

# OUTLAWING THE USE OF REFUGEES AS TOOLS OF FOREIGN POLICY

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## I. PREMISE

Assume that you are the dictator of a small country adjacent to a prosperous first world nation. You have little interaction with this nation because it objects to the manner in which you maintain control of the dissidents in your country. However, there are internal policies of the prosperous nation that, if changed, could bring an economic windfall to your country. The policies could be as mundane as a tariff or as expansive as an embargo. Since this prosperous nation refuses to negotiate (at least until you stop jailing and torturing dissidents), and since using military force would surely result in your own destruction, you are in a bit of a bind. But wait!

As with many dictatorships, yours has engendered its share of political refugees. It is hard not to when you torture and jail people for their political beliefs. Furthermore, the end of the Cold War dried up the superpower largesse, and your country is economically bereft; another motivator for your fleeing citizens.

Perhaps the state of affairs is not all bad! Perhaps you could harness these refugees. Perhaps they could

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unwittingly be used to serve your policy goals. They could be used to influence other nations just as surely as those old tanks you've got that are beginning to fall apart.

Yes, I think you're on to something. You will encourage refugees to cross the border. Instead of jailing them for trying to leave, you will open the gates. Sure, you know you will lose a lot of people (including, perhaps, many of those damn dissidents), but you cannot be expected to guarantee another country's borders, can you?

Once the problem reaches crisis status in the bordering nation, you can offer to assist them by restoring previous measures to prevent escapes. Of course, there would have to be some sort of quid pro quo. You cannot be expected to guard another nation's borders for nothing.

If only the prosperous nation would change those policies that have been vexing you so. Lower that tariff. Stop building settlements. Offer some aid. You are sure it can all be worked out.

The arguments have been increasing for humanitarian intervention in states which violate international law regarding human rights abuses.<sup>1</sup> Such human rights abuses are abhorrent, and states responsible for them should be held accountable. But there is an even greater threat than the senseless abuse taking place because of internal power struggles or political differences.

In today's post-Cold War world, small totalitarian nations no longer have the bargaining chips to convince the larger, more prosperous nations to adopt policies that would provide these smaller nations with

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1. Two excellent articles confirming the legality of recent humanitarian interventions by the U.N. in Somalia and the Balkans are Marc M. Boutin, *Somalia: The Legality of U.N. Forcible Humanitarian Intervention*, 17 SUFFOLK TRANSNAT'L L. REV. 138 (1994) and David M. Kresock, "Ethnic Cleansing" in the Balkans: *The Legal Foundations of Foreign Intervention*, 27 CORNELL INT'L L.J. 203 (1994). Another excellent survey article is by Richard Lillich, *The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World*, 3 TUL. J. INT'L & COMP. L. 1 (1995). For interesting articles on the extreme edge of humanitarian intervention, including intervention to restore the right of self-determination as expressed through democratic government, and the intriguing view that humanitarian interventions constitute war see Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329 (1995); W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM INT'L L.J. 794 (1995); and Byron F. Burmester, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, 1994 UTAH L. REV. 269 (1994).

needed benefits.<sup>2</sup> Having seen that refugees are one of the prime problems vexing the more prosperous nations,<sup>3</sup> totalitarian nations have found ways to exploit the refugee situation. Using the refugees as tools of foreign policy gives nations back a measure of the leverage they lost with the end of the Cold War.

Unfortunately, such actions are not clearly prohibited by international law. Yet, by using multilateral treaties and resolutions an argument can be made that such actions are already prohibited under international law. This article will suggest ways in which the world community might prevent such situations from occurring in the future.

As a case study for the proposals, we shall look at the actions taken by Cuba during August 1994. During that time, Cuba, a repressive dictatorship with a long record of human rights abuses and refugees, opened its borders. This permitted a flood of refugees to spill into its economically prosperous neighbor, the United States. In return for halting the exodus, Cuba insisted that the United States lift the embargo of goods to and from Cuba. Even though Cuba did not succeed, its actions did win some concessions, namely a revised immigration policy in the United States. The danger is that this limited success might spur other nations in Cuba's situation, such as North Korea or Iraq, to attempt similar coercive acts. Cuba should be held accountable under international law for using refugees as tools of foreign policy. By doing nothing, the world encourages repressive states to cultivate refugees, if only to be utilized in achieving foreign policy goals. The world may not be ready to step in and remedy human rights violations for their own sake, but the world should at least recognize a self-defense interest in a nation which is being purposely flooded by refugees from another state as part of that state's conduct of its foreign affairs.

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2. While Egypt is probably the most obvious example of a nation that played the superpowers against each other, states such as Israel, Nicaragua, Cuba, the former Eastern European Soviet satellite states and, in fact, just about every state in the world, used the superpower rivalry to reap monetary benefits.

3. For example, Germany has been dealing with more than 400,000 refugees from the Balkan crisis. Germany has had problems in the past with integrating refugees into its society, including Kurdish and East European refugees. For a breakdown of states that have accepted Balkan refugees, see Mary Williams Walsh, *Germany May Repatriate Bosnian Refugees*, L.A. TIMES, Dec. 23, 1995, at A10. For information on how refugees have forced changes in German laws, and how revised refugee policies have had a domino affect on other nations see Igal Avidan, *Refugees-Germany: Facts, Figures, and Costs Behind Policy*, INTER PRESS SERV. GLOBAL INFO. NETWORK, July 20, 1993, and *Germany Pulls Welcome Mat From Refugees; In a Domino Effect, Other Countries Are Preparing Their Own Restrictions*, ASSOCIATED PRESS, July 1, 1993.

## II. FACTS

The origin of the Cuban refugee crisis can be traced to 1959, when a totalitarian regime took power. Since 1959, over 800,000 Cubans have left Cuba for the United States.<sup>4</sup> Many Cubans opposed to the government left Cuba when the revolution occurred. Yet, many stayed behind. However, as the harshness of the new regime became apparent, many more tried to escape. Since the United States is so close to Cuba, it was the destination of choice for those trying to escape.

Two boatlifts preceded the events of 1994; the Camarioca Boatlift of 1965 and the well known Mariel Boatlift of 1980. The former was small, in a relative sense; only 5000 refugees arrived in the United States before the Cuban government agreed to an airlift that permitted 268,000 Cubans into the United States between 1965 and 1973.<sup>5</sup> The Mariel Boatlift brought over 125,000 Cuban refugees to the United States before anything happened.<sup>6</sup> Following an incident in which 10,000 people took refuge in the Peruvian Embassy, Castro announced that any Cuban who wished to leave the country could do so through the port of Mariel. The Cuban government controlled the exodus directly. They determined who departed on which boats. They even added criminals and the mentally ill to the ranks of those departing.

It is against this background that 1994s Cuban refugee flight can be measured. The flash point for this latest mass exodus was the sinking of the tugboat, the "13<sup>th</sup> of March," on July 13, 1994.<sup>7</sup> The Cuban government claimed that the sinking was accidental and that they were just using the water cannons to try and stop the boat's engines. However, survivors claim that the boat was pummeled by the water cannons from three of the governments tugs and then rammed by one of the vessels. The 115 year old wooden boat sunk with sixty-eight passengers aboard.<sup>8</sup> Thirty-seven of the passengers drowned, while thirty-one were picked up by Cuban gunboats which observed the events.<sup>9</sup> In the three weeks following this incident, three passenger ferries were hijacked, along with an airplane and a military vessel.<sup>10</sup>

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4. *Exodus From Cuba*, DEP'T ST. BULL., July 1980, at 80.

5. Ronald Copeland, *The Cuban Boatlift of 1980: Strategies in Crisis Management*, 467 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 140 (1983).

6. *Id.* at 139.

7. Tod Robberson, *Story of Tug's Sinking Incited Cubans; Drownings That Launched Exodus of Rafters May Be Portent*, WASH. POST, Sept. 11, 1994, at A1.

8. *Id.*

9. *Id.*

10. *Id.*

These events led to a riot in Havana on August 5, 1994.<sup>11</sup> Rumors that a ferry boat was going to be hijacked to Florida drew more than five hundred people to the Havana docks, and the first anti-government riot since Castro assumed power occurred. Two police officials were killed, a third injured, and several hotels and dollars-only shops were damaged.<sup>12</sup>

Castro answered the riot by declaring, through the government news agency Prensa Latina, that "we will stop blocking the departure of those who want to leave the country,"<sup>13</sup> and that "we cannot continue to guard the coasts of the United States."<sup>14</sup>

With those words the spigot opened. Flight from Cuba, an activity formally punishable by a prison sentence, morphed into one condoned by the Cuban government. By August 24, 1994, rafters were departing from the Havana waterfront, "in full view of government office buildings and large crowds of onlookers."<sup>15</sup> In all, more than 32,000 would depart.<sup>16</sup>

The United States responded by sending Coast Guard ships to pick up many of the rafters at sea. But as the number of refugees climbed into the thousands arriving daily,<sup>17</sup> the United States reversed a thirty year old policy of granting Cuban refugees asylum.<sup>18</sup> The Clinton Administration first barred direct entry into the United States on August 19, 1994, stating that refugees picked up at sea would be detained at Guantanamo Naval Base located, ironically enough, in Cuba.<sup>19</sup> Then, on September 1, 1994, Clinton began talks which culminated in a revised United States immigration policy.<sup>20</sup> This policy was altered even further in a Joint Statement on May 2, 1995.<sup>21</sup> With fears of another summer exodus

11. *Id.*

12. *Id.*

13. John Rice, *Castro Threatens to Allow Refugees to Flood Out*, ASSOCIATED PRESS, Aug. 5, 1994.

14. *Id.*

15. Roberto Suro, *Havana Giving Tacit Approval to Rising Tide of Rafters*, WASH. POST, Aug. 24, 1994, at A24.

16. For a daily breakdown of the number of refugees picked up at sea, see Daniel Williams, *Cuba Deal Depends on Castro Dropping Trade Demands*, WASH. POST, Sept. 9, 1994, at A34.

17. *Id.*

18. Michael Dobbs, *Lawmakers Assail New Policy On Returning Cuban Refugees*, WASH. POST, May 19, 1995, at A8.

19. *President Clinton's Press Conference Remarks*, 5 U.S. DEP'T ST. DISPATCH 35 (1994).

20. *U.S.-Cuba Joint Communique on Migration*, 5 U.S. DEP'T ST. DISPATCH 37 (1994).

21. *Joint Statement with the Republic of Cuba on Normalization of Migration*, 31 WKLY COMP. PRESIDENTIAL DOC. 752, May 2, 1995 [hereinafter *Joint Statement with the Republic of Cuba*].

growing, the Clinton Administration announced that refugees would henceforth be returned to Cuba.<sup>22</sup> These announcements were met by large scale demonstrations by the Cuban exile population, as well as causing considerable strife amongst United States Congressional Representatives.<sup>23</sup> Yet, on Wednesday, May 10, 1995, the Coast Guard followed the new policy as thirteen Cubans picked up at sea were returned to the island.

The costs of this crisis were enormous. The Pentagon estimated it will have spent 52 million dollars in physical improvements to the Guantanamo base, 10 million dollars a month to provide food and sundries for the refugees, 93 thousand dollars a day to charter a ship where extra military personnel reside, and 1.3 million for extra security patrols. Add those costs to the 44 million dollars the United States spent in temporarily transferring an overflow of 7450 refugees to Panama, and the United States spent a total of well over 100 million dollars, not including costs incurred by the Coast Guard for the rescue operation itself or by the Immigration and Naturalization Service for processing the refugees.<sup>24</sup>

From these facts two conclusions can be drawn. First, the Cuban government knew its actions would trigger a massive departure to the United States. The Cuban government used this tactic before to serve its political goals, such as ridding itself of political "undesirables," and exporting its criminals and mentally ill to the United States. Now, the Cuban government had a different agenda, but it stuck with a proven tactic.

The second conclusion is that the actions taken by Cuba had large scale political and economic repercussions within the United States. When we turn to an examination of the relevant multinational documents, we must bear these costs in mind.

### III. CUBA'S POSITION

During the 1994 crisis, high ranking members of the Cuban government made explicit demands for an end to the United States trade embargo<sup>25</sup> and for an alteration of United States immigration policies as

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22. See *U.S.-Cuba, Joint Communique on Migration*, *supra* note 20.

23. Dobbs, *supra* note 18, at A8.

24. Douglas Farah, *U.S. Begins Flying Cuban Refugees in Panama to Guantanamo Naval Base*, WASH. POST, Feb. 2, 1995, at A18; Dana Priest, *Pentagon May Employ Others to Watch Refugees*, WASH. POST, Mar. 6, 1995, at A9.

25. Roberto Suro, *Havana Giving Tacit Approval to Rising Tide of Rafters*, WASH. POST, Aug. 24, 1994, at A24.

precursors to halting the flow of refugees.<sup>26</sup> Such demands took many forms.

As early in the crisis as the August 5, 1994 riots, Fidel Castro stated the Cuban government would “stop guarding the coast of the United States,”<sup>27</sup> unless the United States ceased provocations.<sup>28</sup>

On August 23, 1994, Jose Cabanas, a senior Cuban Foreign Ministry official who heads a department dealing with Cuban migrant communities in other nations, indicated that “the fundamental cause [of the exodus] is the blockade against Cuba.”<sup>29</sup> Cabanas was referring, in more accurate parlance, to the United States embargo, and that Cuba was waiting for “agile and clear measures”<sup>30</sup> from the United States.<sup>31</sup> Castro acknowledged in an August 24th speech that as early as August 11th he had stated, “[to] go to the bottom of the problem means to discuss the blockade.”<sup>32</sup>

During the official negotiations, which began September 1, 1994, Ricardo Alarcon, a Cuban diplomat and former foreign minister, was interviewed on *Nightline*.<sup>33</sup> He stated that while Cuba was willing to discuss immigration issues, the uncontrolled migration to the United States would not end without talks of a broader political scope.<sup>34</sup> Referring to the United States negotiating position (dealing only with immigration issues), Alarcon stated, “[I] am not convinced by the promises [on migration]. It should be part of a strategic change, a foreign policy change.”<sup>35</sup> Alarcon went on to talk about the benefits to be gained in Cuba if the embargo by the United States was discontinued.<sup>36</sup> During these talks, Alarcon also pressed for the United States to force private radio stations in Florida to cease broadcasting to Cuba.<sup>37</sup> Finally, the Cuban government demanded

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26. *Id.*

27. John Rice, *Castro Threats Over Emigration Brings New Cuban Crisis to the U.S.*, ASSOCIATED PRESS, Aug. 7, 1994, at A70.

28. *Id.*

29. Suro, *supra* note 15.

30. *Id.*

31. *Id.*

32. *CNN News Live Report*, (CNN, Aug. 24, 1994), available in 1994 WL 3678276.

33. Daniel Williams, *Diplomat Encourages Talk About Embargo*, WASH. POST, Sept. 4, 1994, at A44.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

that the United States change its immigration policy.<sup>38</sup> These demands included granting entry to a "backlog"<sup>39</sup> of 140,000 Cubans, who Cuba claimed should have been permitted to enter the United States under a 1984 joint agreement.<sup>40</sup>

#### IV. CONCESSIONS GRANTED

The Cuban government succeeded in its attempts to alter United States policies. Although Cuba did not achieve the elimination of the embargo, it gained other valuable concessions. The most obvious concession was the revised United States immigration policy. Yet, perhaps the most important concession was that Cuba established a new pattern of threats and coercive acts, which were followed by conciliation and negotiation through which it might attain future goals.

Under the December 14, 1984 Joint Communique on Immigration,<sup>41</sup> the United States agreed to issue up to 20,000 preference visas to Cuban nationals residing in Cuba. In return, Cuba agreed to accept "excludables"<sup>42</sup> from the Mariel immigrants. This group consisted of those individuals who normally would have not been allowed to immigrate to the United States because of their criminal records.<sup>43</sup> This Joint Communique was the Act which Cuba accused the United States of violating because, although the agreement provided for up to 20,000 Cubans to be admitted yearly, only 11,000 visas were issued under the program.<sup>44</sup>

Under the September 9, 1994 United States-Cuba Joint Communique on Migration,<sup>45</sup> that ceiling of 20,000 visas was changed into a floor.<sup>46</sup> A minimum of 20,000 visas would be issued to Cuban nationals, but this figure would not include immediate relatives of United States

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38. Daniel Williams, *Cuba Deal Depends on Castro Dropping Trade Demands*, *Officials Say*, WASH. POST, Sept. 9, 1994, at A34.

39. *Id.*

40. *Id.*

41. Joint Communique Between The United States of America and Cuba, Dec. 14, 1984, U.S.-Cuba, T.I.A.S. No. 11,057 [hereinafter Joint Communique Between the United States and Cuba].

42. *Id.*

43. Individuals who had only committed "offenses against the Security of the State" were not included in this "excludable" category. See Joint Communique Between The United States and Cuba, *supra* note 41.

44. Daniel Williams, *Cuban Response to U.S. Immigration Offer "Outlandish"*, WASH. POST, Sept. 5, 1994, at A34.

45. U.S.-Cuba Joint Communique on Migration, *supra* note 20.

46. *Id.*



citizens.<sup>47</sup> As an additional measure, the United States agreed to a one year period during which it would issue permits to all qualified Cuban nationals who were then on the immigrant visa waiting list.<sup>48</sup>

In addition to these changes in immigration policy, the September 9, 1994 Agreement contained a reversal of the thirty year old American policy of automatically paroling Cuban refugees into the United States. The agreement set forth this policy change in two prongs. First, the United States provided that all "migrants rescued at sea attempting to enter the United States will not be permitted to enter the United States, but instead will be taken to safe haven facilities outside the United States."<sup>49</sup> The second prong "discontinued the [United States] practice of granting parole to all Cuban migrants who reach U.S. territory in irregular ways."<sup>50</sup> In return, the Cuban government promised to take effective measures in every way possible to prevent unsafe departures, using mainly persuasive methods.<sup>51</sup>

In the May 2, 1995 Joint Statement with the Republic of Cuba on Normalization of Migration,<sup>52</sup> the Cuban government obtained more concessions. The United States agreed to parole the refugees ensconced at Guantanamo into the United States.<sup>53</sup> The United States also agreed that "Cuban migrants intercepted at sea by the United States and attempting to enter the United States will be taken to Cuba."<sup>54</sup> Though it might be of scant comfort to those forcibly repatriated, the two governments also agreed to inform returnees of the official procedures by which Cubans might apply for admission to the United States at the United States Interests Section in Havana.<sup>55</sup> Cuba's concession in this agreement was to "ensure that no action is taken against those migrants returned to Cuba as a consequence of their attempt to immigrate illegally."<sup>56</sup>

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47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Williams, *supra* note 33.

52. *Joint Statement with the Republic of Cuba, supra* note 21.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

## V. CUBA'S VIOLATIONS OF INTERNATIONAL LAW

Cuba's actions violated two distinct categories of international law. The first can be described as violating the right of a sovereign state. Cuba violated these rights by deliberately attempting to influence the internal policies of the United States through coercive measures, specifically by flooding the United States with refugees.

The second body of international law which Cuba violated through its actions involved the rights of individuals, commonly known as human rights. Cuba has a long history of such violations; yet, its actions in promoting and dealing with refugees constitute clear violations of major multinational and regional human rights accords. Each of these violations will be discussed in turn.

United Nations Charter article 2(4) provides that all Member States "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."<sup>57</sup> Cuba's attempts to influence a range of internal United States policies, including the embargo, radio broadcasting, and immigration, certainly constitutes a threat to the political independence of the United States. A nation which is being coerced into policy shifts can hardly be said to be politically independent.

The territory of the United States was also violated. Thousands of Cubans streamed toward the United States in an attempt to enter. Only the use of United States military forces prevented the violation of its borders en masse; and those refugees who did reach the United States on their rafts violated the nation's territorial integrity. This exodus was at least tacitly, if not actively, encouraged by the government of Cuba.

The only question appears to be whether or not there was the threat or use of force. Is it farfetched to analogize the promotion of a large number of refugees to an invasion force? Both can cause great damage and costs within the country targeted. Both can be used for the same ends: the alteration of another nation's internal policies. The only difference appears to be the potential for the loss of human life, and in this Cuban scenario, this holds true only for the invading nation. The Cuban force of refugees certainly had the greatest potential for the loss of their lives during their perilous raft crossing of the Straits of Florida.

The U.N. Charter was written at a time when the use of force was, if not accepted, at the least not clearly outlawed. The Charter's purpose

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57. U.N. CHARTER art. 2, para. 4.

was to outlaw war and the violent acts which might lead to war.<sup>58</sup> To a degree, it has been successful. Yet, the Charter suffers from the learning curve, as does any statute. Clever lawbreakers will find new methods to achieve the same goals. (Especially since the use of force was thwarted, and roundly condemned by the example the world set in reversing Iraq's invasion of Kuwait.) Yet when an *invasion* of refugees is used to accomplish the same ends as an invasion of soldiers, and in fact can be more successful because of the absence of the possibility of military defeat, it is only logical to hold such states to the same standards of international conduct.

The rights of states to be free of the external influence of other states is stated even more directly in the Charter of the Organization of American States (O.A.S. Charter).<sup>59</sup> Among the principles espoused by the document is that "every state . . . has the duty to abstain from intervening in the affairs of another state."<sup>60</sup> No means limitation is included; any form of intervention is deplored.<sup>61</sup>

The chapter on the Fundamental Rights and Duties of States further declares:

Article 14. The right of each State to protect itself and live its own life does not authorize it to commit unjust acts against another State.

Article 18. No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against the political, economic, and cultural elements.

Article 19. No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.

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58. Joint Communiqué Between The United States and Cuba, *supra* note 41.

59. O.A.S. CHARTER art. 3, para. (e).

60. *Id.*

61. *Id.*

Article 20. The territory of another State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial advantages or special acquisitions obtained either by force or by other means of coercion shall be recognized.<sup>62</sup>

Each article is specific in its prohibition against intervention by another state. This is a more expansive view than the U.N. Charter,<sup>63</sup> yet one which the American States, including Cuba, opted for in signing the O.A.S. Charter in 1951.<sup>64</sup> The norms which this document promotes are those of negotiation and mediation. States in the O.A.S. system are duty bound to discuss their disagreements and to try to gain the alteration of another state's policies through diplomacy rather than coercion.<sup>65</sup>

Cuba's actions clearly violated a number of the listed precepts. First, though it is surely understated, Cuba's promotion of a vast exodus of refugees by opening its borders is an *unjust act* within the meaning of article 14.<sup>66</sup> Any violations of the articles which follow would, a priori, violate the prohibition on *unjust acts*.<sup>67</sup>

Articles 18 and 19 are more explicit. The right to intervene is prohibited, not only in terms of armed force, but in any other form of interference. Any subornation of another state's sovereign will, any pressure applied in a coercive fashion that brings about an alteration of another state's policies by interference in that state's internal affairs, is prohibited.<sup>68</sup>

62. *Id.* at arts. 14-20.

63. U.N. CHARTER art. 2, para. 4.

64. O.A.S. CHARTER art. 3, para. (e).

65. *Id.*

66. *Id.* at art. 14.

67. *Id.*

68. The obvious reply would be that the United States itself is violating the O.A.S. Charter in sustaining its embargo against Cuba, and thus has forfeited a defense against Cuba's violations. While this line of argument is beyond the scope of this article, several points are worthy of note.

In general, internal embargoes of a country's goods and services would not seem to violate international law as sovereign states have the power (as an element of their sovereignty) to exclude the entry of any material from their territory. While the effects of an embargo will certainly vary from country to country, especially in light of a difference in size of the economy to which a country is denied access, such variations alone should not alter the nature of state sovereignty. Thus, while an embargo by the United States would certainly have a greater effect on Cuba's economy than an embargo by Jamaica, the effect of the embargo alone should not

Cuba's violation of such precepts is distinct. When one acts with the knowledge that one's actions will lead to a certain result, one is as much responsible for that result as for the initial acts. Cuba opened its borders knowing that a mass exodus would ensue. It successfully used this result as a bargaining chip to force the United States to alter its immigration policies. This was an "advantage gained"<sup>69</sup> within the meaning of article 19, and the act itself fits easily within the broad scope of article 18.<sup>70</sup>

Article 20 deals with territorial violations. This section also refers to territorial violations not caused merely by the use of force, but by any "other means of coercion."<sup>71</sup> Under this language, using refugees is as sure a violation as using an army. The section does not limit the illegality of territorial violations merely to those bent on acquiring land, but extends such condemnation to any "special advantage"<sup>72</sup> gained by the territorial violation. Would anyone seriously claim that the alteration of another state's immigration policy (or any other political policy) is not an advantage?

Lest we think that these two documents are isolated post-war relics, and that the community of nations has since been less concerned with intervention, let us examine more recent materials.

Fourteen years after the signing of the O.A.S. Charter, the principle of non intervention was reinforced by the 1965 United Nations General Assembly Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.<sup>73</sup> This declaration recognized "that full observance of the principle of non intervention in the internal or external affairs of other states is essential to the fulfillment of the purposes and principles of the United Nations."<sup>74</sup> The document declared that:

No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and

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determine its legality. For a concise discussion of this topic, see 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 58-67 (1995).

69. O.A.S. CHARTER art. 19.

70. *Id.* at art. 18.

71. *Id.* at art. 20.

72. *Id.*

73. *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, Dec. 21, 1965 [hereinafter *Declaration on the Inadmissibility of Intervention*].

74. *Id.*

all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.<sup>75</sup>

Drawing on language almost identical to the O.A.S Charter,<sup>76</sup> the Declaration<sup>77</sup> prohibits direct or indirect intervention to obtain advantages of any kind.<sup>78</sup>

As an even more recent example, the World Court cited the principle of non intervention in its 1986 ruling against the United States for the mining of Nicaraguan harbors.<sup>79</sup> Citing the principle as an element of customary international law, the court defined the principle as follows:

A prohibited intervention must be bearing on matters in which each state is permitted, by the principle of State sovereignty, to decide freely (for example the choice of a political, economic, social and cultural system, and formulation of foreign policy). Intervention is wrongful when it uses, in regard to such choices, methods of coercion. . . .<sup>80</sup>

The principle of non intervention remains the norm in international law. It matters little whether the tool used is an invasion force, the dropping of leaflets from planes, or the flooding of a nation with refugees. If such measures are used in an attempt to influence another nation's policies, then such measures are condemned by international law. Yet the use of refugees as a tool of foreign influence is hardly reprehensible merely because of the alteration of a nation's immigration quotas. What is truly unfortunate is the human cost of such a ploy. The second segment of international law violated when states use refugees in this manner is the violation of the rights of the refugees themselves under various human rights accords.

Once again, one must begin with the Charter of the United Nations.<sup>81</sup> One of the purposes of the Organization, set out in article 1, section 3, is "promoting and encouraging respect for human rights and for

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75. *Id.*

76. O.A.S. CHARTER arts. 18-20.

77. *Declaration on the Inadmissibility of Intervention, supra* note 73.

78. *Id.*

79. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4 (June 27) (separate opinion of Judge Ago).

80. *Id.*

81. U.N. CHARTER.

fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>82</sup>

This language is used yet again in article 55, section c, of the Charter. This section declares that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>83</sup> This section converts the mere purpose<sup>84</sup> of article 1 into an affirmative duty on the part of the Organization to promote<sup>85</sup> human rights. Although these statements are written in terms of the Organization, individual Member States have pledged, in article 56, to "take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."<sup>86</sup>

These passages establish a duty on the part of Cuba to promote human rights. One must now determine what those rights are. The starting point is the Universal Declaration of Human Rights,<sup>87</sup> in conjunction with the International Covenant on Civil and Political Rights.<sup>88</sup>

At the time of its adoption, the Universal Declaration was technically a non binding statement of principles. Yet, few today would consider a deviation from the precepts espoused in this document as anything other than a violation of international law. The Universal Declaration is viewed either as the authoritative interpretation of the rather open ended human rights clauses in the U.N. Charter,<sup>89</sup> or as a codification which through consistent citation, espousal, and adherence over the past forty-seven years has attained the status of customary international law.<sup>90</sup>

Cuba is not a party to the International Covenant on Civil and Political Rights (ICCPR).<sup>91</sup> Thus, the ICCPR binds Cuba only to the extent that its provisions have become customary law through the practice

82. U.N. CHARTER art. 1, para. 3.

83. U.N. CHARTER art. 55, para.(c).

84. *Id.*

85. *Id.*

86. U.N. CHARTER art. 56.

87. *Universal Declaration of Human Rights*, G.A. Res. 71, U.N. GAOR, 3d Sess., art. 3, U.N. Doc. A/1810 (1948).

88. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171, art. 6, para. 1 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

89. U.N. CHARTER art. 1.

90. For a fine, concise discussion of this topic see THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 29-33 (1988).

91. ICCPR, *supra* note 88.

of states.<sup>92</sup> As the provisions in this document mirror, to a large extent, those in the Universal Declaration, the relevant articles of the ICCPR are included for reference.

The most basic right set out in both the Universal Declaration and the ICCPR is the right to life. Article 3 of the Universal Declaration states that "everyone has the right to life, liberty, and the security of person."<sup>93</sup> The covenant is even more explicit, stating in article 6, section 1, that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."<sup>94</sup> Can one seriously argue that in encouraging refugees to take to the sea in makeshift rafts, Cuba demonstrated any concern for the sanctity of life? Indeed, it is the depraved indifference Cuba demonstrated for those lost at sea that constitutes the most serious violation of the human rights of those who fled.

The next provision with potential applicability to the use of refugees as foreign policy instruments is article 9 of the Universal Declaration on Human Rights. This article states that "no one shall be subjected to arbitrary arrest, detention, or exile."<sup>95</sup> While arbitrary arrests and detentions are commonplace in Cuba and have definitely contributed to the development of refugees, it is the final clause which concerns us here. An individual faced with an array of human rights abuses, who seeks refuge in a nation other than his own, is forced out of the nation of origin as surely as if he were escorted to the dock at gunpoint. In fact, one might see a ruthless nation in the future doing exactly that, marching refugees over the border at gunpoint.<sup>96</sup> We have already seen glimpses of such a scenario in the acts of ethnic cleansing that have occurred in Bosnia, where thousands of Muslim refugees have been forced out of Serb held territory. While these actions have not been taken in order to influence another nation's internal agenda, one could easily see such tactics, proven viable in the current conflict, applied to such a purpose in the future.

Two further articles in these documents concern the freedom of movement and residency in a state, article 13 of the Universal Declaration<sup>97</sup> and article 12 of the Covenant.<sup>98</sup> Article 13 of the Universal

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92. The ICCPR has over 114 States Parties, thus a good case may be made for its provisions to have passed into the customary law of nations. *Id.*

93. *Universal Declaration of Human Rights*, *supra* note 87, at art. 3.

94. ICCPR, *supra* note 88, at art. 6.

95. *Universal Declaration of Human Rights*, *supra* note 87, at art. 9.

96. O.A.S. CHARTER art. 20.

97. *Universal Declaration of Human Rights*, *supra* note 87, at art. 13.

98. ICCPR., *supra* note 88, at art. 12. See Mbitiru, *infra* note 127.



Declaration states that "everyone has the right to freedom of movement and residence within the borders of each state,"<sup>99</sup> and that "everyone has the right to leave any country, including his own, and to return to his country."<sup>100</sup>

Article 12 of the Convention tracks the same rights. Section 1 provides for the rights of freedom of movement and freedom to choose one's residence, and section 4 declares that no one shall be arbitrarily deprived of the right to enter one's own country.<sup>101</sup>

These rights have been violated by Cuba. The repressive government which commits daily human rights abuses causes refugees to leave their homes or suffer oppression. Given the opportunity to live in a Cuba which did not repress individual liberties, most Cuban refugees would do so. Yet, this choice is denied to them. They may not live in peace where they choose, they can only leave by taking life threatening measures, and once they have departed they are denied the ability even to visit their homeland, let alone resettle there.

The Universal Declaration provides, in article 15, that "everyone has the right to a nationality,"<sup>102</sup> and that "no one shall be arbitrarily deprived of his nationality."<sup>103</sup>

The use of refugees, including the intentional creation of conditions which generate refugees and the subsequent capitalization of such a resource, causes those used in such a manner to lose their nationality. In being forced to seek refuge in a foreign land, individuals are deprived of their citizenship, their heritage, and in some cases their ethno-cultural identity. Living in Miami's Little Havana may imitate aspects of Cuban culture, but it is not Cuba.

In addition to violating the human rights norms of the United Nations, Cuba has violated the human rights provisions in the primary regional instruments. These include the Charter of the Organization of American States,<sup>104</sup> the American Declaration of the Rights and Duties of Man,<sup>105</sup> and the American Convention on Human Rights.<sup>106</sup> Cuba is a party

99. *Universal Declaration of Human Rights*, *supra* note 87, at art. 13.

100. *Id.*

101. ICCPR, *supra* note 88, at art. 12, para. 1, 4.

102. *Universal Declaration of Human Rights*, *supra* note 87, at art. 15, §§ 1, 2.

103. *Id.*

104. O.A.S. CHARTER art. 3, para. (e).

105. *American Declaration of the Rights and Duties of Man*, Resolution XXX, Final Act of the Ninth International Conference of American States, art. 23 (1948), *reprinted in* ORGANIZATION OF AMERICAN STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN

to both the O.A.S. Charter and the 1967 Protocol<sup>107</sup> which amended the Charter. The Charter itself includes two distinct human rights provisions. In article 3, section K, "the American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex."<sup>108</sup> The second provision is article 16, which guarantees each state the right to "develop its cultural, political, and economic life freely and naturally,"<sup>109</sup> *so long as* "in this free development, the State shall respect the rights of the individual and the principles of universal morality."<sup>110</sup> These clauses establish the normative requirement that member states respect human rights; yet, definitional content must be given to the rights of the individual which are to be protected.

In order to define these rights, one may look to the two primary sources of American human rights law: the American Declaration on the Rights and Duties of Man,<sup>111</sup> and the American Convention on Human Rights.<sup>112</sup> The American Declaration was originally adopted as a *non-binding* statement of principles.<sup>113</sup> Yet, as with the Universal Declaration in the U.N. system, constant citation of the document has rendered it the authoritative interpretation of the Human Rights provisions in the O.A.S. Charter.<sup>114</sup> This argument is even more firmly buttressed than its U.N. system parallel, for the American Declaration is the *legal code* which the Inter-American Commission on Human Rights applies in determining whether member states have violated the O.A.S. Charter.<sup>115</sup>

The Commission is a charter organ,<sup>116</sup> an arm of the O.A.S. system, made thus by the Protocol of Buenos Aires<sup>117</sup> which amended the Charter in 1967. The charter governing the operations of the Commission

THE INTER-AMERICAN SYSTEM, 18 OEA/Ser. L.V./ II. 82 doc. 6 rev. 1 (1992) [hereinafter *American Declaration*].

106. American Convention on Human Rights art. 4, para. 1, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 9 I.L.M. 673 (1970) (entered into force July 18, 1978).

107. Protocol of Amendment to the Charter of the Organization of American States ("Protocol of Buenos Aires"), *opened for signature* Feb. 27, 1967, 21 U.S.T. 607 (entered into force Feb. 27, 1970) [hereinafter Protocol].

108. O.A.S. CHARTER art. 3, para. (k).

109. *Id.* at art. 16.

110. *Id.*

111. *American Declaration*, *supra* note 105.

112. American Convention on Human Rights, *supra* note 106.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Protocol, *supra* note 107.

defines *human rights*, in article 1, section 2, as follows: "1. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto; 2. The rights set forth in the American Declaration of the rights and Duties of Man, in relation to the other member states."<sup>118</sup>

The Inter-American Court of Human Rights acknowledged the normative status of the American Declaration when it declared "for the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. . . . The Declaration is for those States a source of international obligations related to the Charter of the Organization."<sup>119</sup> In the same opinion, the court found the normative character of the Declaration supported by the practice of the Member States of the Organization.<sup>120</sup>

Cuba is not a party to the American Convention on Human Rights. Its provisions are thus binding on Cuba only to the extent that they have, through the practice of a vast majority of the states in the region, become customary international law. Since the provisions of the convention which concern us in this instance mirror similar provisions in the American Declaration,<sup>121</sup> which as demonstrated above are binding on Cuba, they will be included for reference. The rights proclaimed in the American system match those rights guaranteed in the United Nations system.

The first of these rights is the right to life. Both article I of the American Declaration, and article 4, paragraph 1, of the Convention expound this fundamental principle.<sup>122</sup> Both documents track the right of an individual to fix his residence, the right to move about a state freely, and the right not to be forced to leave a state.<sup>123</sup> The Convention adds an additional clause to the latter right, guaranteeing that "no one can be expelled from the territory of a state of which he is a national or deprived of the right to enter it."<sup>124</sup> Both the American Declaration and the

118. O.A.S. CHARTER, art. 1, sec. 2.

119. Advisory Opinion No. OC-10/89, Interpretation of American Declaration of Rights and Duties of Man Within Framework of Article 64 of American Convention on Human Rights, 1989 Inter-Am. C.H.R. (ser.A) No. 10, *reprinted in* 29 I.L.M. 379.

120. *Id.* at art. I; American Convention on Human Rights, *supra* note 106, at art. 4, para. 1.

121. *American Declaration*, *supra* note 105.

122. *Id.* at art. 4, para. 1.

123. *Id.* at art. 8; American Convention on Human Rights, *supra* note 106, at art. 22, para. 1.

124. American Convention on Human Rights, *supra* note 106, at art. 22, para. 5.

American Convention grant the right to a nationality, in articles XIX and 20, respectively.<sup>125</sup>

All of the above rights have been violated by Cuba's use of refugees in the same manner as Cuba violated the corresponding provisions in the Universal Declaration and the ICCPR.

The foregoing lists of rights are merely those implicated by the political use of refugees as foreign policy tools. In individual cases, such as the sinking of the tugboat "13<sup>th</sup> of March," broader and more direct violations occur. Indeed, while the scope of review here must be limited to those rights directly violated by the political use of refugees, the catalog of violations responsible for creating a large enough group of refugees to have an impact on another state's policies would inherently be much greater than those violations implicated by the process itself.<sup>126</sup>

## VI. SECURITY CONCERNS

A nation inundated by refugees must deal with the economic and political ramifications of their presence. These are obviously quite formidable, and the major source of leverage for the state using refugees as a foreign policy tool. Yet another, possibly overlooked, concern for the receiving state involves the possibility of foreign agents entering its borders, either among an uncontrolled population of refugees or posing as refugees themselves.

Ask any Immigration & Naturalization Service (INS) officer who has processed large groups of refugees, and he or she will admit to a modicum of confusion in the process. Identity documents are often non-existent, and the past history of many refugees cannot be checked reliably. This is the perfect situation for planting human intelligence operatives in a nation. One could even plant refugees whose sole purpose would be to arouse the anger of the local populace in order to create greater political pressure to end a refugee crisis. Such action could give the government who must deal with this pressure greater incentive to capitulate to the nation that can alleviate such problems by halting the refugee flow.

Agents might raise the level of pressure by committing criminal acts. As one can see from the outcry in the United States over the crime rate among some of the Marielito population, criminal acts by refugees

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125. *American Declaration*, *supra* note 105, at art. XIX; *American Convention on Human Rights*, *supra* note 106, at art. 20.

126. For examples of such violations, see *Cuba's Human Rights Abuses Under the U.N. Spotlight*, U.S. DEPT. ST. DISPATCH 54 (1989); *Human Rights Situation in Cuba*, U.S. DEPT. ST. DISPATCH 41 (1989); and various Amnesty International, America's Watch, and Inter-American Commission on Human Rights Country reports on Cuba.

create major concern in the nation which harbors them. One could even envision a nation dealing with such criminal actors by returning the criminals to their country of origin. The criminals, in reality agents, would be welcomed home to a vacation instead of a jail sentence.

Agents installed in a nation through refugee infiltration might also gather valuable information on the expatriate population, which often contains elements working for the end of the totalitarian regime. In a multicultural society, with the attending ethnic groups, agent agitators could stir up racial or ethnic tensions. The use of refugee politics offers totalitarian nations many opportunities to sow dissension in neighboring countries above and beyond the inherent strain caused by the actual refugees.

## VII. CONCLUSION

Imagine a scenario in which the totalitarian government of North Korea announces, with great fanfare and to much acclaim, that it is dismantling its fortifications along the Demilitarized Zone and withdrawing its troops stationed there. South Korea and the United States, though suspicious, follow suit. A great victory for peace is proclaimed, though the border is still guarded and free movement between the two nations is nonexistent.

North Korea then begins trade and development talks with its southern neighbor while maintaining strict control of its internal population. At some point an impasse is reached, whether it be over the access to nuclear technology or over development assistance. The North expresses its disappointment and opens its borders. A large number of refugees spill into South Korea, causing immense political and economic difficulties. South Korea quickly capitulates, and the North Korean border guards return to their posts.

Does such a scenario sound far fetched? Admittedly, such coercive measures would only be effective if a large enough stockpile of potential refugees were present in a state, and then such techniques would only be effective against nations which the refugees could reach. Thus, the use of refugees as a foreign policy tool by Iraq might have considerable impact on Kuwait, Jordan, or Turkey, but could hardly coerce the United States into concessions.

Such scenarios are gruesome. Yet countries such as Cuba, North Korea, Iraq, or Myanmar (Burma), ruled by self interested totalitarian regimes, might resort to such measures to attain specific policy alterations from neighboring states. This is especially true when the neighboring

states are either wealthy or democratic. It is in such states that refugee tactics would have the greatest impact.

It is unlikely that flooding an adjacent totalitarian regime would have the desired effect. First, the likelihood of an armed response is much greater from such outlaw nations than from democratic states, in which political outrage to such a response would generate internal debate. Second, it is quite possible that a neighboring totalitarian nation might merely round up refugees and march them back across the border at gun point<sup>127</sup>. Third, there is always the possibility of such a state using its own refugees in the same manner to achieve its foreign policy objectives.

Does the world really need to see such tactics become a repeated reality before taking action? Of course not. There are several measures the United Nations, or appropriate regional bodies, could take in order to prevent the future use of refugees as foreign policy tools.

The first step might be a United Nations General Assembly (or regional assembly) resolution declaring such actions unlawful. Public condemnation of this sort is not legally binding, but can still be effective. Such a declaration should be worded strongly and should encourage Member States to consider a state's use of refugee politics when setting their own foreign aid agendas.

A more concrete, yet more difficult measure would be the negotiation and adoption of a separate convention aimed at eliminating the use of refugees as foreign policy tools. The difficulty with this course of action is that it is highly unlikely that a problem state would become a party to such a treaty, and would thus escape any enforcement mechanisms such a treaty might contain. The positive aspect of such a treaty is that it would begin the process of condemnation required to outlaw the political use of refugees under customary international law.

A more controversial proposal would be for the use of refugees to be included in the Definition of Aggression expounded by the United Nations General Assembly.<sup>128</sup> By including the use of refugees in the definition of physical aggression, a right of self-defense under article 51 of the U.N. Charter would vest in the state thus invaded.<sup>129</sup> This would make the threat of military retribution by such states both legal and viable. The

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127. The August 1995 expulsion/repatriation of thousands of Rwandan refugees by the government of Zaire, carried out by its military, stands as evidence that such actions occur. See Chege Mbitiru, *Zaire Expels Rwanda Refugees*, TACOMA MORNING NEWS TRIB., Aug. 23, 1995, at A18.

128. *Resolution on the Definition of Aggression*, Dec. 14, 1974, G.A. Res. 3314 (XXIX), U.N. GAOR, Supp. No. 31, at 142, U.N. Doc. A/9631 (1975), reprinted in 13 I.L.M. 710 (1974).

129. U.N. CHARTER art. 51.

ability to respond using military force might deter the active use of refugees in the first place, though admittedly the practice of such a military response would be horrific.

Along the same lines, were the United Nations Security Council to authorize global intervention or sanctions to prevent a totalitarian regime from using refugees as foreign policy tools, perhaps that example might discourage similar tactics by other governments. Given the political nature of the United Nations security body, this is highly unlikely to occur, unless the humanitarian nature of the crisis were of extreme proportions, or unless the national interests of the Member States on the Security Council were somehow threatened.

Finally, perhaps the solution with the greatest long term chance of success, and with the least destructive application, is simply to continue to promote democracy and human rights on a worldwide scale, so that outlaw nations with large populations of potential refugees cease to exist. This may seem simple, obvious, and unlikely to show immediate results. Yet, who would have thought in the mid-1980s that a decade later, many totalitarian regimes in Eastern Europe, Latin America, and Southern Africa would have crumbled and consequently millions of people would begin to enjoy freedom and democracy.