

Refugee Law Reconsidered: Reconciling Humanitarian Objectives of Western Europe and the United States

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Refugee Law Reconsidered: Reconciling Humanitarian Objectives with the Protectionist Agendas of Western Europe and the United States

Kenneth Regensburg*

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* J.D., Cornell Law School, 1996; A.B., Stanford University, 1993. I dedicate this Note to my parents, Joan and Ken Sr., who have supported me throughout the years in all of my endeavors and taught me the value of hard work and perseverance.

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Introduction

Ever since the first Europeans came to this country in search of freedom and opportunity, America has been viewed as a safe haven and a source of hope for millions of people around the globe. We take tremendous pride in our leading efforts to assist refugees, and we continue to cherish the great and generous spirit embodied by our magnificent Statute of Liberty. As Emma Lazarus wrote in her timeless sonnet to the famed Mother of Exiles, 'from her beacon-hand glows worldwide welcome.'¹

Although the United States historically has been a nation of immigrants and refugees,² its willingness to admit outsiders has competed with public sentiment in favor of limiting immigration flow.³ This ironic reluctance to accept newcomers is not peculiar to Americans. Since the end of the Cold War, Western nations in particular have manifested increased resistance to asylum seekers, suspicious of their motives and anxious about the consequences of mass exoduses.⁴

Statistics indicate that there are more than twenty-seven million refugees around the world,⁵ a clear reflection of the post-Cold War political and social instability in the Third World and Eastern Europe.⁶ These num-

1. Proclamation No. 6219, 3 C.F.R. 239-40 (1990) (President George Bush proclaiming Refugee Day, 1990).

2. The term "refugee" refers to a person obliged by war or persecution to leave his or her dwelling and seek refuge abroad. MICHAEL R. MARRUS, *THE UNWANTED: EUROPEAN REFUGEES IN THE TWENTIETH CENTURY* 3 (1985). International law and U.S. immigration law expand upon this general definition by specifying requirements which must be satisfied before a person may qualify for refugee status and protection. See *infra* notes 32, 50 and accompanying text.

3. Congress first began regulating the influx of immigrants over a century ago. See, e.g., Act of May 6, 1882, ch. 126, § 1, 22 Stat. 58, 58-59 (the first of the so-called Chinese Exclusion Laws, suspending for ten years the "coming of Chinese laborers to the United States").

4. The majority of mass movements, especially those in Third World countries, are caused by war, ethnic strife, and socioeconomic inequalities in the home state. Deep ethnic divisions and economic underdevelopment have contributed to the domestic conflict and political instability which usually precedes mass exodus. GIL LOESCHER, *REFUGEE MOVEMENTS AND INTERNATIONAL SECURITY* 28 (Adelphi Papers No. 268, 1992).

5. *REFUGEES AT A GLANCE: A MONTHLY DIGEST OF UNHCR ACTIVITIES*, Aug. 1995, at 1 (Office of the United Nations High Commissioner for Refugees, New York, N.Y.) [hereinafter *Refugee Digest*] (on file with author).

6. See LOESCHER, *supra* note 4, at 9-27 (discussing the dimensions of the refugee problem in the post-Cold War world).

bers preoccupy the citizens of developed countries who perceive refugees as competitors for local resources and as a threat to the cultural identities of the receiving states.⁷ Consequently, the phenomenon of mass exodus has forced states to reevaluate their commitments under international law and to formulate emergency responses to these population movements. This Note addresses the major crisis management options considered by Western nations and proposes a solution to refugee situations in the post-Cold War world.

Part I of this Note examines the significant body of refugee law developed in the twentieth century. It traces the international origins of the "refugee" definition and describes the rationale underlying the Refugee Convention of 1951⁸ and its 1967 Protocol.⁹ In addition, Part I clarifies the obligations of signatories to the 1951 Convention and evaluates the performance of those responsibilities by the United States during the Cold War.

Part II depicts the emerging standard of international refugee obligations in an era of protectionist law-making. The section briefly examines the recent Schengen¹⁰ and Dublin¹¹ Conventions in Western Europe as well as the Asylum Amendment to the German Constitution.¹² Part II then examines the U.S. policy of interdiction as applied to Haitian and Cuban asylum seekers. The section concludes by considering the Clinton Administration's decision to pursue a policy of humanitarian intervention as a response to the security threat posed by the mass refugee influx from Haiti.

Part III presents three potential response strategies: (1) reconcile humanitarian intervention with the U.N. Charter's prohibition on the use of force, (2) legitimate interdiction by eliminating the Refugee Convention's mandatory principle of nonrefoulement,¹³ and (3) establish an international monitoring agency to facilitate and finance regional burden-sharing in accordance with the objectives of refugee law. This Note advocates the third proposal as the only legally justified and politically practical solution. A burden-sharing approach to the contemporary problems of refugee law builds upon regional efforts already underway in Europe and the Amer-

7. *Id.* at 48-49.

8. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

9. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

10. Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and the Convention Applying the Agreement, Belg.-Fr.-F.R.G.-Lux.-Neth., 30 I.L.M. 68; Agreement, June 14, 1985, 30 I.L.M. 73 [hereinafter Schengen Agreement]; Convention, June 19, 1990, 30 I.L.M. 84 [hereinafter Schengen Convention].

11. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 30 I.L.M. 425 [hereinafter Dublin Convention].

12. GRUNDGESETZ [GG] art. 16a.

13. This principle prohibits expulsion or return of a refugee to 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." 1951 Convention, *supra* note 8, art. 33, para. 1.

icas. In addition, such a solution respects the territorial sovereignty of nations and recognizes the political necessity that members of the international community promote their own national interests.

I. The Development of International Refugee Law

A. Providing a Legal and Institutional Framework for Refugee Protection

The First World War resulted in the collapse of four dynastic empires which had dominated Eastern Europe for centuries.¹⁴ This postwar political transformation induced several refugee movements.¹⁵ Germans poured across the new frontiers from Alsace-Lorraine following its reattachment to France.¹⁶ Others moved south from northern Schleswig, territory now governed by Denmark.¹⁷ Refugees also entered Germany from Eupen and Malmédy, now joined to Belgium.¹⁸ From the East, German refugees moved westward from former Reich provinces which had become part of Poland as a result of the Treaty of Versailles.¹⁹ In addition, the Treaty of Trianon, which officially signaled the collapse of Hapsburg authority, triggered a massive exodus of Hungarians from areas lost to Rumania, Yugoslavia, and Czechoslovakia.²⁰

Flight from the former tsarist empire after the Russian Revolution also involved many nationalities. There was a particularly large displacement of Jews resulting from their systematic persecution along the western borderlands of Russia.²¹ Other refugees hostile to the Bolshevik regime either poured north into Finland and the Baltic provinces or moved south to Odessa and the Crimea.²² Between 1918 and 1920, refugees fleeing the revolution crossed the Ukrainian border into Poland, as did thousands of Poles who had been driven eastward during World War I.²³

The post-War peace treaties²⁴ acknowledged that millions of people would be residing as minorities in culturally, linguistically, or religiously alien environments. Western nations initially enlisted the aid of private agencies to address the emerging burdens of refugee assistance. However,

14. These dynasties were the Ottoman, the Romanov, the Hapsburg, and the Hohenzollern empires. MARRUS, *supra* note 2, at 52.

15. *Id.* at 70-74. See also EUGENE M. KULISCHER, *EUROPE ON THE MOVE: WAR AND POPULATION CHANGES, 1917-47*, at 166-74 (1948).

16. MARRUS, *supra* note 2, at 71.

17. *Id.*

18. *Id.*

19. *Id.*

20. In 1921, Hungary announced the arrival of approximately 139,390 refugees from Rumania, 56,657 from Czechoslovakia, and 37,456 from Yugoslavia. *Id.* at 72.

21. *Id.* at 61.

22. *Id.* at 56.

23. *Id.* at 57.

24. These treaties included: the Treaty of Brest-Litovsk (1918) between Germany, Austria-Hungary, Bulgaria, Turkey, and Russia, the Treaty of Versailles (1919), the Treaty of Saint-Germain (1919) between the Allied Powers and Austria, the Treaty of Trianon (1920) between the Allied Powers and Hungary, and the Treaty of Riga (1921) settling the Polish-Soviet frontier.

international cooperation after World War I eventually resulted in the creation of the League of Nations.²⁵ In 1921, the League of Nations established the position of High Commissioner for Refugees to address refugee problems.²⁶ Unfortunately, support for the Commission dissipated soon after its formation, as did the goal of achieving universally protective refugee policies, because of resistance from countries receiving refugees during the years immediately preceding World War II.²⁷

Once the world community became aware of the full extent of atrocities committed by Nazi Germany during the War, most governments acknowledged, at least to some degree, that refugee and asylum issues were critical to the safety of nations and the preservation of human rights.²⁸ In the late 1940s, the United States admitted approximately 350,000 individuals who had been displaced as a result of the War.²⁹ By 1950, the newly formed United Nations had initiated measures designed to define international refugee law. The first priority of the U.N. General Assembly was to establish an office which would effectively oversee international refugee issues, the United Nations High Commissioner for Refugees (UNHCR).³⁰ A subsequent international conference produced the United Nations Con-

25. The scope and carnage of World War I had a considerable impact on the attitude of States toward the use of force. With the strong support of President Woodrow Wilson, the creation of the League of Nations became an integral part of the peace settlement. Though the League did not prohibit war or the use of force, it did set up a procedure to restrict international hostilities to tolerable levels. In particular, the League system included a guarantee by member states of the political independence and territorial integrity of each member against external aggression and authorized the use of collective economic and military measures to defeat such aggression. JOHN F. MURPHY, *THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE* 10 (1982). See MALCOLM N. SHAW, *INTERNATIONAL LAW* 542-43 (2d ed. 1986).

26. See David A. Martin, *Strategies for a Resistant World: Human Rights Initiatives and the Need for Alternatives to Refugee Interdiction*, 26 *CORNELL INT'L L.J.* 753, 755 (1993); MARRUS, *supra* note 2, at 86-91.

27. A large number of anti-fascist refugees attempted to flee the new governments in Italy and Germany during the 1930s. In particular, the Western democracies witnessed panic-stricken flight during the two years prior to the outbreak of the Second World War. Economic depression in the United States and Western Europe also contributed to anti-immigrant policies. France, however, was an early haven for asylum seekers until it also added restrictions to its immigration law. The League of Nations was powerless to act throughout this crisis, given the fact that most Member States were reluctant to accept more than a few thousand refugees. In 1938, Hungary, Yugoslavia, Italy, Belgium, Switzerland, and the Netherlands took measures to reduce their earlier rates of acceptance and to reinforce frontier guards. Within a year, Europe was immersed in another grand scale war while Adolf Hitler simultaneously proceeded with his policy of ridding the Reich of non-Aryans and political dissenters. See MARRUS, *supra* note 2, at 122-207.

28. Martin, *supra* note 26, at 755.

29. GIL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT* 2 (1986). The number of displaced persons at the conclusion of World War II totaled nearly 14 million. The Soviet Union claimed that it took charge of over 7.2 million forced laborers and prisoners of war. The French cared for more than 1.6 million Polish nationals, 700,000 Italians, 350,000 Czechoslovakians, 300,000 Belgians, and over 300,000 Dutch. MARRUS, *supra* note 2, at 299.

30. The responsibilities of the High Commissioner include:

vention Relating to the Status of Refugees, an agreement which directly addressed the problem of European refugee flows due to events prior to 1951.³¹ A 1967 Protocol modified the 1951 Convention to apply a broader definition of refugee.³²

The 1967 definition requires four elements for a person to attain refugee status: (1) the person must be outside the country of his nationality; (2) the person must be unwilling or unable to seek the protection of that country; (3) this inability or unwillingness must arise from a well-founded fear of persecution; and (4) the feared persecution must derive from being a member of a certain race, religion, nationality, or particular social group or from holding a particular political opinion.³³ If one qualifies as a refugee under the Convention, he is entitled to certain statutory protections. Article 33 of the Convention articulates the principle of nonrefoulement, the keystone of a refugee's rights under international law. This principle

(1) promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;

(2) promoting through special agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;

(3) assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;

(4) promoting admission of refugees, not excluding those in the most destitute categories, to the territories of States;

(5) endeavoring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;

(6) obtaining from governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;

(7) keeping in close touch with the governments and inter-governmental organizations concerned;

(8) establishing contact in such manner as he may think best with private organizations dealing with refugee questions;

(9) facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.

G.A. Res. 428, U.N. GAOR, 5th Sess., Supp. No. 20, at 46, U.N. Doc. A/1775 (1950).

31. 1951 Convention, *supra* note 8, art. 1.

32. The 1951 Convention defines refugee as any person who,

[a]s a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

1951 Convention, *supra* note 8, art. 1, para. A.

The 1967 Protocol eliminated the January 1, 1951 limitation and extended protection to all contemporary refugees. 1967 Protocol, *supra* note 9, art. 1.

33. See *supra* note 32 and accompanying text. This definition of refugee originated with the International Refugee Organization (I.R.O.), which was founded in 1946. The world community established the I.R.O. to protect victims of Nazi, Fascist, or collaborator regimes who presented valid objections such as persecution or a reasonable fear of such persecution in their home states. See Constitution of the International Refugee Organization, Dec. 15, 1946, 62 Stat.(3) 3037, 18 U.N.T.S. 3.

dictates that a state may not return a refugee within its borders to his or her home country to face persecution.³⁴ A refugee, however, must first be admitted within the borders of the receiving state and, once there, may still be removed to another country willing to extend acceptance and protection. The Convention does not bestow a right to asylum upon the refugee. Thus, any conferred right is actually a right of the state, as a sovereign, to grant asylum at its discretion.

B. U.S. Compliance with International Refugee Obligations

During the Cold War,³⁵ Western nations had several reasons to be satisfied with the generalized and abstract 1967 refugee definition which was not limited by dateline, continent, or other group designation.³⁶ In 1951, there were 1.5 million refugees,³⁷ as opposed to today's figure of over 27.42 million asylum seekers and internally displaced persons who are unable to cross borders because of war and persecution in their homelands.³⁸ During the Cold War, only a handful of people succeeded in escaping "Iron Curtain" countries. The Western industrialized nations³⁹ did not doubt

34. 1951 Convention, *supra* note 8, art. 33, para. 1.

35. A dramatic alteration in East-West refugee movements occurred in 1989 when the Berlin Wall, a potent symbol of the Cold War rivalry, was dismantled. The elimination of physical barriers between Eastern and Western Europe resulted in an explosion of migration from Communist countries in the East. See LOESCHER, *supra* note 4, at 22. See also Bimal Ghosh, *The Exodus That Could Explode*, FIN. TIMES, Jan. 23, 1991, at 15. In December 1991, the Soviet Union formally dissolved into twelve independent republics. The Western allies, including the United States, recognized the Russian Federation as the legal successor state to the U.S.S.R. Although the Soviet military threat to Europe had diminished since the revolutionary events of 1989, the final disintegration of the Soviet Union effectively signaled the end of the Cold War. See Michael Wines, *End of the Soviet Union*, N.Y. TIMES, Dec. 26, 1991, at A1. See also *infra* note 61.

36. See generally Paul Weis, *Convention Refugees and De Facto Refugees*, in AFRICAN REFUGEES AND THE LAW 15 (Göran Melander & Peter Nobel eds., 1978). In reference to the formulation of the 1967 refugee definition, Weis notes:

As one who has participated in the drafting of the convention, I can say that the drafters did not have specific restrictions in mind when they used this terminology. Theirs was an effort to express in legal terms what is generally considered as a political refugee. The Convention was drafted at a time when the cold war was at its height. The drafters thought mainly of the refugees from Eastern Europe and they had no doubt that these refugees fulfilled the definition they had drafted.

Id. at 15.

37. LOESCHER, *supra* note 4, at 9.

38. Refugee Digest, *supra* note 5, tbl. 1. This figure includes refugees (14.48 million), returnees (5.42 million), internally displaced persons (3.98 million), and "others" (3.5 million). "Others" includes individuals who are outside their country but who have not been formally recognized as refugees. This definition encompasses persons who have been granted protection on a temporary basis or for humanitarian (non-Convention) reasons. An example would be the UNHCR-assisted victims in the former Yugoslavia.

39. For purposes of this Note, these nations include Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Spain, Sweden, Switzerland, the United Kingdom, and the United States. The Secretariat for Intergovernmental Consultations estimates that 660,600 asylum applications were processed in these countries in 1991 alone. LOESCHER, *supra* note 4, at 74.

the seriousness of the claims of such individuals⁴⁰ since they had risked their lives to flee the totalitarian regimes of the Soviet bloc.⁴¹ The numbers remained low for years, and the credibility problems associated with current asylum claims were virtually nonexistent because of the unquestionable political persecution in the countries of origin.⁴² In fact, the United States used refugees to enhance its international image as the benign superpower by offering refuge to escapees from the "evil" Soviet empire.⁴³ Furthermore, expense and distance assured that many refugees from Asia and Africa would not attempt a large-scale migration to the West. Finally, because the Communist governments strictly controlled the dissemination of information, many Eastern Europeans were not aware of the economic opportunities and freedoms that existed in Western Europe and the United States.⁴⁴

Although the United States acceded to the 1967 Protocol, its domestic refugee policy was largely inconsistent with the requirements delineated in the 1951 Convention.⁴⁵ The Immigration and Nationality Act (I.N.A.)⁴⁶ established procedures which were used discriminatorily to favor persons from hostile nations. The I.N.A. provided the U.S. Attorney General with the discretion to withhold deportation in cases where an alien would face "physical persecution" upon return to the home state.⁴⁷ Under the I.N.A.,

40. Martin, *supra* note 26, at 757 ("If someone had risked his life to escape the East's barbed wire, or had put up with the privations of refugee camps elsewhere in the world, it seemed churlish to doubt the seriousness of the claim.")

41. In particular, the United States accepted large numbers of refugees from Eastern Europe, including Hungary, Czechoslovakia, Poland, Yugoslavia, and the U.S.S.R. In the Western Hemisphere, the majority of refugees were fleeing communist regimes in Cuba and Nicaragua. From 1960 to 1967, 185,487 refugees from Cuba were granted admission into the United States. After the U.S. military withdrawal from Vietnam, the number of refugees from Indochina soared, totaling 290,075 during the period from 1975 to 1979. Refugees from the Peoples Republic of China, which was not considered part of the Soviet bloc, were also admitted in relatively large numbers throughout the years following the 1949 Communist Revolution in that country. CONG. RES. SERVICE, 96TH CONG., 1ST SESS., WORLD REFUGEE CRISIS: THE INTERNATIONAL COMMUNITY'S RESPONSE, REPORT TO THE COMMITTEE ON THE JUDICIARY 213 (1979) [hereinafter WORLD REFUGEE CRISIS].

42. See David A. Martin, *The New Asylum Seekers*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s 1, 9-11 (David A. Martin ed., 1988).

43. See generally JOSEPH CERQUONE, UNCERTAIN HARBORS: THE PLIGHT OF THE VIETNAMESE BOAT PEOPLE 5 (1987) (emphasizing the distinctly "Cold War flavor" of U.S. refugee policy); BARBARA M. YARNOLD, REFUGEES WITHOUT REFUGE: FORMATION AND FAILED IMPLEMENTATION OF U.S. POLITICAL ASYLUM POLICY IN THE 1980's 5-20 (1990) (discussing how U.S. decision-makers were overwhelmingly influenced by whether an alien was from a hostile, *i.e.*, Communist, country of origin).

44. See Martin, *supra* note 26, at 757.

45. Prior to the Refugee Act of 1980, U.S. law contained no general definition of a refugee. See Ira J. Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 874-75 (1982). There were also no statutory provisions for asylum. Although the Immigration and Naturalization Service (I.N.S.) promulgated asylum regulations, these procedures were haphazardly applied. *Id.* at 875 n.61.

46. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1525 (1994)).

47. The physical persecution standard was inconsistent with the 1951 Convention requirements. See *supra* note 32 and accompanying text. In 1965, Congress amended

the Attorney General also possessed authority to "parole" aliens temporarily into the United States "for emergent reasons or for reasons deemed strictly in the public interest."⁴⁸ In practice, the executive branch utilized this power to bring in persons fleeing communist countries.⁴⁹

The Refugee Act of 1980 sought to eliminate the discrimination in U.S. practice by enacting into law a comprehensive definition of refugee.⁵⁰ The 1980 Act, which also limits the use of the parole power,⁵¹ nonetheless permits the executive branch to establish annual parole programs.⁵² This new provision, in addition to placing an emphasis upon the discretionary aspect of asylum,⁵³ perpetuates the Cold War mentality that foreign policy considerations should control refugee determinations.⁵⁴

the statute, and "physical persecution" was replaced by "persecution on account of race, religion, or political opinion." Pub. L. No. 89-236, § 11, 79 Stat. 918 (1965) (amending 8 U.S.C. § 1253) (current version at 8 U.S.C. § 1253(h) (1994)). This change was made despite the fact that the United States had not formally acceded to the Convention and would not do so until it adopted the United Nations Protocol Relating to the Status of Refugees in 1968. See 1967 Protocol, *supra* note 9. However, even under this new standard, the Attorney General could favorably exercise discretion only if a particular alien faced a "clear probability of persecution." See, e.g., *Matter of Joseph*, 13 I. & N. Dec. 70, 72 (BIA 1968); *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); *Lena v. INS*, 379 F.2d 536, 538 (7th Cir. 1967). Aliens from noncommunist countries had to satisfy a high standard of proof to successfully petition the government to withhold their deportation. See, e.g., *Cisternas-Estay v. INS*, 531 F.2d 155 (3d Cir. 1976); *Gena v. INS*, 424 F.2d 227 (5th Cir. 1970).

48. Immigration and Nationality Act, § 212(d)(5) (1952) (current version at 8 U.S.C. § 1182(d)(5) (1994)). The "parole" power came to be used far beyond the scope for which it was originally intended, i.e., for aliens who required immediate medical attention or whose presence was required as a witness or for purposes of prosecution. See H.R. REP. NO. 1365, 82d Cong., 2d Sess. 52 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1706. However, individuals seeking refuge from communist nations were the primary beneficiaries of this provision. See *Kurzban*, *supra* note 45, at 870-71.

49. See generally *WORLD REFUGEE CRISIS*, *supra* note 41.

50. Section 201 of the Refugee Act of 1980 defines as a refugee:

any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 102 (1980) (amending 8 U.S.C. § 1101(a)).

51. The Refugee Act of 1980 limited the use of parole to a case-by-case basis. See 8 U.S.C. § 1182(d)(5)(B) (1994).

52. This provision authorizes the President to designate annually the number of refugees and persons of special humanitarian concern from specific geographic locations who may enter the United States. 8 U.S.C. § 1157(a) (1994).

53. In 1982, the Board of Immigration Appeals upheld the discretionary denial of asylum to an alien who had established likelihood of persecution. *Matter of Salim*, 18 I. & N. Dec. 311 (BIA 1982). Arguably, this decision has resulted in the frequent denial of asylum as a matter of discretion. See Arthur C. Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 SAN DIEGO L. REV. 999, 1000 (1985).

54. In the years immediately following passage of the Refugee Act of 1980, less than five percent of the admissions under the annual parole program came from noncommunist nations. See *Kurzban*, *supra* note 45, at 879-80 (suggesting that the 1980 Act "institutionalizes political choice as the primary criterion for allocating refugee admissions").

In 1990, the Foreign Operations Act highlighted the double standard in asylum decisions.⁵⁵ Under this Act,⁵⁶ Soviet Jews or Evangelical Christians, Ukrainian Catholics, and selected Vietnamese, Laotians, and Cambodians qualified as refugees if they offered a credible fear of persecution as opposed to the more rigorous standard of well-founded fear.⁵⁷ Similarly, the Immigration Act of 1990 indirectly identified refugees from Poland, Hungary, Panama, and Nicaragua as individuals who had uprooted themselves in order to flee persecution, and who should not be repatriated simply because of the rapid democratic changes which had taken place in those countries.⁵⁸ This provision is another illustration of congressional preference for refugees fleeing states that were hostile to the United States.⁵⁹

II. The Emerging Standard: Protectionism in Europe and America

Though the 1951 Refugee Convention was itself a "child of the Cold War,"⁶⁰ the instrument remains relevant today, and its advocates face even greater challenges following the demise of the Soviet Union. Significant changes generated by the end of the Cold War have triggered mass movements of people across the globe. In 1989, a flood of refugees from East to West Germany helped bring down the Berlin Wall.⁶¹ The ethnic conflict in

55. Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 101-167, 103 Stat. 1195 (1989) [hereinafter Foreign Operations Act].

56. Foreign Operations Act § 599(D).

57. "Well-founded fear" is the standard adopted by the 1951 Convention, and codified by the United States in the 1980 Refugee Act. See *supra* notes 32, 50 and accompanying text. By establishing a "credible basis for concern" standard for certain groups of asylum seekers, Congress bestowed preferential treatment. A credible basis for concern is established if the alien asserts that a "similarly situated individual, in his or her geographic locale" has been persecuted or the alien has "knowledge, either from having read or heard of . . . [persecution] as affecting persons in the same category residing elsewhere in the home country." H.R. CONF. REP. No. 344, 101st Cong., 1st Sess., 135 CONG. REC. H8495, H8515 (daily ed. Nov. 13, 1989).

58. Immigration Act of 1990, Pub. L. No. 101-649, § 104(d), 104 Stat. 4978, 4985 (1990).

59. By selectively relaxing refugee standards to accommodate certain groups for ideological reasons, the United States not only violates the spirit of the 1951 Convention, but it also contravenes Article 3 of the Convention, which requires contracting states to "apply the provisions of this Convention to refugees without discrimination as to . . . country of origin." 1951 Convention, *supra* note 8, art. 3.

60. Pierre Bertrand, *An Operational Approach to International Refugee Protection*, 26 CORNELL INT'L L.J. 495, 498 (1993).

61. On September 10, 1989, Hungary opened its border with Austria to allow East German refugees, gathered at the West German embassy in Budapest, to reach the West. East German President Erich Honecker subsequently permitted refugees in the Prague and Warsaw embassies to board trains for West Germany. He then, however, banned visa-free travel to Czechoslovakia out of fear that East German citizens would use that country as an escape route. In response to several large political protests during the month of October, the East German government eventually eased travel restrictions on October 24, 1989, thereby allowing East German citizens to enter Czechoslovakia. On November 4, Czechoslovakia opened its borders with West Germany, while 500,000 people demonstrated for democracy in the streets of East Berlin. Within five days, East Germany officially opened its western borders, resulting in the first major exodus since

Bosnia-Herzegovina, a direct ramification of the fall of communism in Eastern Europe,⁶² has produced hundreds of thousands of bona fide refugees with strong claims to asylum.⁶³ Finally, as recently as August 1994, the United States found itself confronted with another mass refugee flow from Cuba. During the height of the crisis, the United States was providing shelter to over 25,000 Cuban refugees at Guantanamo Bay Naval Base.⁶⁴ Most of the refugees attributed their departure to a sense of hopelessness about the island's future under the leadership of its long-time dictator, Fidel Castro.⁶⁵ Cuban government economists cite the collapse of the Soviet bloc and the consequent end of economic support as the main cause of Cuba's economic woes.⁶⁶

Such mass refugee movements complicate immigration policies. Both Western Europe and the United States are faced with refugees from areas where extreme poverty is compelling an increasing number of people to migrate. Growing economic disparity between industrialized nations and the Third World are forcing Western States to work towards the creation of appropriate international mechanisms to handle this new phase in international migration. For example, many Eastern Europeans are discontent with the hardships associated with the structural adjustments to free-market economies and are taking advantage of their proximity with the West. With the collapse of the Soviet Union, the iron grip has been relaxed and the self-verifying character of refugee claims has lost some of its clarity. As a result, signatories to the Refugee Convention are increasingly questioning the wisdom of their earlier commitments under international law. Specifically, Western nations have responded to these global changes with three different approaches: (1) reformation of liberal asylum laws, (2) interdiction of asylum seekers on the high seas, and (3) humanitarian intervention in the source country. These attempts at solving the refugee problem have met with varied levels of success.

A. The Rise of Nationalism and the Challenge to Open Borders in the European Union

The move toward European integration may not be beneficial for non-EU nationals hoping to settle in the European Union. In fact, the recently signed Dublin Convention,⁶⁷ the 1985 Schengen Agreement, and the 1990 Schengen Convention⁶⁸ in some ways reflect a growing nationalistic fervor

the Berlin Wall was built in 1961. See Ferdinand Protzman, *Thousands Swell Trek to the West by East Germans*, N.Y. TIMES, Sept. 12, 1989, at A1; *Clamour in the East: A Singular Month Produces an Exodus*, N.Y. TIMES, Nov. 10, 1989, at A16.

62. See LOESCHER, *supra* note 4, at 25 (discussing connection between ethnic conflict in the former Yugoslavia and the end of the Cold War).

63. *Refugees: Keep Out*, ECONOMIST, Sept. 19, 1992, at 64.

64. Paul Lewis, *Cuba Vows to End Exodus in Return for a Rise in Visas*, N.Y. TIMES, Sept. 10, 1994, at A1.

65. Tim Golden, *A Dubious Pact*, N.Y. TIMES, Sept. 10, 1994, at A4.

66. *Id.*

67. Dublin Convention, *supra* note 11.

68. Schengen Agreement and Convention, *supra* note 10.

within the countries of Western Europe. Although the agreements ostensibly advocate free trade, and thus appear adverse to a nationalist agenda, they also provide a strong weapon against undesirable immigration into the EU.⁶⁹

The EU nationalism which emerges from the Schengen and Dublin Conventions directs its "fear" of foreigners⁷⁰ against the asylum seeker. As defined by one commentator, nationalism is "a political principle which holds that 'foreigners' . . . have (or should have) no right under law to become citizens or to challenge the economic, political, and cultural dominance of citizens/nationals."⁷¹ Because of these anti-foreigner sentiments, members of the EU that are comfortable with the concept of internal free movement are reluctant to cede sovereignty over the politically charged issues of non-EU immigration and asylum.⁷² The European approach to these concerns involves the establishment of a legal framework which

69. The Schengen and Dublin Conventions grant the citizens of EU Member States unrestricted freedom of movement within the Union, but condition this freedom upon the adoption by each state of visa requirements and carrier sanctions intended to regulate the entry of foreigners into the EU. See *infra* notes 76-78 and accompanying text. In addition, these conventions assign responsibilities for asylum determinations to the entry state and require EU members to defer to the decision of that state. Because a sole state is responsible for handling an asylum request, the ability of the asylum seeker to choose a state with more liberal asylum laws is greatly reduced. See *infra* note 77 and accompanying text.

70. This "fear" of foreigners reflects the fact that Europeans have come to view foreigners as "threats to regional stability and security." James C. Hathaway, *Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 26 CORNELL INT'L L.J. 719, 720 (1993). In addition, there is "a pervasive belief that the cultural and racial heterogeneity which accompanies immigration jeopardizes European identity and solidarity." *Id.* at 720. See also W.R. Böhring, *Integration and Immigration Pressures in Western Europe*, 130 INT'L LAB. REV. 445 (1991). The fear of foreigners may also be rationalized by a concern that foreigners will compete with citizens for scarce jobs and housing. See Craig R. Whitney, *Europeans Struggle to Balance New Muslim Immigrants and Old Ways*, N.Y. TIMES, May 6, 1995, at A4. But cf. DANIELE JOLY & CLIVE NETTLETON, *REFUGEES IN EUROPE* 13 (1990) ("Economic recession and unemployment have often been put forward as an explanation for this [restrictionist] trend, but by itself it does not seem to be a sufficient explanation: Norway became one of the strictest countries for asylum-seekers . . . at a time when there was practically no unemployment.").

71. Daniel Kanstroom, *The Shining City and the Fortress: Reflections on the "Euro-Solution" to the German Immigration Dilemma*, 16 B.C. INT'L & COMP. L. REV. 201, 230 (1993).

72. See Kay Hailbronner & Jörg Polakiewicz, *Non-EC Nationals in the European Community: The Need for a Coordinated Approach*, 3 DUKE J. COMP. & INT'L L. 49, 50-55 (1992) (discussing reluctance of member states to cede sovereignty with regard to migration policy). See also Alan Cowell, *Seven European Union Nations Form a Passport-Free Zone*, N.Y. TIMES, Nov. 27, 1995, at A6 (noting that passport-free zone may make it simpler for unlawful job-seekers and criminals to traverse Western Europe once they gain entry to any country within the Schengen group). Immigration and asylum are not the only issues which have sparked debate among European leaders. The United Kingdom has recently backed away from the political and monetary union envisioned in the Maastricht treaty. Specifically, Prime Minister Major has expressed reluctance to join a single European Union currency by 1997. See John Darnton, *Major Turns Cool to British Links with European Union*, N.Y. TIMES, Feb. 5, 1995, at A10. One author refers to European integration as an erosion of state sovereignty which has "sparked a backlash in which traditional nationalist elements have combined with economic interests who fear

seeks to insulate EU Member States from the potentially harmful effects caused by a massive influx of people from non-Union countries.⁷³

To further the economic and political goals of the EU, which include the free movement of persons, transparency of the labor market, and political unity, Western European leaders decided to harmonize immigration and asylum policies.⁷⁴ The decision to implement a coordinated policy was also supported by a growing consensus within the EU that immigration was "the most serious problem facing Europe."⁷⁵ Certain scholars, however, have argued that the Western European fear of foreigners has resulted in a restriction of refugee protection under these recent agreements.⁷⁶ For example, the Schengen Convention imposes visa requirements on the nationals of most lesser developed countries and imposes penalties upon carriers which transport asylum seekers not in possession of the requisite visa.⁷⁷ The United Nations High Commissioner for Refugees has criticized such measures for tending to increase the risk of refoulement.⁷⁸ Both the Schengen and Dublin Conventions also assume that the treatment a refugee claimant receives in one signatory state reasonably discharges the duty of any other. In other words, states may legitimately rely upon each other's asylum decisions.⁷⁹ This reliance raises legal questions as to a State's obligations under Article 33 of the Refugee Convention, which imposes a duty upon each state to independently implement its responsibilities under international law.⁸⁰

Another indication of the devaluation of refugee protection in Europe is the recent amendment to the German Constitution's liberal guarantee of a right to asylum.⁸¹ In particular, the escalating number of asylum seekers

that the removal of protective barriers will hurt their position and privileges." GIDEON GOTTLIEB, *NATION AGAINST STATE* 17 (1993).

73. See generally Gil Loescher, *The European Community and Refugees*, 65 *INT'L AFF.* 617 (1989) (arguing that an asylum policy based on deterrence weakens refugee protection).

74. See Treaty on European Union, Feb. 7, 1992, Declaration on Asylum, 31 *I.L.M.* 247, 373 (identifying harmonization of asylum policies as an aim of the European Conference).

75. *Refugees: Keep Out*, *supra* note 63, at 64.

76. See generally Hathaway, *supra* note 70 (suggesting that under the guise of harmonization, the EU governments have renounced their commitments to refugee protection and the principle of nonrefoulement).

77. Schengen Convention, *supra* note 10, art. 26.

78. The risk of refoulement is increased by forcing carriers to verify visas and other travel documentation. These visa requirements do not distinguish between asylum seekers and other aliens. By essentially placing responsibility for asylum decisions in the hands of individuals who are untrained in the procedures of refugee principles and motivated by economic rather than humanitarian considerations, these provisions violate the spirit of the 1951 Refugee Convention.

79. Report of the European Commission on Immigration Law, *PARL. EUR. DOC.* (SEC 1857) 5 (1991).

80. 1951 Convention, *supra* note 8, art. 33.

81. GG art. 16a(2). Prior to the Amendment, the provision that "persons persecuted on political grounds shall enjoy the right of asylum" was applied liberally by the German courts. See Sam Blay & Andreas Zimmerman, *Recent Changes in German Refugee Law: A Critical Assessment*, 88 *AM. J. INT'L L.* 361, 362 (1994).

from Eastern Europe led to a dramatic increase in the number of asylum applications to Germany.⁸² German politicians claimed that most asylum seekers were economic migrants or criminals without legitimate claims for asylum who were abusing the liberal provisions of the German Constitution.⁸³ At the time, Germany was in the midst of an economic recession and was struggling with the rising costs of reunification. These combined factors resulted in public resentment, manifested by increased violence directed primarily against asylum seekers. In 1992, there were more than 2,200 reported cases of violence against foreigners.⁸⁴

In order to preserve a law that would protect applicants in genuine need of asylum while erecting a barrier against large influxes of foreigners, Germany enacted a constitutional amendment.⁸⁵ The altered law retains the right of asylum for the politically persecuted, but considerably limits the scope of that right. In particular, the amendment imposes restrictions based upon (1) entry from a Member State of the European Union, (2) entry from another state where application of the Refugee Convention and the European Convention on Human Rights is assured, and (3) entry from places designated as safe countries of origin.⁸⁶ In other words, applicants who enter Germany from States that, at a minimum, comply with the Refu-

82. As of October 1992, Germany was receiving approximately 50,000 refugees per month, resulting in an annual total of 438,191. This mass influx accounted for a 71% increase in refugee applicants from 1991. Blay & Zimmerman, *supra* note 81, at 361.

83. Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT'L L. 503, 514 & nn.75-77 (1993).

84. *European Topics*, INT'L HERALD TRIB., March 18, 1993, at 6.

85. GG art. 16a.

86. The relevant portions of the Amendment state:

(1) Persons persecuted on political grounds shall enjoy the right of asylum.

(2) Paragraph 1 may not be invoked by persons who enter from a member state of the European Communities or from a third country where the application of the Convention Relating to the Status of Refugees and the European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR] is guaranteed. Countries outside the European Communities to which sentence 1 applies shall be determined by law, subject to the approval of the Bundesrat. In such cases deportation measures may be carried out regardless of an appeal.

(3) A law subject to the approval of the Bundesrat may determine the states whose legal situation, application of the law and general political situation seem to ensure that there is no political persecution or inhuman or degrading treatment or punishment. An alien originating in such a state will not be considered to be politically persecuted unless he produces reasons why he is politically persecuted contrary to the presumption of sentence 1.

(4) In cases arising under paragraph 3, deportation measures will only be suspended by a court if there are serious doubts about the legality of the measure. This also applies to deportation measures in other manifestly unfounded cases. In that regard the scope of review can be limited and subsequent argument disregarded. Details shall be prescribed by statute.

(5) Paragraphs 1 to 4 are without prejudice to treaties between member states of the European Communities or between member states and third states that make arrangements, with due regard to the obligations under the Convention Relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms, whose application is guaranteed by the parties to these treaties, for the examination of applications for asylum, including the reciprocal recognition of asylum decisions.

gee Convention and adhere to the European Convention on Human Rights will not be granted political asylum. This approach takes advantage of the wording of the Refugee Convention which does not preclude deportation to a country where the refugee will be safe from both persecution and refoulement.⁸⁷ Though the concept of safe countries of origin does not necessarily contravene international law, it seems to disregard the spirit of the Refugee Convention. The German approach is consistent with the broader European attempts to structure a legal framework for refugee law which restricts access to asylum.⁸⁸

B. The Fear of Refugees: Haitian Boat Interdiction

Concerns about the rapidly increasing number of asylum seekers are not unique to Europe. Although the U.S. solution differs in form from that of the EU, the underlying policy objectives are quite similar. The U.S. policy of interdiction on the high seas came under close scrutiny during the Bush Administration. In September 1991, the elected president of Haiti, Rev. Jean-Bertrand Aristide, was ousted from power by a military coup.⁸⁹ In the wake of this takeover, the number of asylum seekers from Haiti to the United States swelled to new heights.⁹⁰ This dramatic increase was due partially to the harsh repression of Aristide supporters by the military lead-

Id.

87. The 1951 Convention provides that contracting states may not "impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . enter or are present in their territory without authorization." 1951 Convention, *supra* note 8, art. 31. See *supra* note 34 and accompanying text. Germany has read this provision to mean that if asylum seekers do not come directly from their State of origin, where they may be subject to persecution, the prospective receiving State may impose certain sanctions. However, since the 1951 Convention does not restrict a refugee to a particular State of refuge, one can argue that a refugee is not precluded from applying for asylum in a third State by merely traveling through a State other than their State of origin. According to one commentator, the implications of the German interpretation are considerable:

To be considered for asylum under the new German law, a person must travel directly from the state of persecution to a German port. Since Germany is virtually surrounded by secure states, the only way the asylum seeker can reach Germany directly is by air or by sea. As almost 90 percent of all asylum seekers in Germany come by land through one of its neighbors, most of them will not be considered for, let alone granted, the right of asylum.

Blay & Zimmermann, *supra* note 81, at 369.

88. Since the amendment was enacted, the number of foreigners seeking asylum in Germany has decreased by more than 70% from 438,191 applications in 1992 to 127,210 in 1994. *German Supreme Court Reviews Asylum Laws*, REUTERS, Nov. 21, 1995, available in LEXIS, News Library, Reuwlld File.

89. See *Haiti's Military Assumes Power After Troops Arrest the President*, N.Y. TIMES, Oct. 1, 1991, at A1.

90. Between September 30 and November 25, 1991, the United States interdicted 4,530 Haitians on the high seas. Bill Frelick, *Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection*, 26 CORNELL INT'L L.J. 675, 686 (1993). By August 1994, the United States had provided shelter for more than 21,000 Haitians at the U.S. military installation in Guantanamo Bay, Cuba. Larry Rohter, *U.S. Starts the Return of Haitians from Guantanamo*, N.Y. TIMES, Jan. 7, 1995, at A3.

ers.⁹¹ However, many fled the island because of the severe economic hardships resulting from an embargo imposed by the Organization of American States (OAS).⁹² On May 23, 1992, President Bush ordered the U.S. Coast Guard to interdict all boats coming from Haiti.⁹³ The passengers were to be returned to Port-au-Prince without any inquiry as to possible refugee claims. This policy was a direct way of thwarting the refugee flow, but it was of questionable legality under Article 33 of the Refugee Convention.⁹⁴

The rationale behind President Bush's order was based partly upon economic concerns similar to those confronting the European Union. Most immigrants arrive in the United States with little money and few skills, thus imposing a financial burden upon the states in which they settle.⁹⁵ In Florida alone, the cost of education, medical care, incarceration, and other public services for immigrants is estimated at 2.5 billion dollars a year.⁹⁶

Nationally, about 150,000 of 900,000 legal immigrants each year are refugees and asylum seekers.⁹⁷ Because these immigrants are not evenly distributed, states such as Florida, California, New York, and Texas bear a huge portion of the costs.⁹⁸ In addition, there is a growing number of illegal aliens who cost taxpayers in these states more than one billion dollars a year.⁹⁹ For this reason, Florida was joined by several other states, including California and Texas, in filing suit against the federal government for the money it has spent on public assistance for these immigrants.¹⁰⁰ On

91. See Pamela Constable, *As Political Crackdown Widens in Haiti, U.S. Returns 272 More Refugees*, BOSTON GLOBE, May 29, 1992, at 2 (detailing the harassment of Aristide supporters and curtailment of press freedoms in Haiti since the coup).

92. *Support to the Democratic Government of Haiti*, OAS MRE/Res.1/91 (Oct. 3, 1991); *Support for Democracy in Haiti*, OAS MRE/Res. 2/91 (Oct. 8, 1991).

93. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992).

94. Whether the Coast Guard's interception of Haitian refugees on the high seas contravened domestic and international law was litigated in the federal courts. The Eleventh and Second Circuits reached contrary conclusions on this issue. *Haitian Refugee Center v. Baker*, 953 F.2d 1498 (11th Cir. 1992), cert. denied, 112 S. Ct. 1245 (1992); *Haitian Centers Council v. McNary*, 969 F.2d 1350 (2d Cir. 1992), rev'd, 113 S. Ct. 2549 (1993). The Supreme Court addressed the legality of interdiction in *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993). See *infra* note 106 and accompanying text (discussing Supreme Court decision in *Sale* upholding interdiction policy as legal under U.S. and international law).

95. Lizette Alvarez, *Immigration: A Contentious Topic*, ST. PETERSBURG TIMES, June 14, 1994, at 1A.

96. *Immigrants Cause Unfair Burden, Governor Says*, TIMES-PICAYUNE, Mar. 14, 1994, at A4.

97. Alvarez, *supra* note 95, at 1A.

98. A 1994 report by the Center for Immigration Studies estimated that immigrants generated a net national deficit of \$29.1 billion in 1992. *A Flickering Torch*, SUN SENTINEL (Fort Lauderdale), Oct. 30, 1994, at 4H.

99. *Id.*

100. The district court dismissed Florida's plea for relief from the costs associated with illegal immigration on December 19, 1994. Governor Lawton Chiles referred to the decision as a "temporary setback" and indicated the state's intention to appeal. See Mireya Navarro, *Florida's Plea for Immigration Relief Fails*, N.Y. TIMES, Dec. 21, 1994, at A20. A U.S. district court in California similarly dismissed the California lawsuit, holding that only Congress and the President can decide how to allocate federal funds on

November 8, 1994, California residents, disgruntled with lenient immigration policies, voted in favor of Proposition 187, an initiative which denies public benefits such as education, welfare, and most health care to illegal immigrants.¹⁰¹

Furthermore, President Bush's 1992 Executive Order reflected the increasing popularity of a protectionist agenda in American politics. This "Americanism" was a major factor in the 1992 presidential election. Throughout his campaign for the Republican presidential nomination, challenger Pat Buchanan criticized the Bush Administration's inability to block one of the largest waves of immigrants in U.S. history.¹⁰² In his speeches, Buchanan asked, "What happened to make America so vulgar and coarse, so uncivil and angry?"¹⁰³ He also warned that it was no coincidence "that racial and ethnic conflicts pervade our media when the racial and ethnic character of the U.S. has changed more in four decades than in the previous twenty."¹⁰⁴ For many people who live in the states bearing the brunt of the immigration burden, these issues were a major concern during the 1992 recession and remain so today.¹⁰⁵

immigration problems. California was seeking \$2.4 billion and is also appealing the case. See Reynolds Holding, *Bid to Recoup Immigration Costs Denied*, S.F. CHRON., Feb. 14, 1995, at A1.

101. State of California Proposition 187, Nov. 8, 1994, 1994 Cal. Legis. Serv. Prop. 187 (West) (codified in scattered sections of California's Penal, Welfare and Institutions, Health and Safety, Education, and Government codes). A recent CNN/USA Today poll showed that 62% of individuals polled wanted their states to eliminate benefits to undocumented aliens. David LaGesse, *Discontent Grows Toward Immigrants*, SUN SENTINEL (Fort Lauderdale), Jan. 8, 1995, at 4A. See also B. Drummond Ayres Jr., *Anti-Alien Movement Spreading in Wake of California's Measure*, N.Y. TIMES, Dec. 4, 1994, at A1 (discussing how California is reshaping U.S. immigration debate as "Proposition 187" movements gain momentum in other states). Proposition 187 is under legal challenge. In November 1994, a district court in California issued a temporary restraining order blocking immediate enforcement of the initiative's bans on non-emergency medical, educational, and social services for illegal immigrants, and also ordered a temporary halt to the initiative's requirement that police and government agencies report suspected illegal immigrants to the Immigration and Naturalization Service and the state attorney general's office. See Paul Feldman & James Rainey, *Parts of Prop. 187 Blocked by Judge*, L.A. TIMES, Nov. 17, 1994, at A1; H. Eric Schockman, *Why Prop. 187 Needs Judicial Review*, L.A. TIMES, Jan. 22, 1995, at B19. The Ninth Circuit held that the district court acted appropriately in blocking most portions of Proposition 187 from taking effect prior to an upcoming trial to determine its constitutionality. *Gregorio T. v. Wilson*, 59 F.3d 1002 (9th Cir. 1995).

102. See John Aloysius Farrell, *Open Doors/Closing Minds*, BOSTON GLOBE, Feb. 23, 1992, at 61 (supporting Buchanan's view that if the current trend continues, the 1990s may surpass the 1900s as the single biggest decade of immigration with more than a million immigrants a year). In the 1996 presidential campaign, Pat Buchanan once again put forth a nationalistic message, denouncing illegal immigration and supporting protectionist trade policies. Adam Nagourney, *Buchanan Refuses to Let Boos Spoil the Fun*, N.Y. TIMES, Feb. 23, 1996, at A22; James Bennet, *Buchanan, Exalted, Pushes Economic Insecurity Theme*, N.Y. TIMES, Feb. 22, 1996, at A1.

103. Farrell, *supra* note 102, at 61 (quoting Buchanan).

104. *Id.*

105. See *supra* notes 100-01 and accompanying text. See also Peter Passell, *A Job-Wage Conundrum: Crises in Cuba and Haiti Resurrect Debate About Immigrants and Employment in U.S.*, N.Y. TIMES, Sept. 6, 1994, at D1 (suggesting that more unskilled immigrants mean lower wages and fewer low-end jobs for those already here).

The policy of interdicting refugees in international waters—physically preventing them from entering the United States—and returning them to their home country was challenged in the American courts. In *Sale v. Haitian Centers Council*, the Supreme Court held that neither the I.N.A. nor Article 33 of the Refugee Convention limits the President's power to order the Coast Guard to repatriate undocumented aliens intercepted on the high seas.¹⁰⁶ Nevertheless, many have criticized the Bush Administration policy

106. *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993). In *Sale*, the Supreme Court addressed the question of whether the interdicted Haitians had cognizable legal rights under U.S. domestic law or international law. The relevant U.S. law is Section 243(h)(1) of the I.N.A., which states: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1) (1988 & Supp. IV 1992). Respondents contended that the removal of the words "within the United States" and the addition of the word "return" to this section reflected the Congressional intent in 1980 to conform U.S. law with Article 33(1) of the 1951 Refugee Convention and 1967 Protocol, assuring that the benefits of the section applied extraterritorially (thus encompassing refugees intercepted on the high seas). *Sale*, 113 S. Ct. at 2558. Petitioners rejected this assertion, arguing that Section 243(h)(1) does not apply to actions of the President and Coast Guard on the high seas. *Id.* The Court reasoned that because no I.N.A. provision authorizes exclusion or deportation proceedings outside of the United States, Section 243(h)(1) cannot be interpreted to limit the Attorney General's actions in places where she has no authority to conduct such hearings. *Id.* at 2560. In the absence of a clear Congressional intent to the contrary, the Court will presume that the Act does not apply outside U.S. borders. *Id.* (citing *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 440 (1989) ("When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute.")). The statute, therefore, does not restrict the President's authority to order the interdiction and repatriation of Haitians. The Court then characterized the respondent's definition of "return" as overly expansive, relying upon the U.S. legal distinction between deportation and exclusion. By using both "deport" and "return" in Section 253(h)(1), Congress must have intended "return" to signify exclusion at a border. Otherwise Congress would have used the word "return" alone to cover both deportation and exclusion proceedings. *Id.* The use of both terms thus "implies an exclusively territorial application." *Id.*

The Court then addressed the international law issue. The relevant segment of Article 33(1) of the 1951 Refugee Convention reads: "No Contracting State shall expel or return ('refouler') a refugee . . . to the frontiers of territories where his life or freedom would be threatened on account of his race, religion . . ." 1951 Convention, *supra* note 8, art. 33, para. 1. Interpreting this provision, the Court concluded that the phrase "expel or return (refouler)" paralleled the phrase "deport or return" in I.N.A. Section 253(h)(1). Using the American legal distinction between deportation and exclusion, the Court reasoned that "return" as used in the treaty must refer only to "the exclusion of aliens who are merely on the threshold of initial inquiry." *Sale*, 113 S. Ct. at 2563 (quoting *Shaughnessy v. United States ex rel. Mezei*, 357 U.S. 206, 212 (1953)). Arguably, the U.S. government would not have instituted a policy of interdiction without the belief that these Haitians were indeed "on the threshold of initial entry." *Id.* at 2569 (Blackmun, J. dissenting). This interpretation of "return" seems strained at best especially since the Convention qualifies the term by placing "refouler" in parentheses. The Court conceded that "refouler" is translated as "repulse" or "drive back," but then used the definition to distinguish interdiction. "Return" connotes a defensive act of resistance at the border as opposed to the active transportation of refugees to another destination. *Id.* at 2564.

for undermining the spirit of the principle of nonrefoulement.¹⁰⁷ In particular, the United States lost any moral high ground it may have held in protesting the treatment of refugees by other governments.¹⁰⁸ President Bill Clinton, who had vehemently opposed the Bush Administration's Haitian refugee policy during the 1992 campaign,¹⁰⁹ was also the subject of criticism during the early stages of his presidency because of a post-election reversal in his stance.¹¹⁰ Until the summer of 1994, the emerging international approach to refugee crises, as evidenced first by a resurgent nationalism in the EU and subsequently in a decision by America's highest court, pandered to protectionist fears and advocated the use of restrictive border controls.

C. The Clinton Doctrine: Humanitarian Intervention to Restore International Security

During the summer of 1994, Fidel Castro provided President Clinton with both a challenge and an opportunity. The Cuban leader opened his borders, allowing free exit to those who wished to brave the waters between the Caribbean island and Miami, Florida.¹¹¹ Once it became clear that Cuban officials would not restrain those seeking to leave by boat, the United States was forced again to confront its much debated refugee policy.¹¹² This was an opportunity for the President to regain the approval of

107. See, e.g., Hiroshi Motomura, *Haitian Asylum Seekers: Interdiction and Immigrants' Rights*, 26 CORNELL INT'L L.J. 695 (1993); David A. Martin, *Interdiction, Intervention, and the New Frontiers of Refugee Law and Policy*, 33 VA. J. INT'L L. 473 (1993).

108. The U.S. State Department expressed dismay at the repatriation of Vietnamese refugees by Hong Kong in December 1991, only to be confronted with questions about U.S. interdiction of Haitian boat people. See Barbara Basler, *Hong Kong Ousts More Boat People*, N.Y. TIMES, Dec. 11, 1991, at A16 (discussing repatriation of Vietnamese).

109. During his campaign for president, Bill Clinton stated:

I am appalled by the decision of the Bush Administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to political asylum This process must not stand. It is a blow to the principle of first asylum and to America's moral authority in defending the rights of refugees around the world.

Clinton Continues Summary Return of Haitians: U.S. Lawyers Investigate In-Country Processing, REFUGEE REP., Jan. 29, 1993, at 1, 2 (quoting then Presidential Candidate Bill Clinton).

110. See, e.g., Frelick, *supra* note 90, at 688.

111. This was not the first time that South Florida's shores were flooded with Cuban refugees. In 1980, the Carter Administration allowed an estimated 125,000 Cubans to enter the United States. The "Mariel" Boatlift, named for the Cuban port of Mariel from which the asylum seekers set off, changed the demography of Miami, whose residents are currently over 60% Cuban. In addition, Mariel imposed an added cost on American taxpayers because many of the refugees were in fact convicted criminals in Cuba who were subsequently incarcerated in the United States. See Edward Cody, *Florida Seeking to Cope with Influx*, WASH. POST, Dec. 15, 1984, at A12.

112. Arguably, U.S. foreign and trade policy toward Cuba was instrumental in causing the mass flow of refugees. Since 1960, the United States has maintained a strict economic embargo against Cuba. In 1992, the Bush Administration increased economic pressure on the Castro regime by passing the Cuban Democracy Act. These actions, combined with Cuba's loss of its principal benefactor, the Soviet Union, have caused the standard of living in Cuba to disintegrate even further. See Seth Borenstein, *Immigration Policy Needs Direction*, SUN SENTINEL (Fort Lauderdale), Oct. 30, 1994, at 3S.

critics who were gravely disappointed with his approach to the Haitian exodus. Given the already exacerbated anti-immigrant politics in Florida during an election year,¹¹³ the Administration needed to act swiftly and it did. By mid-September, over 30,000 Cubans had fled the island, nearly all of whom were interdicted at sea and temporarily housed at Guantanamo Bay Naval Base.¹¹⁴ At that point, the Administration signed an agreement with the Castro regime under which the United States agreed to accept at least 20,000 new Cuban immigrants each year in exchange for a guarantee that immediate efforts be taken to reduce the outflow and number of unsafe departures from the island.¹¹⁵ On May 2, 1995, the United States officially announced a policy of summarily returning Cuban refugees to their homeland. This policy marked a shift from the nine-month old practice of directing Cuban refugees to Guantanamo Bay as well as from a three-decade old policy of granting free entry to individuals who sought relief from the repressive regime of Fidel Castro.¹¹⁶

The Cuban situation exemplified the dire consequences of refugee movements, and thus provided support for the President's decision to threaten the Haitian military junta with the use of force. Throughout the summer, the United States had been pressing the U.N. Security Council to authorize military intervention in Haiti. In order to legitimate the restoration of democracy under international law, the Clinton Administration urged the Council to view the massive flow of refugees as a threat to international security in the region. On July 31, 1994, the U.N. Security Council responded by passing Resolution 940 which authorized "Member States . . . to use all necessary means to facilitate the departure from Haiti of the military leadership . . ."¹¹⁷ In a televised address to the nation on Septem-

113. See Richard L. Berke, *Governor Chiles Seizes the Refugee Issue*, N.Y. TIMES, Sept. 11, 1994, at A22 (suggesting that the Governor's efforts to stem the exodus and influence U.S. refugee policy would benefit him in an election year); Deborah Sharp, *Action on Cuba Could Pay Off For Chiles*, USA TODAY, Aug. 23, 1994, at 2A (emphasizing the opposition of Florida voters to a government policy which gives Cuban refugees preferential treatment).

114. See *supra* note 64 and accompanying text.

115. Under the agreement, the Administration set a minimum level of 20,000 visas for Cuban immigration, and the Administration also agreed to issue entry visas for 500 close relatives of Cubans already living in the United States. In addition, for one year only, the United States agreed to grant entry to all Cubans on the American immigration waiting list. See Lewis, *supra* note 64, at A1. More than 200,000 Cubans, most of whom did not flee the island in August 1994, applied for the 20,000 available visas. See *What Refuge for Refugees*, ST. LOUIS POST-DISPATCH, Feb. 5, 1995, at 2B. Consequently, only 5,000 of the 27,500 Cuban refugees who resided at Guantanamo Bay Naval Base were granted entry in the first year of the accord. *U.S. Meets Quota for 20,000 Visas in Cuban Award*, WASH. POST, Aug. 22, 1995, at A9. The others remained in a limbo-like existence, the victims of a shift in U.S. policy. Most of the refugees gradually gained entry to the United States. On January 31, 1996, the U.S. government officially closed down the tent cities which had been erected at Guantanamo a year and a half earlier. Mireya Navarro, *Last of Refugees From Cuba in '94 Flight Now Enter U.S.*, N.Y. TIMES, Jan. 31, 1996, at A8.

116. Steven Greenhouse, *U.S. Will Return Refugees to Cuba in Policy Switch*, N.Y. TIMES, May 3, 1995, at A1.

117. S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994).

ber 15, 1994, President Clinton referred to the prospect of an expanded refugee crisis as a critical factor in his decision to impose an ultimatum on the Haitian military junta.¹¹⁸ Fortunately, on September 19, a final diplomatic effort to avert a U.S. military invasion of Haiti was successful.¹¹⁹ Negotiations resulted in an agreement which would restore President Aristide to power. President Clinton subsequently ordered 20,000 U.S. troops to Haiti for the purpose of supervising the transition in government.¹²⁰ During the months following Aristide's reinstatement as president, the United States gradually reduced its military presence while transferring principal control over the security mission to a combined U.N.-U.S. force of 6,000 troops.¹²¹

III. Proposed Strategies of Response in the Post-Cold War World

In order to effectively handle the challenges of refugee movements in the post-Cold War world, states must develop a comprehensive strategy designed to deal with mass exodus emergencies. Because the confines of the U.N. Charter as well as the legal obligations set forth in the 1951 Refugee Convention restrict the number of feasible alternatives available, viable solutions must address the possibility of altering the current legal structure. Two potential means of crisis management adopt this approach: (1) amending the U.N. Charter in order to permit greater use of the Security Council in refugee emergencies, and (2) reevaluating the principle of nonrefoulement so as to legitimate interdiction under the Refugee Conven-

118. In his speech, President Clinton emphasized that

Three hundred thousand more Haitians, 5 percent of their entire population, are in hiding in their own country. If we don't act, they could be the next wave of refugees at our door. We will continue to face the threat of a mass exodus of refugees and its constant threat to stability in our region and control of our borders.

Address to the Nation on Haiti, 30 WEEKLY COMP. PRES. DOC. 1779, 1781 (Sept. 15, 1994).

119. President Clinton sent former U.S. President Jimmy Carter, retired Chairman of the Joint Chiefs of Staff General Colin L. Powell, and Senator Sam Nunn of Georgia to Haiti in a final diplomatic effort to avert U.S. military action. The President authorized the emissaries to discuss arrangements for the peaceful departure of Haiti's ruling junta. Douglas Jehl, *Showdown With Haiti: Holding Off, Clinton Sends Carter, Nunn and Powell to Talk to Haitian Junta*, N.Y. TIMES, Sept. 17, 1994, at A1. This final attempt at diplomacy resulted in an agreement which provided for the lifting of economic sanctions and the embargo imposed on Haiti and the early "retirement" of certain Haitian military officers who had been in de facto control of the nation. *Mission to Haiti: Text of the Agreement Averting U.S. Invasion of Haiti*, N.Y. TIMES, Sept. 20, 1994, at A12 [hereinafter *Haiti Agreement*].

120. At the time the agreement was reached, the United States had positioned twenty warships within striking distance of the island. Throughout the talks, the emissaries communicated to the junta the fact that a U.S. invasion was imminent and that the damage which would be inflicted on the Haitian people in the event of a military operation would be severe. Elaine Sciolino, *Mission to Haiti: Diplomacy*, N.Y. TIMES, Sept. 20, 1994, at A1. The agreement reached with the junta provided for a U.S. military mission to supervise the transition in power. See *Haiti Agreement*, *supra* note 119, at A12.

121. See F. Andy Messing, Jr., *Perspective on Haiti: A Peacekeeping Job Half-Done*, L.A. TIMES, Feb. 21, 1995, at B5 (criticizing the U.S. peacekeeping effort in Haiti and discussing the continued costs of restoring President Aristide to power).

tion. A third proposal adheres to the spirit and law of both the U.N. Charter and Refugee Convention by advocating the establishment of strong emergency relief mechanisms at the regional level.

A. Reconciling Humanitarian Intervention with the U.N. Charter

Article 51 of the U.N. Charter preserves the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations.¹²² However, the U.N. Charter contains no exception for humanitarian intervention, and the International Court of Justice has refused to read the provisions governing the use of force expansively.¹²³ A close analysis of the Clinton Doctrine as applied in Haiti reveals the legal and practical problems associated with humanitarian intervention.

1. A Case Study: *The Threat of Military Intervention in Haiti*

The dissolution of the former Soviet Union and the end of the Cold War illustrate how the international political scene is susceptible to rapid and revolutionary change. However, two enduring elements of world politics are the central role of force in international relations and the debate over the conditions which are required for its legitimate use. There are three main factors which make the use of force under the guise of humanitarian intervention undesirable: (a) its illegality under the U.N. Charter, (b) the great potential for its abuse by powerful nations, and (c) the lack of commitment on the part of nations toward implementing such a policy. The Clinton Administration's threat to invade Haiti under the authorization of Security Council Resolution 940 presents an opportunity to examine each of these issues.

a. The Legal Obstacle: Article 2(4) of the U.N. Charter

There is language in the U.N. Charter which indicates that the Security Council's authorization of intervention in Haiti was illegal. In Article 2(4), all Member States agree to "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."¹²⁴ In order for the Security Council to approve military intervention, it must conclude that there has been a threat to international peace and security under Article 42 of the U.N. Charter.¹²⁵ In Haiti's case, the idea that a tiny nation whose economy was in shambles and whose military posed no threat at all to the surrounding region threatened international peace and security is a difficult proposition to defend. The official response by U.N. officials focused upon the desperate

122. U.N. CHARTER art. 51. See also *infra* text accompanying notes 132-38.

123. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, reprinted in 25 I.L.M. 1023 (1986) (construing the prohibition in Article 2(4) broadly and the exception in Article 51 narrowly). The International Court of Justice is the principal judicial organ of the United Nations. U.N. CHARTER art. 92.

124. U.N. CHARTER art. 2, ¶ 4.

125. U.N. CHARTER art. 42.

plight of Haitian refugees.¹²⁶ However, the Haitian exodus primarily affected the United States, the world's only superpower with the world's largest economy. A mass influx undoubtedly burdens certain segments of society, but one cannot equate such costs with a threat to international peace without severely undermining the intent of the Charter language.¹²⁷ The Council had never before considered the flow of refugees to constitute such a threat, and arguably, its actions during the summer of 1994 were based upon a deep concern over human rights abuses in Haiti. In fact, Resolution 940 cites the "further deterioration of the humanitarian situation in Haiti" and the "systematic violation of civil liberties" as core reasons behind the authorization of military intervention.¹²⁸ This reasoning is problematic because the U.N. Charter does not explicitly authorize the use of force to ensure universal observance of human rights.¹²⁹

Champions of humanitarian intervention have argued that the reference to "Purposes" in Article 2(4) includes the advancement of human rights.¹³⁰ However, the Charter's history indicates otherwise. In fact, the protection of sovereignty and the maintenance of world peace were the supreme goals of the United Nations. To suggest differently "ignores persuasive evidence of a distinct hierarchy of purposes in the Charter as originally conceived."¹³¹

There are several reasons why humanitarian intervention is illegal under the Charter. First, the promotion of human rights is only one organizational goal of the United Nations.¹³² If the founding members had intended to rely upon coercive means as a possible method of implementing all U.N. goals, they would not have specifically provided for only one exception to Article 2(4), namely the self-defense provision of Article 51.¹³³ Second, the founding Member States drafted the U.N. Charter in

126. S.C. Res. 940, *supra* note 117 (citing the "desperate plight of refugees" as a reason for authorizing intervention in Haiti).

127. The refugee justification is flawed in another sense as well. If a return to democracy is certain to stop the flight, one can't help but wonder why Mexican citizens living under a duly elected government continue to flood the cities of Texas and Southern California.

128. S.C. Res. 940, *supra* note 117.

129. U.N. CHARTER art. 39.

130. Michael Reisman & Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167-195* (Richard B. Lillich ed., 1973).

131. Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185, 190* (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

132. The third stated purpose of the United Nations is:

To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion[.]

U.N. CHARTER art.1, ¶ 3 (emphasis added).

133. U.N. CHARTER art. 51. See also Theodor Meron, *Commentary on Humanitarian Intervention*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 212, 213* (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (citing *Nicar. v. U.S.*, 1986 I.C.J. 14, in which the I.C.J. determined that the only exception to Article 2(4) is Article 51).

1945, its principal purpose being to end the scourge of war.¹³⁴ The Member States sent representatives to San Francisco with the shared hope that safeguards would be implemented to protect against future acts of aggression.¹³⁵ If their primary goal had not been to guarantee the protection of sovereign nations from aggressors, the Permanent Members easily could have chosen to give the Security Council coercive authority in connection with all the principles and purposes of the United Nations. Instead, the Security Council can legitimately use force only when there is a threat to the peace, a breach of the peace, or an act of aggression.¹³⁶ In addition, a majority of States rejected a proposal to include a Bill of Rights in the U.N. Charter, indicating that they were unwilling to cede national sovereignty to the organization.¹³⁷ Finally, Article 2(7) of the Charter reinforces the idea that the founding members were reluctant to give the United Nations power over "matters which are essentially within the domestic jurisdiction of any state."¹³⁸

One can also construct a persuasive moral argument against humanitarian intervention. There is a moral duty not to interfere with a state which is developing its policies through the process of self-determination. Just as an individual deserves to have his moral choices respected by others, a state is also a moral being capable of being autonomous in a moral sense.¹³⁹ Foreign intervention violates this autonomy. However, several scholars believe that such an interpretation of the U.N. Charter leaves human rights and freedoms significantly unprotected.¹⁴⁰

b. Distinguishing Precedent: The Protection of U.S. Nationals in Grenada and Panama

The motives and consequences of humanitarian intervention influence the way in which the international community responds to the use of force. Military operations in Grenada and Panama are two instances where the

134. See Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT v. MIGHT* 37 (Council on Foreign Relations ed., 1989).

135. U.N. CHARTER pmb. Referring to the purpose of the Charter, one scholar stated: [i]n the future, the only "just war" would be war against an aggressor—in self-defense by the victim, in collective defense of the victim by others, or by all. Nations would be assured independence, the undisturbed enjoyment of autonomy within their territory, and their right to be let alone.

Henkin, *supra* note 134, at 39.

136. U.N. CHARTER art. 39.

137. See Farer, *supra* note 131, at 191.

138. U.N. CHARTER art. 2, ¶ 7.

139. See generally G.F. HEGEL, *THE PHILOSOPHY OF RIGHT* (T.M. Knox trans., 1965) (articulating the notion of the moral personality of the State). See also J. RAWLS, *A THEORY OF JUSTICE* 378 (1971) (suggesting that the consequence of equality of nations is "the principle of self-determination, the right of a people to settle its own affairs without the interference of foreign powers").

140. See, e.g., FERNANDO TESON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (1988); *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* (Richard B. Lillich ed., 1973).

international community denounced intervention.¹⁴¹ Although several U.N. Member States condemned these unilateral military actions, U.S. intervention in Grenada and Panama can be justified under the Charter more easily than Resolution 940.

i. The Decision to Invade Grenada

On October 12, 1983, a small militia group seized the Prime Minister of Grenada and placed him under arrest.¹⁴² He and several members of his cabinet were executed, leaving Grenada without a government and under the de facto control of a paramilitary group who subsequently implemented a shoot-to-kill curfew.¹⁴³ Approximately one thousand U.S. citizens were residing in Grenada at the time, eight hundred of whom were medical students at St. George's University Medical School.¹⁴⁴ In response to these events, six members of the Organization of Eastern Caribbean States, joined by Barbados and Jamaica, urgently requested U.S. assistance in a military operation to restore a democratically-elected government to the island.¹⁴⁵ On October 23, President Reagan authorized the use of U.S. military force in Grenada.¹⁴⁶ In discussing the invasion, President Reagan referred to Grenada as "a Soviet-Cuban colony, being readied as a major military bastion to export terror and undermine democracy."¹⁴⁷

Although the Reagan Administration proffered three legal arguments to defend the American invasion of Grenada and subsequent restoration of its democratic government,¹⁴⁸ one such principle alone presents a stronger case for the Grenada intervention than the entire rationale behind sending forces to Haiti. That principle was a bona fide concern on the part of the executive branch that American students in Grenada were endangered by the coup d'état.¹⁴⁹ The tone of the Revolutionary Military Council in con-

141. See *Serious Events in the Republic of Panama*, OAS CP/Res. 534(800/89), Dec. 22, 1989 (denouncing U.S. invasion of Panama); *The Situation in Grenada*, G.A. Res. 38/7, U.N. GAOR, 38th Sess., Agenda Item 145, U.N. Doc. A/38/L.8 (1983) (condemning U.S. military deployment to Grenada).

142. Address to the Nation on Events in Lebanon and Grenada, 19 WEEKLY COMP. PRES. DOC. 1497, 1500-01 (Oct. 27, 1983) [hereinafter Grenada Address].

143. *Id.* at 1501.

144. *Id.*

145. For the text of the O.E.C.S. invitation, see WILLIAM C. GILMORE, *THE GRENADA INTERVENTION: ANALYSIS AND DOCUMENTATION* 100 (1984).

146. Reagan later recalled in his memoir, "there was only one answer I could give to . . . those six countries who [had] asked for our help." RONALD REAGAN, *AN AMERICAN LIFE* 450 (1990).

147. Grenada Address, *supra* note 142, at 1501.

148. The three arguments were: (1) protection of nationals, (2) collective action under Article 52 of the U.N. Charter, and (3) the request to invade by lawful authority, namely Grenadian Governor-General Paul Scoon. See Letter from Davis R. Robinson, Legal Adviser, U.S. Department of State, to Professor Edward Gordon, Chairman of the Grenada Committee of the American Bar Association's Section on International Law and Practice (Feb. 10, 1984), in JOHN NORTON MOORE, *LAW AND THE GRENADA MISSION* 125-29 (1984).

149. See generally Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten-Year Perspective*, 33 VA. J. INT'L L. 765 (1993) (suggesting that the Reagan Administration feared the possible use of the medical students as hostages).

trol of Grenada was hostile. The head of the People's Revolutionary Army had set a curfew, closed the schools, and warned that "[a]nyone who seeks to demonstrate or disturb the peace will be shot."¹⁵⁰ The Reagan Administration considered the protection of nationals to be a well-established ground for the use of force.¹⁵¹ Because the leadership on the island had rejected a peaceful evacuation of the U.S. nationals, the landing of U.S. military forces arguably could be justified on this basis.¹⁵²

ii. U.S. Military Intervention in Panama

The legality of U.S. military intervention again was questioned during the 1989 invasion of Panama.¹⁵³ On December 15, 1989, General Manuel Noriega declared that a state of war existed between the Republic of Panama and the United States of America.¹⁵⁴ The following day, Panamanian military forces killed a U.S. marine without reason.¹⁵⁵ Following this shooting and the reported threat of a "commando-style attack" against U.S. personnel, the Bush Administration authorized "Operation Just Cause," a military intervention involving the use of 24,000 U.S. troops.¹⁵⁶

President Bush justified the deployment of troops to Panama as an "exercise of the right of self-defense recognized in Article 51 of the United Nations Charter."¹⁵⁷ Bush, following the precedent set by Ronald Reagan in the Grenada intervention, emphasized that the lives and welfare of American citizens in Panama were at risk.¹⁵⁸ In addition, President Bush cited the U.S. interest in the Panama Canal and the Canal Treaties which permitted U.S. intervention in order to "assure that the Panama Canal shall remain open, neutral, secure and accessible"¹⁵⁹ Finally, the Administration emphasized the need to bring Panama's leader, General Noriega, to

150. *Id.* at 776.

151. *But see* ALLAN GERSON, *THE KIRKPATRICK MISSION* 227 (1991) (suggesting that the Grenada operation was really about a fear that the island might become "another Cuba" and threaten its eastern Caribbean neighbors).

152. Beck, *supra* note 149, at 804; ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW & THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM* 93-111 (1993).

153. Commentators have suggested that the primary goal behind the U.S. action was the removal of a dictator, who had become increasingly hostile toward the United States, and his replacement with the democratically elected Panamanian President Guillermo Endara. Though the overall result of the intervention may have been to restore democracy, commentators have argued that the U.N. Charter prohibits such action: "You cannot justify the invasion of a foreign country on the grounds that you think its ruler is wicked, because the most powerful countries could then just define their weaker opponents as wicked and crush them." Gwynne Dyer, *Bush's Flouting of International Law Must Be Condemned*, CHI. TRIB., Dec. 26, 1989, at 23.

154. *See Series of Incidents Prompted Response*, USA TODAY, Dec. 21, 1989, at 5A.

155. *Id.*

156. *See* Abraham F. Lowenthal, *Are There Rules Just For Us?*, L.A. TIMES, Dec. 22, 1989, at B7.

157. Letter to the Speaker of the House and the President Pro Tempore of the Senate on United States Military Action in Panama, 25 WEEKLY COMP. PRES. DOC. 1984, 1985 (Dec. 21, 1989).

158. *Id.*

159. Panama Canal Treaty, Sept. 7, 1977, U.S.-Pan., U.S. Reservation, 33 U.S.T. 39, 41.

justice on charges of drug trafficking, citing a Justice Department opinion that U.S. forces have the legal power to go to foreign nations to arrest fugitives wanted in the United States.¹⁶⁰

Some critics have labeled the use of force in these actions as blatant aggression outlawed by the U.N. Charter.¹⁶¹ Others have accepted the humanitarian justification provided by the U.S. government, but nonetheless emphasize the fact that the U.N. Charter recognizes no such exception to the use of force.¹⁶² Despite widespread disapproval, these military operations, unlike the Haitian crisis, involved situations where U.S. nationals were at risk, thus giving some credence to an Article 51 justification.¹⁶³

c. The Hypocrisy of the Clinton Administration's Policy on Haiti

Judging from the active military role of the United States in Haiti, one might conclude that armed intervention will be the rule rather than the exception in the future. A closer examination of U.S. foreign policy indicates that the opposite is true. Throughout this century, U.S. leaders have experienced the recurring impulse to volunteer the services of their nation as a world policeman. In the post-Cold War world, the ideological competition between the United States and Soviet Union has ended, but there is a price for any victory.¹⁶⁴ The West faces the challenge of confronting a number of countries left without leadership, order, or governance. Somalia is one example of a country in chaos,¹⁶⁵ and Haiti is another. The United

160. See Robert Graham, *U.S. Military Intervention: International Jurists Question Grounds for American Action*, *FIN. TIMES*, Dec. 22, 1989, at 6.

161. See, e.g., Michael J. Berlin, *U.S. Allies Join in Lopsided U.S. Vote Condemning Invasion of Grenada*, *WASH. POST*, Nov. 3, 1983, at A1.

162. See, e.g., Vladimir Kartashkin, *Human Rights and Humanitarian Intervention*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 202, 204-05 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

163. The author has included this section of the Note in order to accentuate the contradiction between the Haiti Resolution and the U.N. condemnation of U.S. military intervention in Grenada and Panama. After considering the legal rationale offered by the Reagan and Bush Administrations, one recognizes the inherent flaws in the Security Council's analysis of the Haiti crisis.

164. See Patrick J. Buchanan, *U.S. To Pay For And Enforce Peace Everywhere?*, *Hous. CHRON.*, Sept. 14, 1993, at A17 (arguing that the end of the Cold War has led the United States to add military commitments while downsizing military forces).

165. In December 1992, the lame duck Bush Administration committed U.S. ground troops as part of a multinational force to ensure delivery of humanitarian aid to the war-torn country of Somalia, which has been engaged in a clan-based civil war since 1991. The war, in conjunction with a severe drought, caused a famine estimated to have killed 300,000 people within one year. Although the troops were initially scheduled to remain in Somalia for one month, the humanitarian mission was extended by the Clinton Administration. U.S. casualties mounted throughout the year. The Clinton foreign policy reached a crisis in October 1993 with the deaths of 18 U.S. soldiers in a Mogadishu street battle. U.S. reporters captured on film footage of Somalis dragging the body of a U.S. soldier through the streets of the city. More than two dozen U.S. troops died in Somalia, prompting an American withdrawal in March 1994 from the peace-keeping operation. See Don Oberdorfer & Trevor Rowe, *U.S. Offers Ground Troops for Intervention in Somalia*, *WASH. POST*, Nov. 26, 1992, at A1; Jane Perlez, *U.S. Forces Arrive in Somalia on Mission to Aid the Starving*, *N.Y. TIMES*, Dec. 9, 1992, at A1; Daniel Williams, *Joining the Pantheon of American Missteps*, *WASH. POST*, March 26, 1994, at A18 (compar-

States eventually responded to the Haitian crisis by sending 20,000 troops with the stated goal of restoring democracy.¹⁶⁶ However, if Haiti justified military action, why did the United States wait four years to send a military force into Bosnia?¹⁶⁷ Likewise, why did the United States refuse to contribute troops to the U.N. mission in Rwanda?¹⁶⁸ In both cases, the atroci-

ing the Somalia intervention with U.S. "misadventures" in Vietnam and Lebanon). U.S. Marines returned to Somalia in February of 1995 to provide a protective shield for the final retreat of U.N. forces from that country. Almost 2000 U.S. troops participated in the mission. The U.N. withdrawal marked the end of a \$2 billion, two-year plus incursion in Somalia. See John Balzar, *Marines Land for Somalia Pullout*, L.A. TIMES, Feb. 28, 1995, at A1.

166. See *supra* notes 118-21 and accompanying text.

167. In 1991, the world witnessed the dissolution of the former Socialist Republic of Yugoslavia. Since that time the idea of an expanded Greater Serbia has been the driving force behind Serb involvement in a war which raged for four years in the Balkans. The goal of the Serb forces, who occupied 70% of the land in Bosnia-Herzegovina, was to eventually link Serb lands in Bosnia, a U.N.-recognized state, with Serbia proper. In this quest to claim land, the Serbs, and likely the Bosnian Muslims as well, engaged in systematic violations of recognized human rights. The most serious charges asserted by the Bosnian Muslim government accuse the Serbs of engaging in ethnic cleansing as a means of nation-building. 1994 was particularly embarrassing for the five nation Contact Group, comprising Britain, France, Germany, the United States, and Russia, which had been trying, albeit unsuccessfully, to broker a lasting peace agreement. A U.N. peacekeeping force is stationed on the ground in Bosnia to assure the delivery of humanitarian aid to civilians. The United States, however, refused to place American ground troops under U.N. Command. As peacekeepers were harassed, humiliated, and held hostage, the United States pressed its allies in NATO to carry out air strikes against Serbian forces that attacked U.N.-designated safe areas. Britain and France, with sizable ground contingents stationed in Bosnia, vetoed any such action; as the world's great powers looked on helplessly, Bosnia continued to crumble and atrocities continued to go unpunished. See Tony Barber, *Serb Success, NATO's Failure, Bosnia's Misery: 1994: Moments That Made The Year*, INDEPENDENT, Dec. 26, 1994, at 9. See also Bill Schiller, *How the West Didn't Win: It's Nearing Deal With the Serbs That Effectively Endorses Ethnic Cleansing as a Means of Nation-Building*, TORONTO STAR, Dec. 4, 1994, at D1.

In September of 1995, the Bosnian Serbs faced the first substantial military strikes by NATO forces in retaliation for their siege of the U.N. safe area in Sarajevo. This bombardment led to an agreement among the warring parties to hold peace talks. As one commentator writes, "It has taken four years, more than a quarter of a million lives and countless broken promises from the West to reach this point of faint hope and fragile diplomatic coherence." Roger Cohen, *Finally Torn Apart, The Balkans Can Hope*, N.Y. TIMES, Sept. 3, 1995, at E6. See *Bosnia After the Cease-fire*, N.Y. TIMES, Oct. 15, 1995, at A1. Throughout November, the Muslims, Croats, and Serbs negotiated a peace settlement in Dayton, Ohio. This accord preserves Bosnia as a single state and requests the assistance of NATO in maintaining the cease-fire. Address to the Nation on Implementation of the Peace Agreement in Bosnia-Herzegovina, 31 WEEKLY COMP. PRES. DOC. 2060. See Roger Cohen, *Balkan Accord: The Outlook*, N.Y. TIMES, Dec. 15, 1995, at A20. In early December 1995, NATO began deploying a 60,000-strong force, including 20,000 U.S. soldiers. See Robert Fox, *60,000 NATO Troops to Enforce the Deal*, DAILY TELEGRAPH (London), Nov. 22, 1995, at 14; Timothy Clifford, *First U.S. Troops in Sarajevo*, DAILY NEWS, Dec. 5, 1995, at 2. However, so much blood has been shed creating ethnically pure regions that no matter how successful this long-awaited peace agreement is, it will not be possible to rebuild a completely multiethnic State. Thousands of returnees and new arrivals will likely experience tense homecomings.

168. The disintegration of Rwanda into chaos and anarchy has evoked much sympathy from the world community, but very little action has been taken to stop or even slow the carnage. France deployed several hundred troops to Rwanda from late 1990 to late 1993 with the goal of bolstering the Hutu-led government after Tutsi rebels mounted an

ties and deprivation were equally real.

Of course, the restoration of President Aristide to power in Haiti does not necessarily guarantee democratic rule and respect for human rights.¹⁶⁹ One commentator suggests that the U.S. leadership has made an ideological choice to intervene abroad on the side of the hard left.¹⁷⁰ He reminds the reader that the 1991 coup against Aristide was heavily supported by the middle class who feared the expropriation of their property by the new government.¹⁷¹ These contradictions and ulterior motives merely suggest that international law played a minute, if any, role in the Clinton decision to invade Haiti, despite lengthy lobbying by the U.S. delegation at the United Nations.¹⁷² History may judge Resolution 940 to be an unwise

invasion from Uganda. In August 1993, a peace agreement was brokered, and soon after, a 2500 person U.N. force entered the country. Subsequently, Belgium, the largest contingent in the U.N. peacekeeping mission, withdrew its forces when 10 Belgians were killed by the remnant of the Hutu-dominated government. The United States lacks the political will to send American troops to Rwanda, given the ill-fated 1992-93 deployment to Somalia and the absence of U.S. geopolitical interests in the area. As a result, the cease-fire has not been enforced, and the international community has shunned the opportunity to break the cycle of lawlessness and mass murder in Rwanda. The violence reached epic proportions following the death of Rwanda's president in a plane crash in April 1994 as Hutu soldiers and militia slaughtered several hundred thousand people, most of them Tutsi. Nonetheless, the Clinton Administration remains consistent in pursuing its policy of non-intervention despite the mounting death toll and a growing refugee tide. See Elaine Sciolino, *For West, Rwanda is Not Worth the Political Candle*, N.Y. TIMES, April 15, 1994, at A3; Thomas W. Lippman, *U.S. Troop Withdrawal Ends Frustrating Mission to Save Rwandan Lives*, WASH. POST, Oct. 3, 1994, at A11; Raymond Bonner, *Unsolved Rwanda Mystery: The President's Plane Crash*, N.Y. TIMES, Nov. 12, 1994, at A1.

Approximately one year after the plane crash, Rwanda remained a "scene of carnage and desolation." Donatella Lorch, *As Many as 2,000 Are Reported Dead in Rwanda*, N.Y. TIMES, Apr. 24, 1995, at A1. In an effort to get members of the Hutu ethnic group to return to their homes, the Rwandan military, now controlled by the Tutsi, closed down several refugee camps and directed 50,000 people to a hillside in Kibeho. Armed Hutu militias within this group incited the crowd to run through troop lines. The ensuing panic resulted in 2000 deaths and more than 600 injuries. *Id.* This atrocity did not convince the international community to take a more active role in Rwanda. In fact, the massacre was followed by a major reduction of the U.N. military presence in Rwanda. Christopher S. Wren, *U.N. to Withdraw Over Half of Military Force in Rwanda*, N.Y. TIMES, June 10, 1995, at A5. Over one million Hutu refugees in Zaire were given until the end of 1995 to return to Rwanda. This time schedule was eventually deemed unworkable. Any attempt to force such a large-scale return of Hutu refugees is likely to trigger a reoccurrence of violence in Rwanda. See James C. McKinley Jr., *Zaire Steps Up Pressure on Rwandans to Go Home*, N.Y. TIMES, Feb. 15, 1996, at A3 (discussing how a few recent arrivals were beaten and tortured by Tutsi soldiers).

169. On January 6, 1995, the United States began the forced repatriation of almost 4000 Haitian refugees who had been living at Guantanamo Bay Naval Base. However, despite President Aristide's safe return and the presence of over 5000 American troops in Haiti, a number of refugees assert that paramilitary gunmen and former backers of the military junta continue to occupy several police posts in the countryside, where they terrorize supporters of the Aristide Administration. See Larry Rohter, *U.S. Starts the Return of Haitians from Guantánamo*, N.Y. TIMES, Jan. 7, 1995, at A3.

170. See Scott McConnell, *Welcome to the Clinton Doctrine*, N.Y. POST, Oct. 7, 1994, at 23.

171. *Id.*

172. Although it is likely that the Clinton Administration did not entirely ignore international legal norms, a constellation of factors external to decision-makers and to law

decision. If so, the United Nations will regret the setback which it inflicted upon its own international reputation as an effective and impartial legal organization.

2. U.N. Charter Revision: A New Chapter on Human Rights

If the U.N. Security Council is to possess legitimately the power to authorize humanitarian intervention, then the Charter must be revised to define certain human rights violations as a threat to international peace and security. One possible solution is to amend the U.N. Charter by adding a new chapter dealing with human rights.¹⁷³ This would allow outside forces to "go regularly and determinedly to the source of the problem in the home country."¹⁷⁴ Intervention would still depend upon the interests of the five permanent members of the Security Council, each of which would retain its veto power.¹⁷⁵ In addition, a greater role for the United Nations in the military arena might require establishing permanent armed forces for successful enforcement action. To complement the establishment of a permanent U.N. military force, the new chapter could include provisions for an international criminal court responsible for trying crimes against humanity, not only during wartime but also in cases of civil conflict and oppressive dictatorships.¹⁷⁶

often contribute to a particular foreign policy determination. As Professor Henkin stated:

[I]t is never possible to say how much law weighed among the forces that restrained action. The evidence is usually not available, and, at bottom, conclusive evidence can not exist, for if indeed one had access to all the records, if the actors told all, one could not be confident that one had reached the springs of official behaviour.

Louis Henkin, *Comment*, in THOMAS EHRLICH, *CYPRUS 1958-1967*, at 129 (1974). The 1991 Gulf War indicated that the international community is more receptive to military actions sanctioned by the United Nations and involving coalition forces. See *infra* note 179 and accompanying text. The support for Operation Desert Storm sharply contrasted with the widespread criticism received by the Reagan and Bush Administrations for their interventions in Grenada and Panama. See *supra* part III.A.1.b. In deciding to lobby at the United Nations, the Clinton Administration may simply have been drawing upon this history lesson.

173. See Kartashkin, *supra* note 162, at 209 (proposing revision of the U.N. Charter).

174. Martin, *supra* note 107, at 479.

175. U.N. CHARTER art. 27, ¶ 3. Because China, France, Russia, the United Kingdom, and the United States possess permanent status and veto power on the U.N. Security Council, these states will ultimately determine when to authorize intervention. Supporters of a U.N. Charter amendment assume that intervention decisions will turn on the severity of human rights abuses in a particular country. See Kartashkin, *supra* note 162, at 208-09. In reality, alliances and the national interests of the five permanent members will dictate U.N. intervention policy. Such selective application of the intervention power would undermine the goal of encouraging all nations to comply with international human rights commitments.

176. For a discussion of the potential role of an international criminal court, see James Crawford, *Current Developments: The ILC's Draft Statute for an International Criminal Tribunal*, 88 AM. J. INT'L L. 140 (1994); Michael P. Scharf, *Getting Serious About an International Criminal Court*, 6 PACE INT'L L. REV. 103 (1994). Jonathan Power, *The Case For a World Criminal Court*, TORONTO STAR, Jan. 8, 1995, at D4; Jonathan Power, *A World of Law, Not Men*, BALT. SUN, Jan. 6, 1995, at 15A.

These additions to the U.N. Charter would, of course, ignore the cardinal feature of international political and legal systems—sovereignty. A U.N. Charter amendment would authorize forcible action to protect human rights in situations which do not present threats to or breaches of the peace. Although there is a consensus among Member States that acts of aggression threaten the welfare of the entire international community,¹⁷⁷ the behavior of a sovereign within its own borders does not necessarily pose the same danger. For this reason, internal changes have traditionally resulted from internal forces or peacefully by international agreement.¹⁷⁸ A new approach to intervention could actually undermine the achievements of the United Nations, epitomized by the successful coalition against aggression in the 1991 Gulf War.¹⁷⁹ The united military effort against Iraq was a classic defense of the nation-state system, reinforcing the common value of national sovereignty.¹⁸⁰ After the Gulf conflict, hope emerged that the United Nations would finally be able to serve its long-standing purpose

177. See *supra* notes 134-40 and accompanying text. One scholar appropriately noted that the Framers of the U.N. Charter “were agreed that force was not to be used against another state even to achieve democracy, however defined. Over forty years later states are still not agreed as to what democracy means, but they are still agreed that it is not to be achieved by force.” Henkin, *supra* note 134, at 61.

178. “Human rights are indeed violated in every country. In some countries violations are egregious. But the use of force remains itself a most serious—the most serious—violation of human rights.” *Id.*

179. On August 2, 1990, an Iraqi force of over 100,000 troops invaded neighboring Kuwait. After some scattered resistance by the Kuwaitis, the Emir of Kuwait fled to Saudi Arabia. The U.N. Security Council promptly condemned the invasion, and ordered that Iraq “withdraw immediately and unconditionally all its forces.” S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg., U.N. Doc. S/RES/660 (1990). On August 8, Iraq announced that it was annexing Kuwait and that its decision was irreversible. See *Excerpts from Iraq’s Statement on Kuwait*, N.Y. TIMES, Aug. 9, 1990, at A18. The ensuing months resulted in Security Council Resolutions imposing economic sanctions on Iraq and authorizing the collective use of force to restore the Kuwaiti government. S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg., U.N. Doc. S/RES/661 (1990) (imposing economic sanctions on Iraq); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990) (authorizing the use of “all necessary means” to remove Iraqi forces from Kuwait). On January 15, 1991, a coalition of allied forces, led by the United States, commenced offensive combat operations (“Operation Desert Storm”) which were sustained for six weeks. Address to the Nation Announcing Allied Military Action in the Persian Gulf, 27 WEEKLY COMP. PRES. DOC. 50 (Jan. 16, 1991). On February 27, 1991, President George Bush declared “victory for all the coalition partners.” Address to the Nation on the Suspension of Allied Offensive Combat Operations in the Persian Gulf, 27 WEEKLY COMP. PRES. DOC. 224 (Feb. 27, 1991). He referred to the formal cease-fire as “a victory for the United Nations, for all mankind, for the rule of law, and for what is right.” *Id.*

180. The allied countries “drew a line in the sand,” declaring that “the aggression against Kuwait would not stand.” Address to the Nation Announcing Allied Military Action in the Persian Gulf, 27 WEEKLY COMP. PRES. DOC. 224. The key to the coalition’s success was its common purpose and common values. Robin Wright, *Gulf Crisis Rewrites the Policy-Makers’ Guidelines*, L.A. TIMES, Mar. 4, 1991, at A1, A10. Bruce Hoffman, a military analyst at RAND Corp., emphasized that “[t]here was broader and better integration than ever before because it was so clearly and unambiguously over aggression.” *Id.* at A10.

and take global action to fight aggression when necessary.¹⁸¹ A human rights amendment to the Charter would only disrupt the progress of the organization.

First, the introduction of transboundary force in cases of human rights violations runs the risk of escalating rather than confining the incidents of violence, especially when non-military measures such as economic sanctions and scrutiny by international human rights groups offer an effective alternative. Second, even if collective military action is implemented, international law faces the danger of being transformed into a system by which the political objectives of adjacent states and regional powers may be achieved. Finally, the use of force could be counterproductive by resulting in an upsurge of support for the reigning regime acting to defend its country from foreign interference. In essence, any attempt to rework Article 2(4) would strip the international law of the qualities which have made it so useful in an anarchical world.

B. Eliminating the Mandatory Nature of the Principle of Nonrefoulement

Another option available to countries confronted with a large influx of asylum seekers is to completely avoid human rights-based scrutiny by circumventing the nonrefoulement requirement altogether. This approach would require taking the Dublin and Schengen agreements to the next logical step: retaining the right to refuse entry or to expel any applicant without actually processing the asylum claims. Essentially, the Bush and Clinton Administrations adopted this approach in their policy of interdiction. By behaving in an isolationist manner, governments will satisfy their constituents by preserving the national identity. However, this solution sullies a Convention which was intended to insure the righteousness and purity of state parties. As one scholar stated, the Convention "memorializes the purity of state parties, to ensure that they will escape the taint of any responsibility so direct and visible as that involved in sending someone back to the place where he or she is persecuted."¹⁸²

Human rights play a large and visible role in international refugee law. In fact, the job description of the United Nations High Commissioner for Refugees explicitly mentions the humanitarian character of the office.¹⁸³ It thus follows that the Refugee Convention is itself innately humanitarian. After all, the instrument was initially designed to secure the humanitarian

181. In discussing the significance of the allied campaign, Richard Norton, a fellow at the International Peace Academy in New York, stated, "The scale of victory is such that when the Security Council speaks again, its words will have some teeth behind it. In terms of building a new world order, that's very significant." Wright, *supra* note 180, at A10.

182. Martin, *supra* note 26, at 759.

183. "The work of the High Commissioner shall be of an entirely non-political character; it shall be *humanitarian* and social and shall relate, as a rule, to groups and categories of refugees." G.A. Res. 428, U.N. GAOR, 5th Sess., Supp. No. 20, at 46, U.N. Doc. A/1775 (1950) (emphasis added).

objective of relief for the victims of Nazi persecution.¹⁸⁴ Article 33 embodies perhaps the only true right in that Convention. Its efficiency depends upon the willingness of governments to respond to an essentially humanitarian appeal. Any alteration of the right of nonrefoulement would in turn undermine the rationale of the entire Convention. The ultimate result: domestic self-interest will always outweigh the human rights of those fleeing oppression. In particular, the United States, a nation of immigrants and refugees, should not resort to a policy so at odds with its values of democracy, civil rights, and judicial impartiality.

C. Combining Morality & Practicality: A New Type of Regional Burden-Sharing¹⁸⁵

There is another alternative. Thus far, scholars and leaders have limited their policy options to polar extremes. As a result, they have locked themselves in a no-win situation where refugee law will always conflict with the principle of national sovereignty. However, one can learn from these good intentions and incorporate certain aspects of those solutions into a new legal regime.

1. *A New Legal Regime Based Upon International Cooperation*

The UNHCR, in its current form, is a well-meaning position plagued with impotence. Not only is the Commissioner without the power to compel States to cooperate on refugee problems,¹⁸⁶ but the office also lacks sufficient funding to be an effective force of good in a world undergoing enormous social and political change.¹⁸⁷ As part of an international agency, the Commissioner must serve as a catalyst for obtaining asylum opportunities. Thus, this refugee agency must be expanded in order to meet the demands of the massive flows of migration around the world. Under this proposal, the Office of the UNHCR would be divided into various committees, each focusing upon a particular region in the world. The main goal would be to coordinate efforts within a region when for reasons of war, famine, impoverishment, or persecution a large number of people are on the move. By tapping the resources of the developed nations within the

184. Martin, *supra* note 26, at 755-56.

185. This third solution is proposed by the author.

186. See P.D. Maynard, *The Legal Competence of the United Nations High Commissioner for Refugees*, 31 INT'L & COMP. L.Q. 415, 416 (1982).

187. The projected 1995 budget for the UNCHR is \$1.25 billion. *Refugee Digest*, *supra* note 5, at 2. See Edward Epstein, *United Nations' Role Coping With Refugee Crisis*, S.F. CHRON., Apr. 6, 1992, at A10 (revealing how a budget cut and a sharp increase in the number of refugees has led the UNHCR to rely heavily upon assistance from the states of origin). See also William Dullforce, *Refugee Agency in Disarray After Chief's Resignation*, FIN. TIMES (London), Oct. 30, 1989, at 4 (discussing failure of the UNHCR to efficiently allocate decision-making power and budget problems resulting from the elimination of controls on spending); Cindy Shiner, *The Superhero of a World at War*, THE GUARDIAN, May 16, 1995, at 10 (indicating that the recent effort to cut costs may result in untrained and unskilled workers who will undermine the quality of the agency).

particular region, the UNHCR would be in a position to spread the responsibilities of asylum through equitable burden-sharing.

In order for this plan to be effective, the developed nations must agree to submit to the authority of the agency in several ways. First, they would agree to contribute a certain amount of money annually to a regional fund.¹⁸⁸ The funding, managed by the agency, would finance economic and social programs which are deficient in other countries within the region.¹⁸⁹ As a result, the poorer states would still be able to accept an equitable share of refugees, thereby eliminating a bulk of the burden normally imposed on the developed nation. Second, all of the nations within a region would have to abide by a unitary asylum standard. This approach would abolish the inconsistencies which currently exist while fulfilling the goal of harmonization set out in both the Dublin and Schengen Conventions.¹⁹⁰ It would also provide a more active role for regional courts of law which could be responsible for appellate review of the asylum decisions.¹⁹¹

It would be naive to think that this plan will face no obstacles. Indeed, the mere establishment of a workable legal mechanism for such a program presents its own challenges. In addition, the proposal is likely to meet initial opposition from the more developed countries, because of their reluctance to cede sovereign powers relating to border control and judicial review.¹⁹² However, such barriers are surmountable, especially given the rapid transformations toward democracy around the globe. The end of the Cold War has created a new era of cooperation among former enemies, most clearly evidenced by the Gulf War coalition. This is a new world order in which the conceptual structure of international law has been significantly revised. The new atmosphere lends itself to a discussion of a wider range of formerly internal matters.

There are two main reasons why this solution has great potential. As discussed above, the Western world is currently dealing with a surge of

188. The amount of contribution may vary, perhaps based upon a combination of factors such as gross national product and the indirect costs of immigration to the national economy. Under the current structure, the top 10 donors to the UNHCR as of August 3, 1995, are the United States, the United Kingdom, Netherlands, the European Union, Japan, Norway, Denmark, Sweden, Germany, and Switzerland. *Refugee Digest*, *supra* note 5, at 2.

189. Because the United States is the wealthiest nation in its region and the most frequently sought asylum, the agency structure should, from a practical standpoint, provide the United States with the opportunity for ample representation and voting power. Such provisions may be necessary in order to convince the United States to participate in the international agency, given the recent congressional proposals aimed at limiting the use of U.S. funds for U.N. peacekeeping activities. *See, e.g.*, S. Res. 420, 104th Cong., 1st Sess. (1995).

190. *See supra* text accompanying note 79.

191. A more ambitious proposal would include the establishment of a United Nations Court on the Protection of Refugees and Displaced Persons. This Court would allow aggrieved refugees to redress violations of international refugee law.

192. Similar concerns have been voiced by the U.S. Justice and Defense Departments with regard to the establishment of a global criminal court to deal with war crimes, crimes against humanity, and other international problems such as hijacking and drug trafficking. *See Time for a Global Criminal Court*, N.Y. TIMES, Nov. 21, 1994, at A14.

nationalism which has resulted in opposition to liberal asylum policies.¹⁹³ Under the new international legal regime, wealthy states, such as the United States, which are surrounded by less developed nations, will gain additional assistance from these countries without sacrificing their commitment to providing a safe refuge. In addition, this proposal contemplates a change in current refugee law by stripping the refugee of his choice of refuge. Although the UNHCR may still consider refugee preferences in determining the final destination of refugees, the burden-sharing objective will allow officials to ferret out those asylum seekers who are exclusively economic migrants.

Second, the new arrangement will maintain the spirit of the original Refugee Convention.¹⁹⁴ The remodeled refugee agency will continue to assert the right possessed by victims of human rights abuse to migrate from the place of persecution. Thus, the humanitarian goals of the signatories to that Convention remain unscathed. In fact, the Declaration on Territorial Asylum specifically advocates the achievement of "international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights"¹⁹⁵ It declares that "[w]here a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State."¹⁹⁶ Unfortunately, nations have yet to give serious attention to the concept of burden-sharing. However, recent events indicate a willingness to move in this direction. During the early stages of the Haitian boat exodus, President Bush attempted to disperse the refugees throughout Latin America by soliciting the aid of Honduras and Venezuela.¹⁹⁷ Similarly, President Clinton requested help from the Caribbean nations of Jamaica, Grenada, Dominica, Antigua, and Panama.¹⁹⁸ Neither effort was very successful because each lacked adequate coordination and funding.¹⁹⁹ This proposal directly

193. See *supra* text accompanying notes 71, 102.

194. See discussion *supra* part I.A.

195. This non-binding declaration, which reiterated many of the principles of the 1951 Convention, was unanimously adopted by the U.N. General Assembly in 1967. Declaration on Territorial Asylum, G.A. Res. 2312, U.N. GAOR, 22d Sess., Supp. No. 16, at 81, U.N. Doc. A/6716 (1967). Building upon the spirit of the declaration, the United Nations subsequently convened a conference to draft a Convention on Territorial Asylum which ended in failure. See Frelick, *supra* note 90, at 677 & n.12 (1977 conference was "highly politicized, indeed catastrophic").

196. Declaration on Territorial Asylum, *supra* note 195, art. 2(2).

197. See Al Kamen, *Bush Defends Policy on Return of Haitians*, WASH. POST, Nov. 21, 1991, at A36.

198. See *Panama to Receive 10,000 Haitians, Others Offer Haven*, REUTERS, July 5, 1994, available in LEXIS, News Library, Reuwwld File; Michael Rezendes, *A Policy Lost at Sea*, BOSTON GLOBE, July 10, 1994, at 67.

199. Because of the harsh economic conditions in Honduras and reported abuse of refugees by military personnel in that country, nearly all of the Haitians who were transferred there under the Bush Administration voluntarily repatriated. See *Haitian Interdiction Crisis Erupts*, REFUGEE REP., Nov. 29, 1991, at 1. Similarly, in the Dominican Republic, reports reveal harsh, abusive, and restrictive treatment of Haitian laborers. See

addresses those problems. By controlling the flow of refugees, a well-organized burden-sharing program furthers the human rights principles of international refugee law while reducing the burden imposed on the receiving states.

2. *Shedding the Moralistic Disguise and Following the National Interest*

The burden-sharing approach recognizes that it is immoral to ask a nation to embark on altruistic policies oblivious of the national interest.²⁰⁰ This Note illustrates this point by examining the manipulation of refugee admissions for political purposes during the Cold War, and, subsequently, the protectionist rationale which guided European and American refugee policy during the early 1990s.²⁰¹ As early as the sixteenth century, political philosophers such as Niccolò Machiavelli explored the idea that morality has no place in international politics. In *The Prince*, he argued that a sovereign, in order to maintain itself, must be able to "learn to be able not to be good, and to use this and not use it according to necessity."²⁰² Essentially Machiavelli believed that governments must act out of necessity and not under the guise of morality. He reasoned that the prince who "makes a profession of good in all regards" comes to ruin among so many who are not good.²⁰³ The necessities of the State leave little room for moral choice. Because international relations are not controlled by universal moral principles,²⁰⁴ humanitarian intervention, which seeks to project national moral

Frelick, *supra* note 90, at 684. More recently, Panama reneged on an agreement to provide haven for up to 10,000 refugees because of its economic inability to absorb such an influx. See Rezendes, *supra* note 198, at 67.

200. This approach therefore seeks to separate international refugee law from the humanitarian issues involved, and instead examines the apparatus for dealing with refugee crises from a realist point of view, *i.e.*, thinking and acting in terms of the national interest. Humanitarian intervention is essentially a crusade on the part of the intervening nation to impose its moral values upon another sovereign State. It is a foreign policy driven by moral considerations. On the contrary, a regional burden-sharing program will focus upon achievement of the national interest, namely halting the influx of refugees, while respecting the territorial sovereignty of the home country. Although this alternative also fulfills the humanitarian objectives of refugee law, it removes the human rights rhetoric of refugee protection from center stage in the immigration debate. Consequently, the national interest becomes the ultimate standard used to shape refugee policy.

201. This protectionist attitude reflects legitimate national economic and social concerns, and should play a dominant role in guiding foreign policy. For examples of how these concerns have affected refugee law, see discussion *supra* part I.B. See also *supra* notes 96-105 and accompanying text.

202. NICCOLÒ MACHIAVELLI, *THE PRINCE* 61 (Harvey C. Mansfield, Jr. trans., 1985).

203. *Id.* Thus, the sovereign state, in carrying out foreign relations, is not subject to a rule of ordinary morality. Alexander Hamilton reiterated this concept that the rule of morality is not the same between nations as between individuals: "Whence it follows that an individual may, on numerous occasions, meritoriously indulge the emotions of generosity and benevolence, not only without an eye to, but even at the expense of, his own interest. But a government can rarely, if at all, be justifiable in pursuing a similar course" HANS J. MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST* 16 (1951) (quoting Alexander Hamilton's April 1793 "Pacifcus" article in the *Federalist Papers*).

204. For a critique of this view, see Arnold Wolfers, *Statesmanship and Moral Choice*, in 1 *WORLD POLITICS* 175 (1949) (arguing that there is a realm for moral judgment in

standards onto the international scene,²⁰⁵ can never succeed as a legitimate means for offsetting mass refugee movements. Proponents of intervention are deceived by an illusion that nations can escape into a realm where action is guided solely by moral principles when, in fact, the appeal to moral principles in the international sphere has no concrete universal meaning. It is the individual State which creates morality as well as law. For this reason, in the United States, one is able to ascertain objectively the meaning of moral principles such as justice and equality. There is no such consensus in the relations between nations.²⁰⁶ Rather, it is a political necessity for the individual members of international society to take care of their own national interests.

Does this mean that international law itself is a farce? One can take this reasoning to an extreme and reach such a conclusion. However, the burden-sharing proposal set forth in this Note reveals how international law can succeed when it is in the best interest of all nations. The socio-economic and political impacts of refugee flows are incompatible with the national interests of states. Because refugee movements directly or indirectly affect every nation, it is logical to think that a universal problem requires a universal solution. By agreeing to interstate legal obligations, each nation acts in its own best interest while avoiding the moral judgments of humanitarianism.²⁰⁷

Conclusion

Refugee law owes its current structure to an earlier time when the major concern of the international community was establishing an institutional framework which would partly atone for the pre-War callousness of receiving nations. The Cold War brought a semblance of stability to world geography, and home exit controls in communist countries spared the Western nations any major influx of refugees. However, the West was unprepared for the collapse of the Soviet empire. Faced with resurgent nationalism at

foreign policy, although it involves a different set of normative standards than prevails in domestic affairs).

205. In his televised speech to the American public regarding the impending invasion of Haiti, President Clinton cited the need to "stop the brutal atrocities that threatens thousands of Haitians," and the U.S. responsibility to "promote democracy" in Haiti. President Clinton also referred to the responsibility of the United States "to respond when inhumanity offends our values." 30 WEEKLY COMP. PRES. DOC. 1779.

206. See MORGENTHAU, *supra* note 203, at 34 ("Universal moral principles, such as justice or equality, are capable of guiding political action only to the extent that they have been given concrete content and have been related to political situations by society.").

207. The contributions of each nation to the refugee agency should not be thought of as a question of moral principle or selfless generosity. Thinking in "moral" terms does not produce an adequate standard for determining the amount of assistance to be given, and is likely to err on the side of too excessive a contribution. Rather, membership in the international organization should be viewed as a means to an end, an instrument which can be used for the pursuit of the national interest. In this way, the organization becomes a type of alliance, with each developed nation sharing a common goal. The amount of aid to be given by a nation should be determined solely in view of the contribution it is likely to make to reaching that country's ideal level of immigration.

home and instability in Eastern Europe, Western leaders were forced to reevaluate aging refugee policies. Initially, the impulse was to implement laws which prevented asylum seekers from entering the receiving state in the first place. If interdiction was coarse and immoral, the alternative of intervention reflected a foreign policy guided by moral abstractions.

This Note suggests that the issue of political asylum cannot be mastered by intervening at the source of the problem in the home country because such interference collides with the principle of national sovereignty. A more practical solution changes the underpinnings of international refugee law from a question of moral condemnation to a matter of common national interest. Each developed nation benefits from burden-sharing in a contemporary world where mass exodus has become an unfortunate reality. The success of a new international foundation to help control the flow of refugees will depend upon the quantity of financial and human resources that the developed nations are willing to invest in order to limit the flow of refugees to their shores. Eventually, each country will have to weigh the potential societal contributions of asylum seekers against the costs which these new arrivals impose on citizens already present and working within national borders.