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THE NEED TO DEFINE THE INTERNATIONAL LEGAL STATUS OF CUBANS DETAINED AT GUANTÁNAMO

Jonathan Wachs*

INTRODUCTION

Since mid-1994, public and private actors throughout the world have focused their attention on the plight of Cuban detainees in the United States refugee processing centers at Guantánamo Bay. In August of that year, poignant political developments in the Straits of Florida gave rise to concerns regarding whether and to what extent the United States Government must provide legal protection to Cubans held at the Guantánamo Bay Naval Base. Several Cuban legal organizations alleged in an October 1994 complaint that the United States has failed to meet its treaty and statutory obligations to provide medical care and asylum guarantees to these refugees.¹ Despite the recent focus on the propriety of United States Government action vis-a-vis the Cuban detainees under domestic legal standards, the political, legal, and media communities have failed to address the international legal status of Cubans held at Guantánamo. In an effort to address this issue, this Article examines the human rights provisions of several international legal instruments which Cuban detainees could invoke to protect themselves from mistreatment.

If the Cubans held at Guantánamo are to receive any form of legal protection, it is critical that the international community quickly establish a legal framework to examine their rights. If the detainees do not pos-

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1. Cuban American Bar Association, Inc. v. Christopher, No. 94-2183 (S.D. Fla. Oct. 24, 1994) [hereinafter Complaint].

sess rights recognized under the laws of the United States or Cuba, then without the assistance of international law, United States officials theoretically could mistreat, starve, neglect or otherwise abuse Cuban detainees with impunity.² Thus far, the United States and Cuba have failed to articulate concrete legal standards for the proper treatment of Cubans detained at Guantánamo.³ International legal norms, presented in the form of national standards for the treatment of asylum seekers detained in domestic processing centers; the United Nations Universal Declaration of Human Rights; UNHCR Executive Committee Conclusions; and the laws of war, may provide the last, the best, and the only form of legal protection for the Cuban detainees.

On May 2, 1995, the Clinton administration announced that it entered into a new agreement with the Cuban Government regarding the Guantánamo detainees.⁴ In accordance with this revised Cuban migration policy, the United States agreed to grant permanent entry to the remaining Cubans detained at Guantánamo.⁵ The United States further agreed that, from that date forward, it would return to Cuba all Cuban migrants interdicted in international waters by the United States Coast Guard.⁶ In exchange for this promise, the Cuban Government pledged not to persecute those Cubans returned for attempting to flee the island in violation of this new agreement.⁷

In light of this recent United States-Cuban agreement to release the remaining Cubans held at Guantánamo, some people may suggest that there is no longer a need to analyze the international legal status of the Guantánamo detainees. Close examination of the political, legal, and social developments associated with the May 2, 1995 agreement, however, reveals that this new migration policy intensifies, rather than dimin-

2. See *infra* notes 47-51 and accompanying text (documenting current human rights abuses suffered by detainees as a result of United States neglect and mistreatment).

3. See AMNESTY INTERNATIONAL, UNITED STATES/CUBA: CUBAN "RAFTERS"—PAWNS OF TWO GOVERNMENTS, AI Index AMR 51/86/94, at 1, 4 (1994) [hereinafter AMNESTY INTERNATIONAL REPORT] (noting that the United States and Cuba lack a legal position with respect to Cuban detainees who are unwilling to be repatriated and are not welcome in the United States as asylum seekers).

4. Joint Statement of the United States and Cuba, May 1, 1995, *reprinted in* CUBAINFO (The Johns Hopkins Univ., Paul H. Nitze Sch. of Advanced Int'l Studies), May 18, 1995, at 1-2.

5. *Id.*

6. *Id.*

7. *Id.*

ishes, the need to discuss the international legal status of Guantánamo detainees. For example, under the terms of the May 2, 1995 agreement, thousands of Cuban detainees will remain at Guantánamo for several additional months while awaiting entry into the United States without the protection of international legal standards to govern their treatment.⁸ In addition, President Clinton's unexpected revision of his prior dramatic reversal of the longstanding Cuban migration policy suggests that current United States policy regarding Cuban migration issues is fragile and subject to substantial future revision.⁹ Also, the recent use of Guantánamo by the United States as a safe haven for Cuban and Haitian refugees lends credence to the belief that the United States may consider using Guantánamo again as a safe haven to alleviate future regional migration problems.¹⁰ These events suggest that discussion of the international legal status of Guantánamo detainees is not only prudent but necessary.

Part I of this Article examines the historical development of the events immediately preceding the establishment of the Cuban "safe haven" at Guantánamo and offers a factual assessment of life inside the detention centers. Part II discusses *Cuban American Bar Ass'n v. Christopher*,¹¹ the recently decided Eleventh Circuit case that addresses the applicability of United States law to the situation in Guantánamo. Part III offers three alternative models for the establishment of an interna-

8. See Brian Edwards, *Fantastico: Rafters Knew U.S. Policy Would Change*, TAMPA TRIB., May 6, 1995, at 1 (noting that United States military officials estimate they will need at least 40 weeks from the beginning of May 1995 to process the remaining Cuban detainees in Guantánamo for permanent entry into the United States); Deborah Sharp, *Repercussions in Miami Over Cuba Refugee Policy*, USA TODAY, May 4, 1995, at 3A (noting that in May 1995 there were more than 20,000 Cubans detained at Guantánamo and United States officials send roughly 500 Cubans each week from Guantánamo to the United States).

9. See 31 WEEKLY COMP. PRES. DOC. 1137 (June 27, 1995) (setting forth President Clinton's comments that the policy of detaining Cuban migrants at Guantánamo "could not be a long term solution" and that, were the Cuban Government to engage in meaningful political and economic reform, the United States would again revise its Cuba policy with "carefully calibrated responses").

10. See *U.S. Policy Changed With Guantánamo Safe Havens: Providing Haitian Refugees Temporary Shelter Offered Protection Without Promise of Permanent Resettlement*, WASH. POST, Feb. 5, 1995, at A24 (asserting that the Guantánamo detention policies regarding Haitian and Cuban migrants has encouraged the Clinton administration to pursue additional temporary solutions to international migration problems).

11. 43 F.3d 1412 (11th Cir. 1995).

tional legal framework to aid in the analysis and potential resolution of situations similar to that of the Cuban detainees.

I. THE FACTS

Since the inception of Castro's Cuban revolution in 1959, the United States Government operated under laws and policies making it easy for Cuban citizens to migrate to the United States. In 1966, Congress passed the Cuban Adjustment Act which enabled Cuban immigrants to apply for and receive United States residency after living in the United States for two years.¹² In 1980, Congress passed the Refugee Act which allowed Cuban immigrants to apply for and receive United States residency after living in the United States for only one year.¹³ As a result of political and economic developments in both the United States and Cuba, however, this "open door" policy for Cuban migrants changed significantly in 1994 and even more drastically in 1995.¹⁴

Under Cuban law, most persons wishing to migrate to the United States must obtain both an exit visa from Cuba and an entry visa from the United States.¹⁵ Throughout the years in which the Castro government maintained the financial and organizational resources necessary to exercise strict control over its borders, Cuba provided exit visas only to elderly persons.¹⁶ Since the demise of the former Soviet Union and the corresponding termination of the massive Soviet annual subsidies to Cuba, however, Cuba's ability to enforce its migration laws declined drastically.¹⁷ Due to this tremendous and rapid reduction in financial resources, Cuba's emigration control efforts contracted sharply in the 1990s just like many other Cuban programs and institutions.¹⁸

12. Cuban Adjustment Act, Pub. L. 89-732, Nov. 2, 1966, 80 Stat. 1161 (codified in part at 8 U.S.C. § 1255 (1988)).

13. Refugee Act, 8 U.S.C. § 1521 (1988).

14. See *infra* note 38 and accompanying text (providing analysis of United States policy regarding Cubans detained at Guantánamo).

15. AMNESTY INTERNATIONAL REPORT, *supra* note 3, at 1.

16. *Id.*

17. See David Adams, *The Cuban Revolution on Its Final Spin: Castro's Tattered Experiment is Reflected in Grim Street*, S.F. CHRON., Apr. 15, 1993, at A8 (noting that the demise of the former Soviet bloc forced Cuba to lose 85% of its foreign markets and 50% of its hard currency earnings).

18. See Carmelo Mesa-Lago, *Balseros in Limbo*, HEMISPHERE, Vol. 6, No. 3, at 10 (noting that the number of Cuban immigrants arriving in the United States with valid exit visas declined from 83% of all arrivals in 1990 to 31% of all arrivals in 1993).

Cuba's reluctance or inability to enforce its migration laws appeared soon after the dismantling of the Soviet bloc in 1989.¹⁹ In 1990, Cuba began to reduce incrementally the age requirement for exit visas until 1992 when all Cubans over twenty became eligible to apply for them.²⁰ Additionally, the Cuban Government began to treat people attempting to leave the island without an exit visa with considerably greater leniency.²¹ In fact, the Cuban Government made little or no effort to stop the thousands of Cuban rafters ("balseros") who fled the island for the United States without exit visas in August 1994.²²

In response to the August 1994 influx of thousands of Cuban immigrants, Florida Governor Lawton Chiles declared a state of emergency and openly urged President Clinton to take immediate action.²³ Consequently, on August 19, 1994, President Clinton, fearing an influx similar to the Mariel exodus of 1980, reversed the longstanding United States policy of liberal migration procedures for Cuban asylum seekers.²⁴ Clinton's new policy directed the United States Coast Guard to interdict Cuban migrants at sea and transport them to the Guantánamo Naval Base in Cuba for detention pending a review of their asylum applications.²⁵ In addition, Clinton's new policy required that migrants who completed the journey to the United States be held in Immigration and Naturalization Service (INS) domestic detention centers pending review of their asylum applications.²⁶ As a result of this new policy directive,

19. AMNESTY INTERNATIONAL REPORT, *supra* note 3, at 1.

20. *Id.*

21. *See id.* at 1 (noting that, despite article 216 of the Cuban Penal Code under which citizens attempting to depart the island without official government permission are subject to a maximum prison term of eight years, the Castro government recently imposed lesser sanctions, including fines for some first-time offenders).

22. *Id.* at 2. In response to what he believed to be United States encouragement of illegal migration from Cuba to the United States, Castro explicitly instructed the Cuban Coast Guard not to impede any Cuban or United States boats attempting to transport Cuban citizens to United States territory. Complaint, *supra* note 1, at 17.

23. AMNESTY INTERNATIONAL REPORT, *supra* note 3, at 2.

24. John M. Broder, *Clinton Halts Special Treatment for Cubans*, L.A. TIMES, Aug. 20, 1994, at A1; Complaint, *supra* note 1, at 117-18; Carmelo Mesa-Lago, *Cuba's Raft Exodus of 1994: Causes, Settlement, Effects, and Future*, 12 NORTH-SOUTH AGENDA PAPER SERIES 8 (North-South Center, Univ. of Miami 1995).

25. AMNESTY INTERNATIONAL REPORT, *supra* note 3, at 2; *Cuban Refugees: Remarks by President Clinton*, 5 U.S. DEPARTMENT OF STATE DISPATCH 579 (1994).

26. AMNESTY INTERNATIONAL REPORT, *supra* note 3, at 2; Broder, *supra* note 24, at A1.

the United States Coast Guard interdicted approximately 32,000 Cuban *balseros* and delivered them to the Guantánamo detention centers.²⁷

Shortly after the announcement of the change in Cuban migration policy by the United States, representatives of the United States and Cuban Governments met in New York to discuss the August 1994 Cuban migration exodus. These discussions resulted in a joint communiqué, issued on September 9, 1994, that served to solidify the Cuban interdiction and Guantánamo detention policies.²⁸ In this communiqué, the United States agreed to cease "its practice of granting provisional admission to all Cuban immigrants who arrive in United States territory by irregular means."²⁹ In return, Cuba agreed to take "effective measures in every way it can to prevent unsafe departures, using mainly persuasive methods."³⁰ Both countries further agreed to facilitate voluntary repatriation programs for Cuban migrants arriving in either the United States or in "refugee centers" outside United States territory after the reversal of United States policy.³¹

One of the results of the joint communiqué was to bring the United States policy on Cuban refugees into agreement with the United States policy concerning refugees from other countries, namely Haiti. Prior to the communiqué, Haitians seeking asylum in the United States, unlike the Cubans, were required to demonstrate "a well founded fear of persecution" should they return to Haiti.³² Cubans arriving in the United States were automatically considered to be "political refugees" and were entitled to seek United States residency under the Cuban Adjustment Act.³³ Although Clinton asserted that the Cuban Adjustment Act "will continue to be the law of the land,"³⁴ the September 9th communiqué effectively capped the annual number of Cuban refugees entering the United States at 20,000 plus the next-of-kin relatives of United States

27. Complaint, *supra* note 1, at 18.

28. Joint Communiqué between the United States and Cuba, Sept. 9, 1994, reprinted in Max Castro, *Cuba: The Continuing Crisis*, 12 NORTH-SOUTH AGENDA PAPER SERIES 17-18 (North-South Center, Univ. of Miami 1995) [hereinafter Communiqué of September 9, 1994].

29. *Id.*

30. *Id.*

31. *Id.*

32. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (1988).

33. Art Pine, *Cuban Refugees in U.S. Hold Special Immigration Status*, L.A. TIMES, Aug. 19, 1994, at A14.

34. Complaint, *supra* note 1, at 18.

citizens.³⁵ Furthermore, United States officials labeled the Cuban detainees held at Guantánamo as "economic migrants,"³⁶ a term often used to refer to Haitian refugees but not Cuban refugees.³⁷

During the months following the initiation of the Guantánamo policy for Cuban migrants, United States officials began to realize that their detention policy was extremely expensive and ill-suited as a long term solution to the Cuban migration problem.³⁸ Also, United States citizens, neighboring governments, and the international community condemned the United States for its treatment of the Cuban refugees at Guantánamo.³⁹ These factors, combined with political and economic conditions in Cuba that may initiate a new wave of Cuban refugees,⁴⁰ prompted the Clinton administration to reevaluate its Guantánamo detention policy.

35. AMNESTY INTERNATIONAL REPORT, *supra* note 3, at 3.

36. *Id.*

37. Elizabeth Kay Harris, *Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label*, 9 AM. U. J. INT'L L. & POL'Y 269, 281 n.73 (1993).

38. See Edwards, *supra* note 8, at 1 (noting that maintenance of the Guantánamo facilities costs United States taxpayers approximately \$1 million per day); Mesa-Lago, *supra* note 24, at 22 (quoting President Clinton who stated that he did not view the Guantánamo detention policy as a permanent solution to the Cuban migration problem); 31 WEEKLY COMP. PRES. DOC. 1137 (June 27, 1995) (citing Clinton's comments to the Cuban-American community that the detention of Cubans at sea is not a long-term solution); *Hearings on U.S. Policy Toward Cuba Before the W. Hemisphere Subcomm. of the House Int'l Relations Comm.*, 104th Cong., 1st Sess. (May 18, 1995) (statement of Peter Tarnoff, Undersecretary of State for Political Affairs) [hereinafter Tarnoff] (stating that the detention of Cuban migrants at Guantánamo is "neither humane nor sustainable" as a long term policy).

39. See Joint Working Group of Non-Governmental Civil, Political and Human Rights Organizations in the U.S., *THE STATUS OF HUMAN RIGHTS IN THE UNITED STATES: AN ANALYSIS OF THE INITIAL U.S. GOVERNMENT REPORT TO THE HUMAN RIGHTS COMMITTEE OF THE UNITED NATIONS UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (Morton Sklar, ed.), Mar. 2, 1995, at 10 (providing a detailed analytical critique of the United States policy of detaining Cubans at Guantánamo).

40. See Ann Devroy and Daniel Williams, *Serious Alarm Bells Led to Talks with Cuba: Congressmen Warned of Exodus, Riots at Camp*, WASH. POST, May 5, 1995, at A4 (noting that six weeks prior to the May 2, 1995 Cuban policy announcement, Sen. Bob Graham and Rep. Porter Goss visited Guantánamo and returned to warn the Clinton administration of their belief that there could be riots inside the detention camps and/or a new wave of thousands of Cuban migrants attempting to enter the United States in the summer of 1995).

As noted previously, on May 2, 1995, the United States Government announced that it signed a new agreement with the Cuban Government to revise the Guantánamo detention policy.⁴¹ Under this agreement, the United States promised to grant permanent entry to the remaining Cuban detainees.⁴² The United States also agreed that in the future it would return to Cuba all Cuban migrants discovered either in international waters or at Guantánamo.⁴³ In return, the Cuban Government pledged not to persecute Cuban migrants returned by the United States for violating the May 2, 1995 agreement in their attempts to flee the island.⁴⁴ The agreement, consisting of only five paragraphs, did not include details regarding the final departure date for Cubans detained at Guantánamo or the legal procedures to return or accept future Cuban migrants discovered at sea or at Guantánamo. The agreement did state, however, that "all actions taken will be consistent with the parties' international obligations."⁴⁵

Despite the language of the May 2, 1995 agreement, there is valid cause for concern that the new policy of repatriating Cuban migrants is not consistent with the international legal obligations of the United States. The cornerstone *non-refoulement* principle of international refugee law, to which the United States ascribes, mandates that no nation shall return refugees to their home country if they maintain a legitimate fear of facing persecution in their country of origin.⁴⁶ By creating a policy of returning Cuban migrants to the island without thorough individualized refugee processing and without any specific assurances from Castro regarding Cuba's treatment of the returnees, the United States may have violated its promise to uphold the 1951 United Nations Refugee Convention.⁴⁷

41. Joint Statement of the United States and Cuba, *supra* note 4, at 1-2.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. See United Nations Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 19 U.S.T. 6259, 6276 (declaring that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion").

47. See Letter from Juan Méndez, General Counsel, Human Rights Watch, to Janet Reno, Attorney General, and Doris Meissner, Commissioner, Immigration and Naturalization Service, 2 (May 5, 1995) (on file with *American University Journal of International Law and Policy*) (suggesting that the new United States policy regarding Cuban migration violates the *non-refoulement* principle). Meissner responded to the Méndez letter by identifying procedures the United States Government undertook to

Regardless of the legality of the May 2, 1995 agreement, various reports from human rights activists, attorneys, and journalists who have visited Guantánamo indicate that the conditions inside the Cuban detention centers were and still are woefully inadequate. These reports suggest that the United States Government has failed to provide appropriate shelter, sufficient educational, hygienic, and medical facilities, and adequate supplies of nutritional food and potable water.⁴³ These allegations are supported by affidavits from Cuban detainees,⁴⁹ videotapes filmed

implement the May 2, 1995 agreement in accordance with domestic and international law. Letter from Doris Meissner, Commissioner, Immigration and Naturalization Service, to Juan Méndez, General Counsel, Human Rights Watch, (July 31, 1995) (on file with *The American University Journal of International Law and Policy*). In this letter, Meissner stated that each interdicted Cuban will have the opportunity to explain "in a confidential setting" to an INS Asylum Pre-Screening Officer [APSO] any concerns about returning to Cuba and that the United States will not repatriate interdictees who have articulated, in the determination of the APSO, a "credible fear of persecution." *Id.* Between May 2 and August 28, 1995, however, the United States Coast Guard interdicted 157 Cubans under the new policy but paroled only four of them into the United States. U.S. DEP'T OF STATE, BUREAU OF POPULATION, REFUGEES, AND MIGRATION, PRM: CB-201 (Aug. 29, 1995) (on file with *The American University Journal of International Law and Policy*). With respect to the repatriated interdictees, several reports suggest that the Castro Government already has persecuted returnees in violation of the May 2, 1995 agreement. Armando Correa, *Returned Rafter Reports Beating*, MIAMI HER., May 20, 1995, at A10 (stating that a Cuban police officer arrested and beat a returned interdictee); Armando Correa, *Rafters: Harassment Has Begun*, MIAMI HER., May 11, 1995, at A1 (stating that Cuban Interior Ministry agents stationed themselves outside the homes of repatriated interdictees and verbally harassed the relatives of the returnees). United States officials contend that the Castro Government has not persecuted or discriminated against Cubans returned under the May 2, 1995 agreement. Tarnoff, *supra* note 38; James Carney, et al., *Viva Guantánamo Libre*, TIME, May 15, 1995, at 50.

48. See Tom Carter, *Sorry Plight of Cubans at Guantánamo Assailed*, WASH. TIMES, Jan. 28, 1995, at A1 (noting that videos made at Guantánamo depict "filthy latrines overflowing with raw sewage and alive with maggots; doctors decrying bad medical treatment; [and] flooded and leaking tents"); Valladares Foundation, *SOME OF THE CASES OF HUMAN RIGHTS ABUSES IN GUANTÁNAMO* (1995) (summarizing the denunciations presented by the Valladares Foundation to the United Nations Human Rights Commission); Sonia Mikolic-Torreira, *The Cuban Migration Agreement: Implications of the Clinton-Castro Immigration Policy*, 8 GEO. IMMIGR. L.J. 667 (1994) (describing the lack of activity and inadequate hygienic conditions in the detention centers).

49. See Valladares Foundation, *supra* note 48, at 8 (providing a declaration from several diabetic Cuban detainees alleging that United States Government officials failed to provide a sufficient supply of insulin). Other detainees alleged that United States officials provided meal rations that induced severe diarrhea among the

by Amnesty International staff members from inside the detention centers,⁵⁰ and articles written by journalists from several different countries.⁵¹

United States Government officials at Guantánamo deny all charges that the United States has provided insufficient supplies and facilities in the detention centers.⁵² These officials further contend that the conditions in the Guantánamo detention centers have improved dramatically since the Cuban safe haven operations began there in August 1994.⁵³ A comparison of the official United States reports of conditions at the detention centers and those prepared by human rights activists and Cuban detainees, illustrates that there exists conflicting assertions, documented at different stages in the development of the detention centers, by authors maintaining divergent political agendas. This situation has produced a lack of credible information from which the world community might evaluate United States compliance with international standards for treatment of the Cuban detainees.

II. THE CASE: *CUBAN ABA, INC. v. CHRISTOPHER*

On October 24, 1994, the Cuban American Bar Association ("Cuban ABA"), in conjunction with allied organizations and individuals, filed a complaint in the United States District Court for the Southern District of Florida to challenge the United States policy of detaining Cuban refugees at Guantánamo.⁵⁴ In this complaint, the Cuban ABA alleged that the United States treatment of the Cuban refugees at Guantánamo violated the detainees' freedom of association under the First Amendment;⁵⁵ the right to due process under the Fifth Amendment;⁵⁶ the right to refugee processing under the Immigration and Nationality Act, the Refugee

detainees; that children and pregnant women were denied medical treatment; and that minors were denied water as a punishment for refusing to clean latrines. *Id.* at 2-5.

50. See videotape accompanying AMNESTY INTERNATIONAL REPORT, *supra* note 3 (showing the insufficient provisions and facilities at the Guantánamo detention centers in October 1994).

51. Carter, *supra* note 48, at A1.

52. *Id.*

53. *Id.* Since December 1994, the United States military has been working continuously to build more durable tents for all detainees at a cost of more than \$35 million. Jack Payton, *For Now, A Thumbs Up: Refugees Returning to Guantánamo*, ST. PETERSBURG TIMES, Feb. 2, 1995, at 1A.

54. Complaint, *supra* note 1, at 1.

55. *Id.* at 33, 35.

56. *Id.* at 35, 39, 41, 43, 45, 47.

Act, and the United Nations Refugee Convention;⁵⁷ and the right to resist coerced repatriation under the Refugee Convention.⁵⁸ The complaint further contained several factual claims alleging that the medical, sanitary and safety conditions of the Cuban refugees at Guantánamo were "illegal and unacceptable."⁵⁹

The day after filing its original complaint, the Cuban ABA filed an emergency motion for a temporary restraining order ("TRO") to prevent the United States from repatriating twenty-three Cuban detainees scheduled to depart Guantánamo that day. The district court verbally ordered the requested TRO, and opted to hear additional arguments before rendering a written decision. On October 31, 1994, the district court issued the written order granting the Cuban ABA's emergency TRO motion. The order declared, *inter alia*, that the United States Government could not repatriate any Cuban detainees without "permitting them full access to counsel and receipt of full information so as to assure an informed and voluntary decision to seek repatriation."⁶⁰

On appeal, the Eleventh Circuit vacated the district court's order and remanded to the district court with instructions to dismiss the complaint. The appellate court defined the issues on review to include "whether the Cuban or Haitian migrants in safe haven outside the physical borders of the United States have any cognizable statutory or constitutional rights" and "whether Cuban Legal Organizations or [the Haitian Refugee Center] have a First Amendment right to associate with migrants held in safe haven outside the physical borders of the United States . . ." ⁶¹ The Eleventh Circuit invoked the presumption against extraterritorial application of the laws⁶² to respond to both issues in the negative and to conclude that the Cuban detainees "are without legal rights that are cognizable in the courts of the United States."⁶³

The foundation of the Eleventh Circuit opinion is built not upon a determination of the legal status of the Cuban detainees, but rather on a determination of the legal status of Guantánamo Bay itself. The appellate court used a strict interpretation of the 1903 United States-Cuban Guantánamo Bay lease agreement to hold that the Guantánamo facility

57. *Id.* at 37.

58. *Id.* at 50.

59. *Id.* at 27.

60. Order Granting Plaintiffs' Emergency Mot. for T.R.O., CABA I, (Oct. 31, 1994) in *Cuban ABA, Inc. v. Christopher*, 43 F.3d 1412, 1420 (11th Cir. 1995).

61. *Cuban ABA, Inc.*, 43 F.3d at 1421.

62. *Id.* at 1425 n.12.

63. *Id.* at 1430.

ultimately falls within the sovereign territory of Cuba even though it at the same time constitutes an area over which the United States exercises "complete jurisdiction and control."⁶⁴ The court then determined that the United States actions were proper because the government treats Guantánamo as Cuban territory for the purposes of United States law.

If the United States Government consistently asserts that Guantánamo Bay ultimately lies within the realm of Cuban legal territory, then a different result will occur when the world community examines the United States detention of Cuban refugees through the perspective of international human rights law and humanitarian law. Given that the United States has determined that Guantánamo Bay is within Cuba's legal territory,⁶⁵ that the Castro regime is guilty of committing frequent and widespread violations of human rights,⁶⁶ and that Cubans attempting to leave the island for the United States may be detained at Guantánamo against their will,⁶⁷ then the United States indeed has violated the Cuban migrants' freedom to leave their own country⁶⁸ and their right not to be returned to a country where they may face persecu-

64. The Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418, *reprinted in* 6 Bevans 1113-15. The appellate court applied a strict interpretation of the agreement by holding that "complete jurisdiction and control" was not equivalent to sovereignty, which means that Guantánamo Bay is still a sovereign territory of Cuba. *Cuban ABA, Inc.*, 43 F.3d at 1424-25.

65. *Cuban ABA, Inc.*, 43 F.3d at 1424-25.

66. *See* Cuban Democracy Act of 1992, § 1702(1), 22 U.S.C. § 6001 (Supp. V 1992) (declaring in a finding of Congress that "the government of Fidel Castro has demonstrated consistent disregard for internationally accepted standards of human rights and for democratic valuesIt restricts the Cuban people's exercise of freedom of speech, press, assembly, and other rights recognized by the Universal Declaration of Human Rights"); Tarnoff, *supra* note 38 (noting that on Dec. 28, 1994 the United States introduced and led the passage of a United Nations resolution denouncing the "systematic human rights abuses" made by the Cuban Government).

67. *See* Communiqué of September 9, 1994, *supra* notes 28-31 and accompanying text.

68. *See* Universal Declaration on Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess. pt. 1, art. 13(2), U.N. Doc. A/810 (1948), *reprinted in* INTERNATIONAL LAW SELECTED DOCUMENTS 352, 354 (Barry E. Carter & Phillip R. Trimble eds., 1991) [hereinafter UDHR] (declaring that "everyone has the right to leave any country, including his own, and to return to his country").

tion.⁶⁹ It is unclear whether or not the Cuban ABA will raise this issue on appeal.

III. FILLING THE VOID: POTENTIAL LEGAL REGIMES AT GUANTÁNAMO

A. UNITED STATES LAW: DOMESTIC TREATMENT OF INTERNED ASYLUM SEEKERS

If and when it sets out to define the terms by which the United States should care for the Cubans detained at Guantánamo, the international community could request that the United States treat asylum seekers detained on "foreign" soil in the same way it treats asylum seekers detained within United States territory. This view suggests that governments should provide all people claiming to be refugees with equal resources and procedures, and that states should measure one's opportunity to receive legal and human rights protections on the merits of an individual asylum claim, not merely on the location in which the asylum seeker requests protection. After giving careful consideration to the manner in which the United States Government treats asylum seekers detained in domestic facilities, however, international decision makers are likely to decide that the current legal regime in the United States governing the domestic detention of aliens is insufficient to protect the most widely accepted human rights.

The United States policy of holding asylum seekers in domestic detention facilities for failure to possess proper immigration documents is a relatively recent phenomenon.⁷⁰ While the INS officially detains these aliens to ensure their appearance at an immigration hearing on the right to stay in the United States, INS officials also concede that the real purpose of this form of detention is to discourage an overwhelming flow of migrants seeking political asylum in the United States.⁷¹ As a result of the Mariel exodus, Cuban migrants constitute a large percentage of all aliens detained in domestic INS detention centers.⁷²

69. See United Nations Convention Relating to the Status of Refugees, art. 33, *supra* note 46 (outlining the prohibition against returning refugees to the country where they may be persecuted).

70. HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH GLOBAL REPORT ON PRISONS 252 (1993).

71. *Id.*

72. See LAWYER'S COMMITTEE FOR HUMAN RIGHTS, THE DETENTION OF ASYLUM SEEKERS IN THE UNITED STATES: A CRUEL AND QUESTIONABLE POLICY 21 (1989).

The United States Government maintains no obligation to provide aliens with the same procedural and substantive protections as it provides to citizens.⁷³ In fact, many provisions in the United States Constitution and the United States Code intentionally discriminate against aliens.⁷⁴ If it so desired, the United States easily could promulgate a set of standards for INS detention centers that provides asylum seekers with less substantive and procedural rights than the United States provides to detained citizens while still providing the alien detainees with minimal international human rights guarantees. At present, however, the United States does not maintain a federal set of standards to address the rights of asylum seekers in INS detention centers in the United States.⁷⁵

While the accounts coming from INS detention centers in the United States are subject to the same credibility concerns as the reports coming from Guantánamo, numerous reports suggest that the conditions in INS detention centers are appallingly inappropriate for persons who committed no crime against the United States.⁷⁶ One study prepared in 1983 by Church World Service indicated that:

(indicating that of the 7,641 aliens in INS custody during October 1989, over 2,200 were Cuban).

73. See *Developments in the Law of Immigration: Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286 (1983) (examining developing views on the ability of the United States Government to discriminate against aliens legally).

74. See, e.g., U.S. CONST. art. 1, § 2, cl. 2 (requiring that members of the House of Representatives must have been United States citizens for at least seven years); U.S. CONST. art. 1, § 3, cl. 3 (requiring that Senators must have been United States citizens for at least nine years); U.S. CONST. art. II, § 1, cl. 5 (requiring that United States Presidents must be natural born citizens); 8 U.S.C. §§ 1-1557 (1994) (providing numerous immigration and nationality laws applicable to aliens but not to citizens).

75. CHERYL LITTLE, *CONDITIONS AT KROME NORTH SERVICE PROCESSING CENTER 3* (1991) (on file with, and prepared for, the Haitian Refugee Center). There exists, however, an INS Immigration Detention Officer Handbook which outlines in general terms the proper conduct for INS officers at United States detention facilities. *Id.*

76. *Id.* at 2. This report includes an overview of allegations made by detainees held at the Krome detention center in Florida that suggests Krome officers committed major human rights violations including "physical and sexual abuse; . . . arbitrary and punitive use of solitary confinement; restrictions on access to counsel; . . . coercion to sign statements agreeing to voluntary departure or refuting allegations of mistreatment by officials; lack of proper medical treatment; poor hygienic and sanitary conditions; and oppressive conditions of work." *Id.* The allegations contained in the overview to the report are corroborated later in the report by newspaper articles and affidavits from several detainees. *Id.*

None of the INS facilities were designed for long-term detention, yet in some cases [individuals] have been detained for as long as 12 months. All of the facilities in general are ill-equipped to handle the recreational, physical and especially mental-health needs of the detainees . . . Most facilities have poor medical care for detainees, food is barely adequate or poor, access to telephones is difficult to almost impossible. Visits by relatives and legal representatives are often restricted in general due to time or problems due to lack of space in the physical facility or are arbitrarily denied by the INS.⁷⁷

The Church World Service study as well as other, more recent accounts, indicate that asylum seekers are often detained in ordinary federal prisons along with convicted criminals in quarters that provide little or no privacy.⁷⁸ Given the recent popularity of Proposition 187 in California and similar measures in other states, it is unlikely that the living conditions of undocumented aliens detained at INS detention centers in the United States will improve in the near future.

Because each INS detention center is free to establish its own standards to govern the treatment of detainees, INS officers attending to the Cuban migrants who arrived recently in Florida should use the Department of Justice Krome Manual as important guidance.⁷⁹ If the accounts written about Krome during the last several years are accurate, however, it seems as though the INS detention officers at Krome fail to follow the Krome Manual themselves.⁸⁰ For this reason, the Cuban detainees at Guantánamo may in a strange way actually be better off than the Cuban detainees at Krome: whereas the world sympathizes with the plight of the Guantánamo detainees, it has for the most part ignored or forgotten the plight of the Krome detainees.⁸¹

77. LAWYER'S COMMITTEE FOR HUMAN RIGHTS, *supra* note 72, at 22.

78. *Id.* at 23; Human Rights Watch, *supra* note 70, at 252.

79. Little, *supra* note 75, at 3. Similar to the Immigration Detention Officers' Handbook, the Krome Manual outlines the general duties of Immigration Detention Officers, but does not address the specific rights of detainees. *Id.*

80. *See id.* (noting that conditions inside the Krome detention facility are characterized by extensive and serious mistreatment of detainees by INS officers and dangerous overcrowding of detention cells).

81. *See* Mesa-Lago, *supra* note 24, at 18 (noting that roughly 1,000 Cuban migrants who arrived in the United States during the exodus of 1994 were sent to detention centers at Krome and Port Isabel, Texas). The United States released almost all of these detainees by early 1995. *Id.*

B. INTERNATIONAL LAW: UNIVERSAL DECLARATION
ON HUMAN RIGHTS AND UNHCR EXECUTIVE
COMMITTEE CONCLUSION NO. 22

If and when it sets out to define the terms by which the United States should care for Cubans detained at Guantánamo, the international community could request that the United States treat asylum seekers in the manner prescribed by international legal instruments such as the Universal Declaration on Human Rights (UDHR)⁸² and United Nations High Commissioner for Refugees Executive Committee Conclusion 22 (Conclusion 22)⁸³ pertaining to the protection of asylum seekers in situations of mass exodus. This view implies that applicable international law already exists to address the United States treatment of the Cuban detainees, and that the United States may have been violating international law since the inception of its Guantánamo detention policy. Despite the popular humanitarian appeal of this position, one may encounter great difficulty in convincing government officials to attach great significance to the relevance of the UDHR and Conclusion 22 because courts and agencies in the United States and elsewhere in the past viewed these documents as guiding principles or aspirational goals, but not as binding legal norms.

The UDHR contains many provisions that the Cuban detainees may need in their efforts to acquire adequate international legal protection. For example, the UDHR provides that all individuals are to be recognized as persons under law;⁸⁴ to be free from discrimination in equal protection of the law;⁸⁵ to be free from arbitrary detention;⁸⁶ to have access to legal proceedings in determination of his or her rights;⁸⁷ to be free from interference with family privacy;⁸⁸ to possess the freedom of movement;⁸⁹ to possess the right to leave or return to his or her country;⁹⁰ to seek asylum in other countries;⁹¹ to possess the right to

82. UDHR, *supra* note 68, at 352.

83. Office of the United Nations High Commissioner for Refugees, CONCLUSIONS ON THE INTERNATIONAL PROTECTION OF REFUGEES ADOPTED BY THE EXECUTIVE COMMITTEE OF THE UNHCR PROGRAMME 48, Exec. Comm. 32nd Sess., 1981 (1992) [hereinafter Conclusion No. 22].

84. UDHR, art. 6, *supra* note 68, at 353.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 354.

90. *Id.*

peaceful assembly and association;⁹² and to receive an education.⁹³ Some people might view this panoply of rights as the irreducible minimum of fundamental human freedoms, while others may view these provisions as a “wish list” of liberties and freedoms for governments to grant when international and administrative circumstances permit.

Conclusion 22 goes further than the UDHR in articulating a broad set of rights for governments to provide to asylum seekers participating in a large scale migration. In addition to explicitly incorporating all the civil rights guaranteed in the UDHR,⁹⁴ Conclusion 22 asks governments to offer migrants in a situation of mass influx, at least on a temporary basis, food, shelter, and basic sanitary and medical facilities;⁹⁵ the opportunity to trace relatives;⁹⁶ the opportunity to send and receive mail;⁹⁷ the opportunity to register births, deaths, and marriages;⁹⁸ the opportunity to retain and transfer wealth;⁹⁹ and the opportunity to be located at a “reasonable distance from the frontier of the country of origin.”¹⁰⁰ Because the Executive Committee makes its Conclusions with the advice and consent of several participating nations, including the United States, advocates of Conclusion 22 could suggest that this document constitutes international customary law¹⁰¹ and has the legal effect of an international declaration.¹⁰²

If the international legal community treats the UDHR and Conclusion 22 as binding legal norms, then Cuban detainees at Guantánamo could successfully argue that United States officials violated several key provisions of these instruments. In addition to making arguments relating to physical quality-of-life conditions at Guantánamo, the detainees could argue that Guantánamo is not within a “reasonable distance” from the

91. *Id.*

92. *Id.* at 355.

93. *Id.* at 356.

94. Conclusion No. 22, § II.B.2(b), *supra* note 83, at 50.

95. *Id.* § II.B.2(c), at 50.

96. *Id.* § II.B.2(i), at 50.

97. *Id.* § II.B.2(k), at 51.

98. *Id.* § II.B.2(m), at 51.

99. *Id.* § II.B.2(o), at 51.

100. *Id.* § II.B.2(g), at 50.

101. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (defining international customary law as resulting from a “general consistent practice of states followed by them from a sense of legal obligation”).

102. See *Legal Status of Eastern Greenland (Denmark v. Norway)*, 1933 P.C.I.J. (Ser. A/B) No. 53, in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 117 (2d ed. 1995) (holding that a declaration was legally binding).

frontier of Communist Cuba and that, assuming Guantánamo is located on Cuban soil, the United States Government failed to provide the right of Cubans to leave their country. If the international legal community treats the UDHR and Conclusion 22 as instruments for progressive or incremental implementation, however, then the United States Government maintains an infinite amount of time to effectuate these instruments gradually.¹⁰³

C. LAWS OF WAR: GENEVA CONVENTION IV

If and when it sets out to define the terms by which the United States should care for the Cubans detained at Guantánamo, the international community could request that the United States treat asylum seekers detained at Guantánamo at least as well as it would treat citizens of enemy nations in times of conflict under the laws of war. This view suggests that, in times of peace, governments should provide innocent civilians of other countries with at least the same legal protections they must provide under Geneva Convention IV (Convention)¹⁰⁴ to innocent civilians in times when states are least likely to attend to the administrative and legal needs of aliens. Of the three legal regimes presented in this paper, the laws of war model probably would offer the least legal protection to the Cuban detainees.

Although its application is not limited to cases of armed international conflict, the Convention does apply only to cases concerning the "partial or total occupation" of a party to the Convention.¹⁰⁵ Under international law, a territory held pursuant to a lease from one state party to another state party does not constitute a legal "occupation" of that territory for purposes of the laws of war. For that reason, unless advocates of the Cuban detainees find a way to invalidate the 1903 United States-Cuban agreement pertaining to the leasing of Guantánamo Bay or United States actions taken thereto, United States presence at Guantánamo is legally valid and the Geneva Conventions do not apply to the Guantánamo refugee processing centers.

103. Cf. Mesa-Lago, *supra* note 24, at 20 (noting that the United States has developed a gradual "timetable for improvements" in the quality of life standards at Guantánamo).

104. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (Jean Pictet ed., 1958) [hereinafter CONVENTION].

105. *Id.* art. 2, cl. 2, at 17.

Despite its failure to apply to the current situation at Guantánamo, the Convention is interesting as a model for minimal human rights guarantees. Most of the relevant provisions of the Convention state that detaining governments must provide alien detainees with the basic provisions and facilities needed to maintain a healthy life. The Convention mandates that government officials must provide civilian detainees with ample food and medical supplies,¹⁰⁶ hygienic facilities,¹⁰⁷ clothing,¹⁰⁸ and medical facilities¹⁰⁹ equipped with an adequate health care staff.¹¹⁰ In some provisions the Geneva Convention only requires detaining governments to provide living conditions that will adequately sustain human life,¹¹¹ whereas in other provisions, like the article pertaining to hygienic facilities, the Convention requires the detaining power to take maximum efforts to provide detainees "with every possible safeguard" against the perils of disease and war.¹¹²

Although the Convention provisions focus primarily on the humanitarian physical needs of detained civilians, one article does address the legal status of refugees under the laws of war. In this provision, the Convention states that "in applying the measures of control mentioned in the present Convention, the detaining power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government."¹¹³ This article may prove to be a useful analogy for developing an international legal regime at Guantánamo as the Castro government already has declined to accept from Guantánamo Cuban detainees who are denied eligibility for legal residence in the United States.

106. *Id.* art. 55, at 309; *id.* art. 89, at 392.

107. *Id.* art. 85, at 385.

108. *Id.* art. 90, at 396.

109. *Id.* art. 91, at 398.

110. *Id.* art. 92, at 402.

111. *See id.* art. 89, at 392 (stating that detaining powers must provide a "sufficient" quantity and quality of food); *id.* art. 90, at 396 (stating that detaining powers must provide "sufficient" quantities of clothing, underwear, and footwear); *id.* art. 91, at 398 (stating that detaining powers must provide an "adequate" infirmary for the detained civilians).

112. *See id.* art. 85, cl. 1, at 385 (stating that detaining powers must "take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide protection against the rigours of the climate and the effects of the war").

113. *Id.* art. 44, *supra* note 104, at 262.

Although the laws of war, as they are traditionally interpreted, do not apply to the conditions at Guantánamo in 1995, one should not ignore these laws as they may become applicable if the political situation in Cuba changes in the future. Nobody can predict with certainty how long the Castro government will survive, how long the United States detention centers at Guantánamo will last, or the process by which Cuba and the United States will develop a new and lasting legal regime to address migration issues. What is certain, however, is that if the relations between these nations become further strained, there should be rules in place to govern the treatment of innocent civilian detainees.

CONCLUSION

Unfortunately, the three aforementioned legal regimes as currently interpreted do not provide the Cuban detainees at Guantánamo with any legally enforceable protection. As these models represent three relevant analogies to the situation at Guantánamo, however, students and practitioners of international law might examine these documents closely in proposing a new international agreement to protect the Cuban detainees or other similarly situated detainees. Regardless of which, if any, of these international standards gains favor with the relevant political and legislative actors, it is critical that all agree to apply some legal standard to the treatment of the Cuban detainees before the remaining Cuban detainees leave Guantánamo.

Even if the United States Government completes the Cuban detention program it began at Guantánamo in August 1994, the international community must create a new set of legal parameters to define clearly the limitations and responsibilities of states holding asylum seekers in foreign detention centers. Simply because at present time there may not be a widely accepted, clearly articulated, and easily applicable legal standard to govern United States actions at Guantánamo does not mean that there is not a need for such an instrument in the near future. As witnessed in the case of the Mariel refugees, ad-hoc actions taken in response to temporary or "emergency" migration incidences can often have lasting or permanent deleterious effects on the rights of migrants seeking asylum in the United States.¹¹⁴

114. See Joint Working Group of Non-Governmental Civil, Political and Human Rights Organizations in the U.S., *THE STATUS OF HUMAN RIGHTS IN THE UNITED STATES: AN ANALYSIS OF THE INITIAL U.S. GOVERNMENT REPORT TO THE HUMAN RIGHTS COMMITTEE OF THE UNITED NATIONS UNDER THE INTERNATIONAL COVENANT*

Although the United States Government has held thousands of Cuban detainees at Guantánamo Bay for more than a year, it still needs to address several unanticipated questions concerning its Cuban migration policy. For example, what is the permitted scope of military authority in response to individualized aggression or rioting on the part of the remaining Cuban detainees? Should the United States continue to reinforce the Guantánamo facilities to better accommodate migrants in the event that the United States reestablishes a safe haven policy to detain migrants from Cuba, Haiti, or elsewhere in the region?¹¹⁵ Must the United States restore its Guantánamo detention policy if Castro uses extreme force to prevent future departures, in violation of the September 1994 joint communiqué, or if he persecutes Cubans repatriated from sea in violation of the May 2, 1995 United States-Cuban agreement? As noted earlier, without specific international guidance to assist the United States in answering these questions, government officials are more or less free to act with impunity.

By allowing the United States to circumvent or to deny the applicability of international instruments to the aforementioned issues, and to the larger Guantánamo crisis, the world community has thus far allowed the United States to invent its own, ad-hoc legal standards for the treatment of asylum seekers detained on "foreign" soil. At the same time, the world community has thus far failed to protect thousands of migrants in dire need of international assistance. If in the future it fails to define the international legal status of the Cuban detainees, the community of nations will continue to permit the United States to circumvent relevant legal obligations by treating Guantánamo as Cuban territory for the purposes of United States law and as United States territory for the purposes of international law. It is critical, therefore, that the community of nations, if it is to respond to the needs of its constituency, soon provide a thorough and useful statement regarding the international legal status of migrants held in detention centers like Guantánamo.

ON CIVIL AND POLITICAL RIGHTS (Morton Sklar, ed.), Mar. 2, 1995, at 10 (noting that the United States Government has detained many Mariel Cubans in United States detention centers since 1980).

115. See *Door Closes for Refugees Fleeing Cuba*, ORLANDO SENTINEL, May 3, 1995, at A1 (noting that as a result of the May 2, 1995 policy revision, the United States military will abandon its plans to spend \$100 million on construction of permanent housing facilities at Guantánamo).