred to when determining if the laws of another country restrict the rights of its citizens such that they result in persecution.<sup>37</sup>

Cuba, a Communist country, is widely recognized for its egregious violations of fundamental human rights enshrined in the Declaration on Human Rights. The abuses encompass basic due process concerns, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of assembly, freedom to take part in the government, the right to work, free choice of employment, and the right to freely participate in the cultural life of the community.<sup>38</sup> Cuba’s citizens “do not have the legal

right to change their government or to advocate change” and the government retaliates systematically against those who seek peaceful political change.<sup>39</sup> Furthermore, the Cuban government flatly denies access to international human rights groups and organizations, including the International Red Cross and the United Nations, to monitor human rights conditions or visit penal institutions. The Annual Survey of Political Rights and Civil Liberties, compiled by Freedom House, consistently lists Cuba among the most repressed countries in the world. In 2003, it shared the lowest index value (7) with Burma, Iraq, North Korea, Libya, Saudi Arabia, Sudan, Syria, and Turkmenistan.<sup>40</sup> Under the aforementioned definition of persecution, there is little doubt that many, if not most, of Cuba’s citizens meet the criteria,<sup>41</sup> particularly since that blatant abuses of human rights are actually enshrined in Cuba’s Constitution and laws. As Human Rights Watch and many other international organisms have verified, “the denial of basic civil and political rights is written into Cuban law.”<sup>42</sup> The judicial branch lacks independence and impartiality, as the Constitution “explicitly states that the courts are “subordinate in the line of authority to the National Assembly ... and the Council of State,” and that “the Council of State may issue

---

36. Arthur C. Helton, “Applying human rights law in U.S. asylum cases,” *International Civil Liberties Report*. 2000, [http://archive.aclu.org/library/iclr/2000/iclr2000\\_3.pdf](http://archive.aclu.org/library/iclr/2000/iclr2000_3.pdf). Also see Walter Suntinger, “The Principle of Non-Refoulement: Art 3 UN Convention against Torture (CAT),” Elena International Course, Strasbourg 27 January 2001.

37. Amnesty International, in fact, specifically denounced the government of Sweden’s breach of the *non-refoulement* principle in the case of a Cuban man returned to Cuba, and pointed to the overall situation of human rights Cuba as the reason. “Cuba: Prisoner of Conscience—Roberto González Tibanear,” AI Index: AMR 25/16/97.

38. This has been extensively documented by the United Nations and leading international organizations, including Human Rights Watch, Amnesty International, Freedom House, Rapporteurs sans Frontiers, Pax Christi, International Labor Organization. The U.S. State Department also publishes an annual overview of the human rights situation all over the world, including one on Cuba, submitted to the Congress in compliance with sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (FAA), as amended, and section 504 of the Trade Act of 1974, as amended. The Cuba country report details across the board human rights’ violations (see “Cuba: Country Reports on Human Rights Practices—2002,” released by the Bureau of Democracy, Human Rights, and Labor, March 31, 2003.)

39. “Cuba: Country Report on Human Rights Practices.”

40. “Combined Average Ratings: Independent Countries,” *Freedom in the World 2003: The Annual Survey of Political Rights and Civil Liberties*, Freedom House. <<http://www.freedomhouse.org/research/index.htm>>

41. The most obvious exceptions would be individuals who are representatives of the government, the Communist Party, and the state security apparatus.

42. “Cuba’s Repressive Machinery: Human Rights Forty Years After the Revolution,” *Human Rights Watch*, 1999. <<http://hrw.org/reports/1999/cuba/Cuba996-03.htm#TopOfPage>>

the courts instructions.”<sup>43</sup> Moreover, repression is codified—“the Cuban Criminal Code lies at the core of Cuba’s repressive machinery, unabashedly criminalizing nonviolent dissent.”<sup>44</sup>

Cubans who attempt to leave their country without government approval (“illegal exit”) face one to three years in prison. There are, at present, dozens of known cases of Cubans in jail for attempting to flee their country.<sup>45</sup> Over four decades of the Castro regime, countless numbers have suffered the same fate. Due to the large numbers of Cubans attempting to escape in recent years, it has been reported that the Cuban government detains most individuals intercepted while attempting an escape for short periods, releasing most after interrogation. Yet, these persons face reprisal and are marked as “untrustworthy” for many jobs, particularly those in the foreign and tourist sectors.<sup>46</sup> In addition, migration accords between Cuba and states returning asylum-seekers, such as the U.S., afford protections to those interdicted and returned. However, there have been problems moni-

toring if Cuba honors the agreement and there are reports from inside the island that escapees forcibly returned suffer loss of employment, housing, and ration cards and harassment of themselves and family members, among other abuses. All of this arguably constitutes “punishment and coercion,” i.e., “torture” under the CAT.<sup>47</sup>

Because the Cuban government tightly controls access to any type of sea vessel and a formal retail market is inexistent, Cubans assemble makeshift rafts and embarkations in hiding, and mostly with stolen inputs, as the state owns almost all means of production. This can imply further penalties. Those who resort to stealing sea-faring vessels may be convicted of “piracy,” which is punishable with up to 20 years in prison or the death penalty.<sup>48</sup> In April 2003, Cuba executed three men for unsuccessfully attempting to take a ferry to the United States, despite the fact that none of the hijacked passengers suffered injury.<sup>49</sup> There are 18 other documented cases of Cubans executed for attempting to escape the island.<sup>50</sup> More-

---

43. “Cuba’s Repressive Machinery.”

44. “Cuba’s Repressive Machinery.”

45. For example, see “illegal exit or piracy” as cause in list of political prisoners by Elizardo Sánchez Santa Cruz, *Comisión Cubana de Derechos Humanos y Reconciliación Nacional*, “Lista Parcial de Sancionados o Procesados por Motivos Políticos o Sociales hasta Julio de 2003,” Información enviada al *Buró de Información del Movimiento Cubano de Derechos Humanos*, <http://www.infoburo.org/Presos7-03.pdf>.

46. Personal interview with Maribel Alvarez, who attempted to escape Cuba on a raft in 1999, and was apprehended by the Cuban Coast Guard. Now living in New Jersey, she managed to flee on another raft with a group of five friends in July of 1999 and was not returned by the U.S. Coast Guard due to a medical condition.

47. Omar Ruiz, “Balsero devuelto denuncia los maltratos de la policía política cubana,” Grupo Decoro, [www.cubanet.org](http://www.cubanet.org), Santa Clara, 27 de noviembre 2002; and Reinaldo Cosano Alén, “Desempleado por intento de salida ilegal del país,” [www.cubanet.org](http://www.cubanet.org), La Habana, 30 de diciembre 2002.

48. In June 2001, for example, a group of Cuban soldiers who sought to escape by boat was condemned to jail sentences of up to 27 years. “Cuba seeks heavy sentences for military deserters,” Reuters, Havana, June 13, 2001.

49. David Gonzalez, “Cuba Executes 3 Who Tried to Reach U.S. in a Hijacking,” *The New York Times*, April 12, 2003.

50. At least eighteen men have been executed from 1961 to 1992 for attempting to flee the island by boat, most without resorting to force or any sort of violence (these are known cases, others may exist). One case involves the 1963 execution of three Protestant Ministers, Rev. José Durado (of the Gideon Congregation of Florida, Camagüey), Rev. Pablo Rodríguez (of the Church of God of Güines, Havana Province), and Rev. Antonio González (congregation not reported). They left Cuba by boat as part of a group of 19 asylum seekers and were swept to Anguilla Key, Bahamas, where the Cuban Coast Guard staged a raid, returned them to Cuba, and swiftly executed the three ministers (on October 16, 1963), sentencing the remaining 16 to 5 years in prison. Great Britain sent a diplomatic note of protest to Cuba (on 10/4/63) and *The New York Times* reported twice on this case (on 10/5/63, p.8, and 10/16/63, p. 5). Telephone interview with Armando Lago.

over, there are several notorious incidents of the assassination of escapees, including children,<sup>51</sup> by the Cuban Coast Guard—ramming vessels to drown the occupants or gunning them down—and anecdotal accounts of other such incidents, including sand bags thrown from airplanes to sink rafts.<sup>52</sup>

The 1951 Convention on Refugees recognizes only two limitations for claiming *non-refoulement*. Article 33 states that it may not be claimed by someone seen as a risk to the security of the country or who had been convicted of a “particularly serious crime.” The International Law Commission (ILC) Draft Articles on State Responsibility further provides that a breach of an international law obligation is justified in extreme cases of necessity. The latter is defined as a situation that endangers an “essential interest” of the state and places it in “grave and imminent peril.” Only then can a state invoke necessity as a justification.

A roundtable of international legal experts, concerned with a trend of exceptions to human rights principles, concluded in July 2001: “Exceptions must be interpreted very restrictively, subject to due process safeguards, and as a measure of last resort. In cases of torture, no exceptions are permitted to the prohibition against *refoulement*.”<sup>53</sup> Concerns over

terrorism are particularly significant, particularly after 9/11, yet the criteria used to protect a state and its citizens against potential terrorist activities may be overly general, subjective, or less than imminent. On the other hand, as we shall examine further on, the Cuban *balseiro* situation could potentially merit an “essential interest” exception to *non-refoulement* due to its peculiarities and the historic use of migration “blackmail” by the Castro regime on the United States government.

In considering possible justifications for denying *non-refoulement* to asylum-seekers, the fundamental legal issue is that states have an international legal responsibility to conform to international obligations as they arise. The general evolution of international law affords states obligations that are *erga omnes*—to the community at large.<sup>54</sup> It was the opinion of the Cambridge Roundtable of experts of July 2001 that *non-refoulement* is a principle of customary international law.<sup>55</sup>

This status, together with actual state practice, provides “persuasive evidence of the concretization of this customary rule.” Moreover, *non-refoulement* has been recognized as a higher norm of international law. Renowned legal scholars and human rights organizations sustain that the principle of *non-refoulement*

---

51. The better documented incidents include: (1) the sinking of the tugboat “13 de marzo” on July 13, 1994, where 44 people (including many children) were purposefully drowned by the Cuban Coast Guard after attempting to steal a ferry; (2) the Canímar massacre of July 6, 1980, when 45 people were machine-gunned to death by the Cuban Coast Guard for attempting to steal an excursion boat; and (3) the Barlovento massacre of January 15, 1962, where 5 people were machined gunned to death and many more were sentenced to up to 20 years in prison for attempting to steal a motorboat. Information provided by Dr. Armando Lago. Many other incidents have been reported over the years, as in “Camagüey: Hunden bote con cubanos,” *El Pitirre Digital*, 21 de Marzo de 2003.

52. One such case was related to the author by a mental health professional who left Cuba in recent years and had treated a survivor at a state psychiatric hospital. This account has not been documented for lack of complete information and fear by the émigré that family still on the island will face reprisal.

53. “The Principle of Non-Refoulement,” Cambridge Roundtable, Organized by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, 9–10 July 2001.

54. D. Vanheule.

55. Roundtable of experts held in Cambridge, United Kingdom, as part of the “second track” of global consultations on international protection sponsored by UNHCR. Although not formally binding, the conclusions constitute expert expressions of opinion which are broadly representative of the views of the international community. Volker Turk and Frances Nicholson, “Introduction.” In Feller et al., p. 9.

presents a case of *jus cogens*,<sup>56</sup> a body of higher, peremptory, norms of international law of which no violation is allowed. By international law, states cannot transgress these norms, considered so essential to the international system that their breach places the very existence of that system in question, and are regarded as binding on all states, independently of specific assent and even in the absence of any formal judicial pronouncement.<sup>57</sup>

There is not much debate surrounding the issue of whether or not a refugee must be *inside* a state to enjoy the right of *non-refoulement*. Most experts and international legal scholars appear to agree that *refoulement* commonly covers rejection at the frontier. In fact, it has been argued, “any ambiguity in the terms must be resolved in favor of an interpretation that is consistent with the humanitarian character of the Convention.”<sup>58</sup> Therefore, when states are not prepared to grant asylum to those with a well-founded fear of persecution, “they must adopt a course of action that does not amount to *refoulement*.”<sup>59</sup> This may include removal to a safe third country, temporary refuge, or some other solution.<sup>60</sup> To stress the importance of this interpretation of the Refugee Convention, legal experts participating in the 2001 UNHCR’s global consultations on international protection, categorically stated: “No other analysis, in our view, is consistent with the terms of Article 33(1).”<sup>61</sup> This was further validated by the Executive Committee of the UNHCR’s Global Consultations,

in its Conclusion No. 6 (XXVIII) 1977, that states that the principle of non-refoulement applies both “at the border and within the territory of a state” and that it is “the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary, refuge, to persons on board wishing to seek asylum.”<sup>62</sup> Because of this Conclusion, rejection at the frontier, as well as in transit zones or on the high seas, will “in all likelihood come within the jurisdiction of the State and would engage its responsibility. As there is nothing in Article 33(1) of the 1951 Convention to suggest that it must be construed subject to any territorial limitation, such conduct as has the effect of placing the person concerned at risk of persecution would be prohibited.”<sup>63</sup>

Since 1980, the United States has had in effect legislation that makes its international law obligations applicable in domestic law.<sup>64</sup> Various reforms, both legislative and by judicial decision, have been made to the asylum system established by the 1980 Refugee Act. In 1993, the legality of the interdiction and repatriation policy was directly challenged in *Sale v Haitian Centers Council*,<sup>65</sup> which reached the Supreme Court. It argued that the United States was breaching its international law obligation of *non-refoulement*, enshrined in the Refugee Act by intercepting ships from Haiti and summarily returning them without adequate screening to ascertain whether any of the asylum-seekers had valid claims to refugee sta-

---

56. The notion of *jus cogens* can be found in Articles 53 and 64 of the 1969 *Vienna Convention on the Law of Treaties* providing that treaties may be invalidated or terminated if their content conflicts with “a peremptory norm of general international law,” i.e., “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

57. See for example, Human Rights Watch, “Background: Refugee Convention Violations,” <http://www.hrw.org/press/2001/12/refconbg1211.htm>, and Guy S. Goodwin-Gill, *The Refugee in International Law*, 2 ed, Clarendon Press, Oxford, 1996, p. 167.

58. Lautherpacht and Bethlehem, p. 113. (This paper is part of the UNHCR’s global consultations on international protection.)

59. Lautherpacht and Bethlehem.

60. Lautherpacht and Bethlehem.

61. Lautherpacht and Bethlehem.

62. Lautherpacht and Bethlehem, p. 114.

63. Lautherpacht and Bethlehem, p. 114.

64. The Refugee Act, enacted March 17, 1980, Pub. L. No. 96-212, 94 Stat. 102.

65. *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549, 113 S. Ct. 2549, 125 L. (92-344), 509 U.S. 155 (1993).

tus. The Supreme Court decided in favor of the federal government in interpreting the *non-refoulement* principle to only apply once an asylum-seeker had entered the United States. The “wet foot-dry foot” policy is a derivation of this ruling. No legal challenge is known to have been brought in U.S. courts regarding the interdiction of Cuban migrants or the 1994 and 1995 U.S. Migration Accords with Cuba on the return of *balseros*. The Cuban case might, for example, merit a different treatment by the courts than the *Sale v Haitian* if compelling arguments were made that the Cuban Adjustment Act and the “wet foot” policy are considered *de facto* recognition of Cubans’ condition as political refugees<sup>66</sup> and/or if it is recognized that returnees generally face “torture” or “persecution,” as defined by the CAT.

Although the 1995 Migration Accord gave the U.S. Interests Section in Cuba the right to supervise whether Cuba is keeping its commitment to not submit returned migrants to reprisals, independent journalist reports from Cuba point to specific cases in which it is otherwise.<sup>67</sup> Moreover, the U.S. government has officially expressed its concerns to Cuba over “the continuing harassment of some returned

migrants,” which has included “discriminatory treatment, including loss of employment, repeated arbitrary fines, and denial of access to schooling.”<sup>68</sup> The usual round of scheduled discussions normally held twice a year in New York or Havana was suspended in early January 2004 by the United States in protest over Cuba’s “repeated refusal to discuss key issues.”<sup>69</sup> Among the issues was the refusal by Cuba from March 2003 onwards to allow U.S. diplomats to travel outside of Havana to monitor the estimated 80% of returnees who live outside the capital.<sup>70</sup>

Concerns about procedural fairness have also been raised with respect to the interdiction of Cuban migrants on the high seas. Among the suggested difficulties are inadequacy and lack of access to information and representation, unavailability or potential inaccuracies of translation, questions of confidentiality, and the application of discretionary powers by adjudicators and officials. A prominent legal scholar and refugee rights’ advocate affirmed: “The right to seek asylum is meaningless if individuals are not given the opportunity to apply for asylum or if application procedures deprive them of the ability to present their claims. Interdiction on the high seas, for exam-

66. The CAA was enacted, as per the legislative record, to provide a mechanism for refugees to escape the political persecution of Communist countries. Authority cited by Congressional Committee report cited similar legislation passed on behalf of Hungarian refugees and other refugees fleeing Communist countries outside of the Western Hemisphere. This policy goal is also thought to be well established in history. In addition, the Cuban Liberty and Solidarity Act of 1996 (also known as the Helms-Burton Law, P.L. No. 104-208) supports the legislative intent of providing refuge from persecution. It conditions the repeal of the CAA on a determination by the President that a democratically elected government is in power in Cuba. See Roland Estevez, “Modern Application of the Cuban Adjustment Act of 1966 and Helms-Burton: Adding Insult to Injury,” *Hofstra Law Review*, Vol. 30, No. 4, Summer 2002.

67. See, for example, Reinaldo Cosano Alén, “Desempleado por intento de salida ilegal del país,” *La Habana*, 30 de diciembre 2002, [www.cubanet.org](http://www.cubanet.org); Omar Ruiz, “Balsero devuelto denuncia los maltratos de la policía política cubana,” *Grupo Decoro*, Santa Clara, 27 de noviembre 2002. [www.cubanet.org](http://www.cubanet.org); José Antonio Fornaris, “Amenazan con largas condenas a balseros devueltos,” *La Habana*, 3 de abril 2003, *Cuba-Verdad*, [www.cuganet.org](http://www.cuganet.org).

68. Statement by Kevin Whitaker, Coordinator for Cuban Affairs, U.S. Department of State, speaking to the press in Havana on the occasion of the Migrations Talks held in accordance with a twice a year schedule as per the 1995 Migration Accord concern. Andrea Rodríguez, “Cuba, U.S. officials hold migration talks,” *Havana*, Associated Press, December 17, 2002.

69. The talks, held every six months in Cuba or the United States, are the highest-level discussions between the two nations. State Department Spokesman Richard Boucher said the U.S. government wanted to discuss five issues and would consider rescheduling the talks when Havana agreed to them: (1) Cuba’s obligation to issue exit permits to all qualified migrants; (2) Cuba’s cooperation in holding a new registration for the lottery from which two-thirds of all legal migrants are chosen; (3) a deeper port in Cuba for repatriations by the U.S. Coast Guard; (4) permission for U.S. diplomatic personnel to monitor the government’s treatment of repatriated Cubans; and (5) Cuba’s obligation under international law to accept the return of Cuban nationals the United States wishes to deport. Boucher said Washington has raised the critical issues at the last six sessions of migration talks, but Havana officials have refused to discuss them substantively. In October 2003, Cuba sent a diplomatic note saying it rejected discussion of such issues. “U.S. Suspends Migration Talks With Cuba,” Associated Press, Washington, January 7, 2004.

70. Kevin Whitaker, Coordinator for Cuban Affairs, U.S. State Department, Personal telephone interview, January 9, 2004.

ple, fails effectively to recognize refugees as persons before the law.”<sup>71</sup> The International Covenant on Civil and Political Rights<sup>72</sup> addresses multiple due process concerns. While the United States is a party to the Covenant, the Lawyers Committee for Human Rights had denounced its interdiction practices: “U.S. interdiction practices are woefully deficient and fail to ensure that refugees are not returned to the hands of their persecutors. Under U.S. procedures, migrants who are interdicted on boats are not brought to the U.S. for asylum processing, are not given access to lawyers and are not required to be individually screened to make sure that they are not refugees who are in danger of persecution if returned. While Cuban migrants are read a statement in Spanish notifying them that they may come forward and speak with a U.S. representative if they have any concerns, this statement is deficient and encourages refugees to return to Cuba to pursue in-country refugee processing.”<sup>73</sup>

The U.S. government considers that Coast Guard procedures afford adequate protections. A Coast Guard officer reports that “cutters have at least one person who speaks Spanish to interview Cuban *balseiros*—a Spanish-speaking crew member or someone temporarily assigned in the absence of one.”<sup>74</sup> All *balseiros* are individually “pre-screened,” with written notes taken to document their interviews, typically lasting 10-15 minutes.<sup>75</sup> This report does not make it apparent that the individuals are trained interpreters or have any specialized instruction for this task. Nevertheless, the State Department’s Coordinator for

Cuban Affairs asserts: “A specially-trained Alien Pre-Screening Officer (APSO) from the Department of Homeland Security/Citizenship and Immigration Services (DHS/CIS) travels to any Coast Guard cutter which has conducted an interdiction. These APSOs are all fluent Spanish speakers, in most case possessing native Spanish, and all have up-to-date familiarity with the current political and human rights situation on the island. After the *balseiros* are individually ‘pre-screened,’ case files are transmitted by fax to DHS/CIS headquarters in Washington for individual review and final decision. CIS headquarters can and does request additional and clarifying information from the Department of State, the U.S. Interests Section, or consults public sources before making final determinations. Additional interviews can also be directed.”<sup>76</sup> If the person claims asylum or a credible fear of persecution, the interview is more extensive and, if there is such a determination, the person is taken to the Guantanamo U.S. Naval Base with any accompanying close family members. Additional screening is conducted there to determine whether a “well founded” fear of persecution or torture exists. If the claim is validated, the person and his or her accompanying family are typically given asylum by a third country, such as the Dominican Republic, which has agreed to take them in. Most interviewees are repatriated to Cuba, but those with serious medical conditions, who may not be given treatment at sea, are evacuated for treatment to the U.S. with any immediate family members, where

---

71. A. Helton.

72. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.

73. “Cubans on Floating Truck Returned to Cuba by U.S.: U.S. Should Change Its Interdiction Practices,” Lawyers Committee for Human Rights, Asylum Protection News 18, [http://www.lchr.org/asylum/torchlight/newsletter/newslet\\_18.htm](http://www.lchr.org/asylum/torchlight/newsletter/newslet_18.htm)

74. LTJG K. Puzder.

75. LTJG K. Puzder.

76. K. Whitaker, e-mail of 1/12/04.

“dry foot” procedures apply.<sup>77</sup> Very few *balseros* end up in the United States.

A State Department official explains that “because a refugee claim is individual, not collective, Cubans seeking to come to the United States are given the opportunity by U.S. authorities to establish if he/she personally would face persecution based on his/her individual actions. Therefore, the process in place for vetting interdicted migrants is considered to comply with the United States’ international obligations. The vast majority of interdicted Cuban migrants makes no claim of political persecution or fear thereof if returned to Cuba, but rather indicate that their decision to attempt illegal migration was driven by the desire for economic betterment. Over 95% do not even attempt to make an argument for political asylum. They say they wish to go to the United States to get a job.”<sup>78</sup> This view implies that Cuban *balseros* could be generally regarded as economic migrants.

But, it can be argued that the economic motivation to leave Cuba cannot be disassociated from the reality of repression, which permeates every aspect of life and denies basic economic rights to most citizens. In fact, the U.S. State Department’s 2002 annual report on Cuba’s human rights situation recognizes that “Castro exercises control over all aspects of life through the Communist Party and its affiliated mass organizations, the government bureaucracy headed by the Council of State, and the state security apparatus.”<sup>79</sup> The Heritage Foundation/Wall Street Journal’s annual *Index of Economic Freedom*, which sys-

tematically examines ten factors for each country, consistently classifies Cuba among the “most repressed” countries in the world in terms of economic freedom—keeping company with Belarus, Tajikistan, Iran, Uzbekistan, Turkmenistan, Laos, Burma, Zimbabwe, Libya and North Korea.<sup>80</sup> In Cuba, the government regulates the entire economy by owning and controlling the means of production, including setting virtually all wages and prices,<sup>81</sup> and employing the vast majority of the labor force. Private ownership of land and productive capital by Cuban citizens is strictly limited to farming and self-employment,<sup>82</sup> and only in extremely limited degrees. Regarding labor issues, the State Department 2002 report notes that all legal unions were government entities—their leaders selected by the Communist Party—that collective bargaining does not exist and that workers’ lose employment for their political beliefs. But, what’s more critical is that the “dry foot” policy essentially represents a “collective” approach to the question of asylum, thus, making the “individual” approach applied to “wet foot” situations a puzzling contradiction.

Furthermore, independent polls of *balseros* recently arrived conducted during the height of Cuba’s economic crisis of the nineties reveal that a very high rate of respondents (63.2% in one poll, 90.7% in another) ascribe to political considerations (the desire for freedom and release from state control) a primary motivation for leaving, leading to the conclusion that economics seem to play a secondary role in the deci-

---

77. All information on described Coast Guard procedures was provided by LTJG K. Puzder. Fiscal year figures for Cuban migrants medically evacuated by the U.S. Coast Guard: 1995: 3, 1996: 14, 1997:8, 1998: 28, 1999: 23, 2000: 28, 2001: 2, 2002: 7. Source: “Maritime Migrants Medically Evacuated by the Coast Guard,” Migrant Interdiction Statistics, U.S. Coast Guard, Alien Migrant Interdiction, Coast Guard Office of Law Enforcement, [www.uscg.mil](http://www.uscg.mil).

78. LTJG K. Puzder.

79. “Cuba: Country Report on Human Rights Practices—2002.”

80. Marc A. Miles, Edwin J. Feulner, Jr., Mary O’Grady, et. al., *2003 Index of Economic Freedom*, The Heritage Foundation/Wall Street Journal. <<http://www.heritage.org/research/features/index/countries.html>>

81. Index of Economic Freedom.

82. Index of Economic Freedom.

sion to leave.<sup>83</sup> Researchers have determined that this is consistent with patterns seen in earlier exodus.<sup>84</sup>

Bahamas, Jamaica, and Grand Cayman (the latter a group of three islands south of Cuba that are British territory) have also entered into agreements with Cuba by which Cuban *balseiros* arriving there are repatriated.<sup>85</sup> Whether the United States and these other countries interdicting and/or repatriating *balseiros* are violating international law may best be left to their domestic judicial systems if effective policy revision is sought by special interest groups. Despite the rapid evolution of human rights international law, enforcement of international legal obligations remains basically subject to the will of sovereign states. Unlike other international human rights instruments, there is no independent treaty body to supervise states' compliance with the Refugee Convention. While Article 35 of the Convention on Refugees requires states to cooperate fully with United Nations High Commissioner on Refugees (UNHCR), "the guardian of the Convention,"<sup>86</sup> to supervise the application and implementation of the Convention, many states continue to ignore UNHCR guidelines, policies, and recommendations.<sup>87</sup>

### BEYOND INTERNATIONAL LAW

The repatriation agreements point to a practical issue that calls for placing the international legal argument within a wider and necessary context. While humanitarian and legal considerations call for taking in refugees in most circumstances, host countries face legitimate practical problems in accepting refugees. This is particularly true in situations of mass influx, which constitute an "undue burden" in terms of security, welfare resources, and others.<sup>88</sup> For this reason, the preamble of the Refugee Convention recognizes that hosting large refugee populations can pose an unduly heavy burden on certain countries and calls on states to cooperate to assist host countries and seek solutions to refugee situations.

Ironically, the manner in which the United States and other states neighboring Cuba have dealt with these problems is by entering into repatriation agreements that depend on the Castro government to protect them from the mass sea migration influxes by preventing Cuba's citizens from exercising their fundamental right to leave their country.<sup>89</sup> Yet, fleeing their country is precisely what Cubans must resort to in order to break away from the situation of deprived rights to which their very government subjects them. The victimizing Castro regime is also depended on,

---

83. Ackerman and Clark, pp. 31-32.

84. Ackerman and Clark.

85. "Cayman Islands: Refugee return accord with Cuba announced," *The Miami Herald*, April 29, 1999. Before the 1999 migration accord with Cuba, the Cayman Islands had a history of arrivals by groups of Cuban rafters. During the summer of 1994's mass exodus by raft from Cuba, more than 1,000 Cubans arrived in the Cayman islands: 50 received political asylum, 800 were sent to the U.S. Naval base at Guantánamo, Cuba, others were repatriated. Arthur C. Helton, Directeur des projets d'émigration force, Director, Forced Migration Projects, Décembre 1995. <<http://www.soros.org/textfiles/fmp/caribfre.txt>>

86. V. Turk and F. Nicholson, "Introduction," in E. Feller, et al., p. 6.

87. Human Rights Watch.

88. The problem is particularly challenging for the United States, which has received hundreds of thousands of Cuban refugees since 1959 and is constantly faced with the threat of a mass migration crisis as political blackmail by the Castro regime. The Mariel Boatlift of 1980 put enormous strain on resources, particularly on the U.S. Coast Guard, which was faced with a sudden security and humanitarian crisis. Numerous federal and state agencies were involved and the Florida was declared under a state of emergency. The cost to the Coast Guard alone reached an average of \$650,000 a week, or \$16.5 million for the duration of the event; 1,387 vessels had to be assisted by the Coast Guard in a frantic operation to save lives. Nonetheless, at least 27 lives were lost in maritime accidents. U.S. Coast Guard, Alien Migrant Interdiction, Coast Guard Office of Law Enforcement, "Mariel Boatlift." For a superb account of Coast Guard operations during the Mariel boatlift, see A. Larzalere.

89. Article 13 (2) of the Universal Declaration of Human Rights states: "Everyone has the right to leave any country, including his own, and to return to his country." (Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.) Article 12 (2.) of the International Covenant on Civil and Political Rights (entered into force March 23, 1976) states: "Everyone shall be free to leave any country, including his own."

through these agreements, to take back those apprehended while fleeing before they can attain asylum, without, as we have seen, an *enforceable* guarantee by the government initiating the repatriation that they will not endure persecution once returned. Although these agreements are humanitarian in one sense—they discourage people from endangering their lives at sea—in another sense they make the parties accomplices to the human rights abuses of those they are legally bound to protect from such abuse. What is more ironic is that, in the case of the United States, there is a law in effect since 1966, the CAA, that affords Cubans a special status due to the *de facto* recognition of the deplorable human rights situation in Cuba and the political persecution Cuban citizens suffer as a result of Communist rule.<sup>90</sup>

The mere urge for freedom by a repressed people is complicated by the intricate politics and economics of the Cuban migration phenomenon. To begin with, Cuba has failed to live up to its part of the migratory accords with the United States. The Cuban government arbitrarily denies exit permits to certain individuals holding visas to immigrate into the United States. The U.S. government reported that by the end of FY 2004 (September 30th), 1,600 Cubans had entry documents to the United States, but had

been denied authorization to leave the country by the Cuban government.<sup>91</sup> The Cuban government also refuses to take back approximately 11,000 Cuban “alien excludables” who have exhausted all legal avenues to stay in the United States and have final orders of deportation due to their background, mostly for criminal reasons.<sup>92</sup> In addition, Cuba rejects the U.S. Coast Guard permission to repatriate *balseros* into ports deep enough for the cutters in which they are kept (allowing for their safe and proper conditions) until taken back to the island.<sup>93</sup> Finally, the Cuban government refuses to allow the U.S. Interests Section in Cuba to hold regular lotteries to identify those Cubans who wish to be taken into account for the 20,000 yearly “quota” of visas agreed to in the 1994 accord.<sup>94</sup>

Cuba uses migration to derive considerable benefits. It provides an escape valve to release internal pressure that could otherwise find expression in growing uncontrollable departures that destabilize society, opposition to the government, or popular discontent that could challenge to the power structure. Also, it diminishes the demand on social services, which the state is so hard pressed to rationalize. Importantly, the 20,000 visa allocation is a precondition the Castro government has insisted on forcefully in order to

---

90. Although the CAA itself does not refer to the reasons for its passing, the legislative history surrounding the Act clearly contains references to providing a mechanism for refugees to escape the political persecution of Communist Cuba as an underlying motive behind its enactment. In addition, history is said to support this legislative intent, as for example, reflected in the Cuban Liberty and Solidarity (Helms-Burton) Act of 1996, that conditions the repeal of the CAA to a determination by the President that a democratically elected government is in power in Cuba. See Estevez.

91. “Más de 23.000 cubanos recibieron visas de EEUU en año fiscal 2004,” EFE, La Habana, 1ro de octubre del 2004.

92. K. Whitaker.

93. The U.S. Coast Guard is only allowed into the port of Cabañas, which can only take patrol boats -110 foot cutters- for refugees to be taken back. Refugees picked up at sea are transferred to larger ships, where better conditions can be provided for their stay. For the repatriation, they must be transferred in high seas back to patrol boats, posing security and logistical problems aside from increasing the operational cost. Cuba refuses to discuss allowing USCG access to deeper ports. K. Whitaker.

94. Lotteries were held in 1994, 1996, and 1998. In 1998, however, presumably as people inside the island became more familiar with the process, 541,000 Cubans registered for the lottery in the first 30 days. The Cuban government asked that it shut down, as it had become a source of great embarrassment to them. Since then it has insisted even in writing that it will not allow another lottery (K. Whitaker).

guarantee huge economic benefits from a steady flow of exiles.<sup>95</sup> In late 1993, the Cuban government legalized the holding of dollars, which until then had been forbidden and entailed prison sentences. The ensuing economic transfers from exiles has been critical to keeping the Cuban economy afloat and maintaining the current regime in power.

Annual remittances are estimated between half a billion to up to one billion dollars.<sup>96</sup> Already in 1996, remittances were reported to have surpassed net revenues from tourism and sugar, the main sources of hard revenue for the Cuban economy.<sup>97</sup> A renowned economist from a Cuban institution has published a paper that explains remittances as the exportation of an excess labor force overseas to areas with a much higher income potential and where increased productivity is assured. This, he sustains, has been critical in diminishing poverty, subsidizing the accumulation of

capital, and guaranteeing the survival of the economy in the nineties.<sup>98</sup>

The Cuban government charges exorbitant fees to those who seek permission to emigrate legally. Due to the very low average monthly salary of Cuban workers (less than US\$10 per month<sup>99</sup>), the presumption is that relatives or friends overseas will send the funds to meet these onerous costs. For a Cuban to receive an exit permit, a fee of US\$600 must first be paid to Cuban government (\$400 for a required medical exam, \$50 for a passport, and \$150 for an exit permit).<sup>100</sup> That is the equivalent to over five times the annual salary of the average Cuban worker. The yearly 20,000 minimum entry allocation for Cubans to the U.S.<sup>101</sup> represents US\$12 million for the Cuban government in fees alone. The economic gain is even higher if fees charged to those who wish to visit relatives in the United States are added. The Cu-

---

95. Some Cuban nationals who apply for this program qualify for admission as refugees and some as legal permanent residents; the rest are paroled consistent with the Agreement. Potential parolees are selected for interview in Cuba by lottery. Their backgrounds are screened according to U.S. immigration law to exclude persons with criminal records and certain medical conditions, and those who are likely to become public charges. Successful applicants must answer *yes* to two of three questions: Do you have relatives in the United States? Do you have at least 3 years of work experience? Do you have at least a secondary education? Barbara Robson. "The Cubans: Their History and Culture," Refugee Fact Sheet Series No.12, The Refugee Service Center, Washington, DC, 1996.

96. Cuban official data on remittances is lacking and estimates by experts vary widely.

97. In fact, from 1992-96, remittances are reported to have grown by 242%, at ten times the rate of tourism revenues, considered the most dynamic sector of the Cuban economy. Pedro Monreal, "Las remesas familiares en la economía cubana," *Revista Encuentro de la Cultura Cubana*, Vol. 14, otoño del 1999, pp. 49-62. Monreal is an economist at the Centro de Investigaciones sobre la Economía Internacional (CIEI) in Havana.

98. Monreal well points to the difficulty of obtaining adequate data on remittances and assumes they reached around \$500 million, rather than the reported \$800 million by the United Nation's Economic Commission on Latin America. Over the years estimates from different sources and experts have varied considerably.

99. The average wage in Cuba in 2001 was 245 pesos, and the average monthly income of workers 349 pesos, which takes into account other compensation such as bonuses in hard currency convertible pesos, food support, clothing, shoes, toiletries and other consumer items (Oscar Espinosa Chepe, "El salario en Cuba," CubaNet, Havana, July 2002). That translates into US\$9.42 and US\$13.42, respectively, at the current exchange rate of 26 pesos to the dollar.

100. Armando Soler, "Lo que cuesta salir de Cuba," La Habana, CubaNet, julio del 2002, <http://www.conexioncubana.net/tramites/emigracion/salir.htm>.

101. Approved immigrant visas since the 1994-95 migration accords were put in place (excluding immediate relatives that are counted separately): FY95, 25,838; FY96, 20,006; FY97, 20,048, FY98, 20,787; FY99, 24,149; FY00, 20,566 (as of 8/21/2000). The figures for FY96, FY97, and FY98 include a credit of 5,000 (per year) assigned to refugees interned at the U.S. Guantánamo Naval Base who were allowed into the U.S. The fiscal year ends on September 30. "Fact Sheet: Approved Cuban Migrants," U.S. Department of State, Bureau of Western Hemisphere Affairs, August 28, 2000. [www.state.gov/www/regions/wha/cuba/fs\\_000828\\_cuban\\_migrants.html](http://www.state.gov/www/regions/wha/cuba/fs_000828_cuban_migrants.html). By July 2004, the U.S. had already filled the 20,000 visa limit for FY 2004. "Fulfillment of USG Obligation to Issue 20,000 Travel Documents." Press Statement by James C. Cason, Chief of Mission U.S. Interests Section, Havana, Cuba, July 19, 2004, <<http://usembassy.state.gov/havana/wwwwh2vce.html>>. For FY 2004 (ending 9/30/04), the U.S. granted 23,075 immigrant visas to Cubans. "Mas de 23.000 cubanos recibieron visas de EEUU en año fiscal 2004," EFE, La Habana, 1 octubre 2004.

ban government charges \$300 per person just for processing their invitation letter and exit permit.<sup>102</sup>

Aside from the aforementioned fees and remittances, estimated revenues from travel to Cuba by U.S.-based persons of Cuban heritage are over \$250 million per year.<sup>103</sup> In addition, the reunification with family and friends even more revenues for the Cuban government in telecommunications, as planning family visits involves telephone contacts and the reaffirmation of sentimental ties encourages relatives to call loved ones on the island more frequently. Almost all calls originate in the U.S., as Cubans generally lack the economic means to pay for outgoing long-distance calls, and Cuba charges one of the highest per minute rates in the world. From September 1996 to September 2003, payments to Cuba by U.S. telecommunications companies have amounted to \$482,616,162, almost half a billion dollars, or around \$69 million a year.<sup>104</sup>

Travel complicates things further in a manner that goes to the very heart of the question of asylum. In the 1990s, with the demise of massive Soviet assistance to Cuba, the Cuban government earnestly began to welcome back Cuban exiles to visit family on the island in an effort to bring in hard currency through tourism, tourism-related revenues, cash, and other gifts for family and friends. Even those who leave Cuba “illegally,” with minor exceptions, are ac-

cepted back with open arms, allowing them access and privileges they lacked when they were residents. The trend was also fueled by the increased relaxation of travel restrictions by the U.S. government to facilitate family reunification for humanitarian reasons, which was only recently scaled back by the Bush Administration.<sup>105</sup> As a result, growing numbers of U.S.-based persons of Cuban heritage (citizens or residents) have visited Cuba. From 1990 to 2003, the number of travelers of Cuban heritage who visited the island is estimated at almost 850,000, with the most recent arrivals displaying the highest propensity to travel. Most were born on the island and were accepted into the United States as refugees.<sup>106</sup> Conditions for exiles that go back for visits and those for residents of the island are very different and there are typically no grounds for them to fear persecution or torture when returning. Yet, this illustrates the inherent contradiction in the claim of political asylum and the ability to travel back fearlessly to the home country where persecution or torture has been presumed. Many, in fact, travel back right after they request their permanent residence status a year and one day after arriving, as per the Cuban Adjustment Act.

Finally, the *balsero* issue cannot be examined without taking into account that the United States faces a unique set of circumstances influencing its handling. On several occasions, as we have seen, the Cuban

---

102. “Mas de 23.000 cubanos.”

103. Maria C. Werlau, “U.S. Travel restrictions to Cuba: Overview and Evolution,” *Cuba in Transition—Volume 13*. Washington: Association for the Study of the Cuban Economy, 2003, pp. 407-409.

104. U.S. Cuba Policy Report, September 30, 2003.

105. After the completion of a comprehensive study of Cuba policy by the Commission for Assistance to a Free Cuba, named by President Bush, OFAC/U.S. Treasury rules were amended to eliminate the general license authorizing family visits and to require a specific license to visit certain family members in Cuba. Visits are now permitted once every three years; living expenses for those traveling for family visits are authorized up to \$50 per day plus an additional \$50 per trip for travel expenses in Cuba. The general license authorizing quarterly remittances was also amended to authorize remittances only to certain family members and to prohibit remittances to certain Cuban Communist Party members and Cuban government officials; remittance rate remains \$300 per quarter. (“Summary of New Rules on Travel and Exports to Cuba,” Fact Sheet, Bureau of Western Hemisphere Affairs, U.S. Department of State, July 22, 2004 < <http://www.state.gov/p/wha/rls/fs/34617.htm>>.)

106. According to the 2000 U.S. Census, almost 50% of the U.S. population describing itself as Cuban American was born on the island. See T. Boswell. For an interesting survey on the attitudes of Cuban émigrés to the U.S. of the 1990s, see Silvia Pedraza, “The Last Wave: Cuba’s Contemporary Exodus, Political or Economic Immigrants,” *Cuba in Transition—Volume 10*. Washington: Association for the Study of the Cuban Economy, 2000. Pedraza concludes that, despite the differences in historical and emotional contexts of the distinct emigration waves since 1959, there is an underlying political disaffection that permeates all immigrant waves and cuts across socio-economic and other characteristics.

government has removed restrictions on leaving the country to invite a mass exodus to the United States. This has been amply described in descriptive and analytical studies of several instances of Cuban mass exodus during the Castro regime. Holly Ackerman and Juan Clark have identified a pattern by which the Cuban government fuels migration crisis to obtain internal benefits (such as releasing mounting citizen pressure to leave and a build-up of internal dissent, and identifying the disaffected elements of society), and, ultimately, concessions by the U.S. government that provide benefits to the Castro regime.<sup>107</sup> The fact that the Castro regime holds and may use this card is an important component of the complex issues affecting U.S.-Cuba policy in general and cannot be seen independent of this fact. Importantly, due to the strong sentiments of the population of Cuban heritage in the U.S., its traditionally high political participation and activism, and the importance of South Florida in electoral politics, the community's views and interests are taken very seriously by politicians in developing Cuba policies. These may, generally or at times, be at odds with other policy considerations. All of these considerations coalesce to make the *balseero* issue a particularly challenging problem to address coherently and justly.

### CONCLUSION

Notwithstanding the essential need to develop and maintain adequate human rights' standards, the repatriation of Cuban *balseros* by the U.S. and other countries must be examined within a framework that includes the complicated web of issues intimately in-

tertwined of a legal, humanitarian, and political nature.

Thanks to the steady development of international refugee and human rights law of the last fifty years, the individual has come to be recognized as the inherent bearer of human rights.<sup>108</sup> "The failure or inability of the country of origin to fulfill its responsibility to safeguard human rights has become a matter of international concern and responsibility, even of humanitarian intervention."<sup>109</sup> Thus, in the context of international law, the Cuban *balseero* issue is not merely a U.S. "problem." Yet, international law and the international community have been, to date, woefully lacking for attention nor effective and enduring solutions to the Cuban migration problem.

This failure raises more fundamental question regarding the denial of rights that drives Cubans to escape their country. How should individual governments as well as the international community effectively deal with a state whose citizens seek fundamental freedoms even at peril to their lives while their government is willing to use their desperation as blackmail and for its own profit?<sup>110</sup> What is the responsibility of the international community to the people of Cuba, particularly in light of the human tragedy unfolding in the Florida Straits? These questions merit an in-depth exploration that is beyond the scope of this paper—but one that cannot be ignored if the refugee issue is to be addressed responsibly and effectively.

---

107. Ackerman and Clark. Also see [www.uscg.mil](http://www.uscg.mil) and New York State Archives Legacy Project, "Cubans in America: Push and Pull Factors of Immigration," *Document 5: Excerpt from President Jimmy Carter's press statement, 14 May 1980*; and Robson.

108. V. Turk and F. Nicholson, in E. Feller et al., *op.cit.*, p. 37.

109. V. Turk and F. Nicholson, in E. Feller et al., *op.cit.*, p. 37.

110. As we have seen, the Cuban government has, on several occasions, removed restrictions on leaving the country, a situation that has caused tens of thousands to seek asylum in a very short period. See "Cubans in America: Push and Pull Factors of Immigration;" Robson.