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The 1996 Cuban Asylum-Seekers in Jamaica: A Case Study of International Law in the Post-Cold War Era

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ARTICLES

THE 1996 CUBAN ASYLUM-SEEKERS IN JAMAICA: A CASE STUDY OF INTERNATIONAL LAW IN THE POST-COLD WAR ERA

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I. INTRODUCTION

On May 15, 1996, the Jamaican government presented to Parliament its decision to repatriate fifty-seven Cubans who had sought refuge in Jamaica.¹ This decision was the subject of extensive public discussion² and was not unanimously supported by Jamaican political and civil groups.³ Much of the debate focused on the moral, economic, and political aspects of relations between Jamaica and Cuba, while only limited attention was placed on the legal aspects of the government's decision.⁴ The public may have assumed that the government's conclusions were legally sound, thereby focusing the debate on nonlegal, nontechnical is-

1. Statement by the Honorable Seymour Mullings, Minister of Foreign Affairs and Foreign Trade, on the Cuban Asylum-Seekers to the Jamaican House of Representatives, May 15, 1996, at 4 [hereinafter Statement by the Honorable Mullings].

2. See, e.g., Gail Hoad, *Cubans with Landed Status Named*, DAILY GLEANER, May 17, 1996; *Cubans Fly Home*, DAILY GLEANER, May 21, 1996; Vivienne Siva, *Sorry Amigos: Government Boots Cuban Refugees*, JAMAICA OBSERVER, May 16, 1996, at 1; Rohan Powell, *Cubans in Hiding: Some Said Flown Out of the Island*, JAMAICA OBSERVER, May 20, 1996, at 1; *This Cuban Refugee Fiasco*, JAMAICA OBSERVER, May 22, 1996, at 6; Lionel Russell, *Refugee Status*, JAMAICA OBSERVER, May 23, 1996, at 6; *Cuba, Jamaica Strike Deal*, JAMAICA OBSERVER, May 24, 1996; *Cubans Sent Home*, JAMAICA HERALD, May 16, 1996.

3. See Hoad, *supra* note 2. On May 15, 1996, the National Democratic Movement of Jamaica issued a statement calling on the government to reconsider its decision. On May 16, 1996, the Jamaica Labour Party described the government's decision as one steeped in legalism. *Id.* See also Letter from Sister Joan Clare of Franciscan Sisters of Allegany Refugee Office to the Jamaican Foreign Minister Seymour Mullings (May 18, 1996), *noted in Cubans in Hiding*, JAMAICA OBSERVER, May 20, 1996, at 1. Cf. Statement from the Jamaica Council of Churches, May 25, 1996, *noted in Council of Churches Backs Government*, JAMAICA OBSERVER, May 26, 1996.

4. On refugee law, see ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* (1972); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *SYMPOSIUM ON THE PROMOTION, DISSEMINATION AND TEACHING OF FUNDAMENTAL HUMAN RIGHTS OF REFUGEES*, COLLECTED PROCEEDINGS (1982) [hereinafter UNHCR, COLLECTED PROCEEDINGS]; GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* (1984); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS* (1979) [hereinafter UNHCR, HANDBOOK]. For older references to asylum practice, see HUGO GROTIUS, *DE JURE BELLI AC PACIS*; EMER DE VATTTEL, *LE DROIT DES GENS* (1916).

sues.⁵ This Article examines the legal issues which arose out of the Jamaican government's controversial decision. Although the government was aware of relevant points of international law, its approach was somewhat problematic.

Specifically, this Article argues that the government's overall approach to evaluating asylum claims did not properly reflect the circumstances under which an individual may claim refugee status according to international law. Although the government established procedural mechanisms to address these issues, the Cuban episode highlights the inadequacies of these mechanisms to handle current refugee questions and indicates the need for change. Implementation of legislation delineating the country's international legal obligations would likely enhance the protection of refugees in Jamaica.

Although this Article primarily analyzes the legal aspects of the 1996 Cuban applications, it acknowledges the broader political significance of the episode. While the end of the Cold War has not led to a decrease in the number of refugees internationally,⁶ refugee status increasingly appears to be based on ethnic and nationalistic divisions rather than on ideological cleavages.⁷

In contrast, the effects of the Cold War are still evident in the case of Cuban refugees in the Caribbean as the United States and Cuba remain locked in a political conflict rooted in differing ideological convictions and hegemonic aspirations.⁸ Recalcitrant

5. See, e.g., Calvin Bowen, *The Cuban Connection*, DAILY GLEANER, May 22, 1996, at A4 ("While acknowledging the strictly legalistic rightness of the decision, some of us are somewhat disheartened over it.").

6. Estimated figures of the global refugee population, 1989-1995:

Year	Population (in millions)
1989	14.8
1990	14.9
1991	17.2
1992	17.0
1993	18.2
1994	16.4
1995	14.4

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES: IN SEARCH OF SOLUTIONS 248 (1995) [hereinafter UNHCR, WORLD'S REFUGEES].

7. See *id.* at 11-55; GILBERT LOESCHER, REFUGEE MOVEMENTS AND INTERNATIONAL SECURITY 3 (Adelphi Papers No. 268, 1992); Tiyanjana Maluwa, *The Refugee Problem and the Quest for Peace and Security in Southern Africa*, 7 INT'L J. REFUGEE L. 653, 654-57 (1995); Bill Frelick, *Preventive Detention*, 5 PEACE REV. 305 (1993).

8. For historical overview, see LESTER D. LANGLEY, THE UNITED STATES AND THE CARIBBEAN IN THE TWENTIETH CENTURY 195-217 (4th ed., 1989); THOMAS G. PATERSON,

Cold War aspects of U.S.-Cuban relations have led to inconsistencies in U.S. refugee policy and have prompted the perception that refugee matters are almost exclusively governed by political concerns. Consequently, this Article analyzes the legal issues within the broader political context of the 1996 Cuban episode.

II. THE FACTS

Sixty-eight Cubans arrived along the North Coast of Jamaica between January 27 and March 15, 1996.⁹ The government accommodated the first arrivals at private residences throughout Jamaica, while providing various public institutions for housing to those who followed.¹⁰ The government is estimated to have incurred nearly \$2,000,000, in expenses associated with supporting these Cuban refugees.¹¹

Upon their arrival in Jamaica, the entire Cuban immigrant population claimed refugee status.¹² The government responded by directing their claims to an interministerial Eligibility Committee which was established to address refugee matters.¹³ The Eligibility Committee consisted of civil servants from the Ministry of Foreign Affairs, the Attorney General's Department, and the Ministry of National Security and Justice.¹⁴ On the basis of the Eligibility Committee's conclusion that the Cubans were not entitled to refugee status, the Jamaican government decided to return them all to their homeland.¹⁵

CONTESTING CASTRO: THE UNITED STATES AND THE TRIUMPH OF THE CUBAN REVOLUTION 241-64 (1994); THOMAS G. PATERSON, MEETING THE COMMUNIST THREAT: TRUMAN TO REAGAN 191-210 (1988).

9. Statement by the Honorable Mullings, *supra* note 1, at 1. Sixty of these Cuban nationals formally consented to interviews by the government. REPORT OF THE ELIGIBILITY COMMITTEE FOR REVIEWING THE INITIAL DECISION CONCERNING THE CUBAN ASYLUM-SEEKERS, May 2, 1996, at 6 (on file with author) [hereinafter REPORT OF THE ELIGIBILITY COMMITTEE].

10. See REPORT OF THE ELIGIBILITY COMMITTEE, *supra* note 9, at 6. See also *Sponsors of Cubans Say Colour Didn't Matter*, JAMAICA OBSERVER, May 26, 1996, at 8-9.

11. Statement by the Honorable Mullings, *supra* note 1, at 2.

12. *Id.* See also *Asylum Request Rejected: Cubans to be Sent Home*, JAMAICA OBSERVER, Apr. 11, 1996, at 1; *How They Were Turned Down*, JAMAICA OBSERVER, May 26, 1996, at 9; Michael Becker, *Cubans Flee to Puerto Rico*, JAMAICA OBSERVER, at 1.

13. Statement by the Honorable Mullings, *supra* note 1, at 2; REPORT OF THE ELIGIBILITY COMMITTEE, *supra* note 9, at 2-3.

14. REPORT OF THE ELIGIBILITY COMMITTEE, *supra* note 9, at 3.

15. *Id.* See also Michael Becker, *Asylum Request Rejected: Cubans to be Sent Home*, JAMAICA OBSERVER, Apr. 11, 1996, at 1.

This unpopular decision prompted the government to instruct the Eligibility Committee to take two weeks in order to review the applications of all the Cuban asylum-seekers.¹⁶ The Committee subsequently denied refugee status to fifty-seven of the sixty applicants, and deemed the status of the remaining three inconclusive.¹⁷ Pursuant to the Eligibility Committee's findings, the government resolved to repatriate the fifty-seven Cuban nationals.¹⁸ The remaining three applicants were given authorization to remain in Jamaica.¹⁹

After the government announced its decision, several of the Cubans escaped from the Jamaican security forces.²⁰ Amid reports that some of these asylum-seekers fled Jamaica,²¹ the government repatriated thirteen of the fifty-seven Cubans.²² Jamaica and Cuba entered into an agreement articulating the plan for the repatriation of the remaining forty-three Cubans.²³ Jamaican government officials signed a Memorandum of Understanding relating to the repatriation of future Cuban asylum-seekers in Jamaica.²⁴

III. CARIBBEAN REFUGEES: THE GENERAL CONTEXT

This incident was not the first time Cuban nationals had sought asylum in Jamaica. Jamaica's proximity to Cuba makes it

16. See, e.g., *Government Backs Down: Cubans Have Two Weeks to Appeal Repatriation*, JAMAICA OBSERVER, Apr. 12, 1996, at 1. The instructions to the reconstituted Eligibility Committee, established to review the applications, were announced on April 11, 1996, and the Committee was given two weeks to reconsider the asylum claims. *Id.*

17. Statement by the Honorable Mullings, *supra* note 1, at 4; REPORT OF THE ELIGIBILITY COMMITTEE, *supra* note 9, at 9. An Appendix to the Report of the Eligibility Committee, setting out the Committee's assessment of the individual cases, has not been made public.

18. See also *Cabinet to Review Cuban Asylum Appeals Monday*, JAMAICA OBSERVER, May 9, 1996, at 1.

19. Statement by the Honorable Mullings, *supra* note 1, at 4.

20. Powell, *supra* note 2, at 1.

21. Michael Becker, *Cubans Flee to Puerto Rico*, JAMAICA OBSERVER, June 3, 1996, at 1.

22. *Id.* See also *Five More Cubans Located*, JAMAICA OBSERVER, June 10, 1996, at 5.

23. Statement by the Honorable Mullings, *supra* note 1, at 2.

24. The Memorandum of Understanding is not published, however for references to it, see *Cuba, Jamaica Strike Deal*, JAMAICA HERALD, May 25, 1996, at 1; *Agreement to Send Them Back*, JAMAICA OBSERVER, May 26, 1996, at 1; *Jamaica Devuelve Emigrantes Ilegales de Origen Cubano* [Jamaica Returns Illegal Immigrants of Cuban Origin], GRANMA, May 22, 1996. For a more extensive description of the government's attempts to explain the Memorandum of Understanding, see *Agreement or Memorandum?*, JAMAICA OBSERVER, May 26, 1996, at 1; *NDM Slams Mullings*, JAMAICA OBSERVER, May 27, 1996; *No Subterfuge*, JAMAICA OBSERVER, May 30, 1996; *Cabinet Yet to See Cuba "Agreement,"* JAMAICA OBSERVER, June 4, 1996, at 3.

a likely destination for Cubans fleeing their country.²⁵ On previous occasions, however, the attendant publicity and controversy was absent.

One of the reasons for the heightened interest in the 1996 refugee episode is that it arose shortly after Cuban authorities had shot down two small aircraft operated by members of the Cuban-American organization Brothers to the Rescue (*Hermanos al Rescate*) in February 1996. Immediately following this incident the U.S. government tightened its trade and investment embargo against Cuba through the Helms-Burton Act²⁶ and influential U.S. politicians hardened their anti-Castro positions. Viewed in this context, it is not surprising that Jamaica's decision to repatriate the Cuban refugees had significant political ramifications. Although legal considerations may have motivated the decision, some commentators perceived Jamaica's action as a reflection of its foreign policy priorities.²⁷ The question, therefore, became whether Jamaica would show strong support for its Third World ally at a time when that ally was subject to increasingly powerful hegemonic pressures.²⁸

25. *Cuban Boatpeople Leave Ahead of Castro Crackdown*, Reuters, Sept. 12, 1994, available in LEXIS, News Library, Arcnws File.

26. Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996).

27. See, e.g., *The Cuban Government's Promise*, DAILY GLEANER, May 31, 1996; *Cuban Deportees*, DAILY GLEANER, June 10, 1996; Stephen Vasciannie, *Government by Fog*, DAILY GLEANER, June 3, 1996; *If the Minister is Honourable*, JAMAICA OBSERVER, May 25, 1996, at 6; *This Cuban Refugee Fiasco*, JAMAICA OBSERVER, May 22, 1996.

28. DONALD P. KOMMERS & GILBERT D. LOESCHER, HUMAN RIGHTS AND FOREIGN POLICY 133 (1989) (stating that refugee policy can be used "to embarrass or destabilize enemy governments"). See LOESCHER, *supra* note 7, at 37. See also Ranee K. L. Panjabi, *The Global Refugee Crisis: A Search for Solutions*, 21 CAL. W. INT'L L.J. 247, 251 (1990); Mark Gibney & Michael Stohl, *Human Rights and U.S. Refugee Policy*, in OPEN BORDERS? CLOSED SOCIETIES? 172 (Mark Gibney ed., 1988). Clearly, some of the general support for the Cuban government is also grounded in the developing countries' desire to reaffirm their sovereignty and self-determination in a unipolar world. From this vantage point, the United States is sometimes perceived, at least, as exhibiting overreaching tendencies. Thus, the following statement on Cuba by Alexander Watson, Assistant Secretary of State for Inter-American Affairs to *The Wall Street Journal* Conference on the Americas in New York City on October 28, 1994, is perhaps more aspirational than factual: "In the past, the Castro regime enjoyed a degree of tacit support—even encouragement—from many Latin American and Caribbean nations. These days are over." Alexander Watson, Assistant Secretary of State for Inter-American Affairs, *Update on U.S. Policy Toward Cuba*, 5 DISPATCH 45, 751 (Dept. of St. Bureau of Pub. Affairs, 1994). For discussion on Cuban diplomacy in the Americas and the Third World prior to the end of the Cold War, see JORGE I. DOMÍNGUEZ, *TO MAKE A WORLD SAFE FOR REVOLUTION: CUBA'S FOREIGN POLICY* 219-48 (1989).

More generally, the controversy concerning the Cuban asylum-seekers was exacerbated by certain well-known, and yet almost obsolete, Cold War concerns.²⁹ The Cold War, in its most pronounced and identifiable form, has receded into history³⁰ while the organic connections between Eastern European communism and Cuban society have been publicly severed.³¹ Nevertheless, within the Caribbean region, issues pertaining to Cuba are often sharply divisive. Thus, the ultimate inquiry in the case—whether refugee status should be granted to sixty asylum-seekers—quickly drew concerns which, from a legal perspective, were only tangentially related to the issue at hand. For example, in the midst of the public discussions on the refugees, some suggested that opponents of the Jamaican government's final decision were actually supporting and sustaining the anti-Castro contingency in south Florida.³² Regardless of their intent, supporters of the Cuban asylum-seekers were said to be conspiring against Cuban sovereignty.³³ Indeed, when a refugee question is viewed as having such broad and contentious implications, it is likely to generate a considerable amount of debate.

29. See, e.g., David Rieff, *Cuba Refrozen*, 75 FOREIGN AFF. 62 (1995); James Petras & Morris Morley, *Clinton's Cuba Policy: Two Steps Backward, One Step Forward*, 17 THIRD WORLD Q. 269 (1996); Antoni Kapcia, *Politics in Cuba: Beyond the Stereotypes*, 15 BULL. LATIN AM. RES. 247 (1996); Andrew Zimbalist, *Dateline Cuba: Hanging on in Havana*, 92 FOREIGN POL'Y 151 (1993). For a useful, though dated, review of the resilience of the Cuban regime, see Gillian Gunn, *Will Castro Fall?*, 79 FOREIGN POL'Y 132 (1990).

30. There is extensive literature on the end of the Cold War. See generally 4 WARREN I. COHEN, *THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS* 219-45 (1993); ERIC J. HOBBSBAWM, *THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914-1991* (1994); HENRY KISSINGER, *DIPLOMACY* (1994). For analyses of some of the challenges to global order in the Post-Cold War era, see ZBIGNIEW BRZEZINSKI, *OUT OF CONTROL: GLOBAL TURMOIL ON THE EVE OF THE 21ST CENTURY* (1993).

31. See generally DOMINGUEZ, *supra* note 28; SUSAN EVA ECKSTEIN, *BACK FROM THE FUTURE: CUBA UNDER CASTRO* (1994). Peter Tarnoff, Under Secretary for Political Affairs, argues that prior to 1989, the level of economic assistance from the Soviet Union to Cuba amounted to between four and six billion dollars, almost one-third of Cuba's gross domestic product at the time. Peter Tarnoff, Under Secretary for Political Affairs, *Cuban Refugees*, 5 DISPATCH 35, 579 (Dept. of St. Bureau of Pub. Affairs, 1995).

32. On the political orientation of Cuban exiles in South Florida, see David Rieff, *From Exiles to Immigrants*, 74 FOREIGN AFF. 76 (1995).

33. This position is supported in part by the fact that some Cuban-American groups in Florida threatened to organize a boycott of Jamaica as a tourist destination following the Jamaican government's decision to repatriate the asylum-seekers. See *Government Takes Cuban Exile Threat Seriously*, JAMAICA OBSERVER, June 20, 1996, at 3. The National Democratic Movement in Jamaica, though critical of the government's repatriation decision, opposed the threat from the Cuban-American groups, describing it as "a misguided shot in the dark." *NDM Raps Cuban-American Groups*, JAMAICA OBSERVER, June 22, 1996, at 3.

Furthermore, interest in refugee matters was also stimulated by the unsteady course charted by the Clinton Administration in this area.³⁴ With respect to both Cubans and Haitians, recent U.S. policy has been inconsistent. For instance, in September 1994, the United States eliminated its thirty-year policy of welcoming all Cuban asylum-seekers as refugees.³⁵ The Clinton Administration has implemented measures which now require Cuban asylum-seekers to apply for United States access pursuant to an Immigration Agreement, dated September 9, 1994. In turn, this agreement requires the United States to accept a minimum of 20,000 Cubans annually.³⁶ This newly implemented system shows the potential for genuine refugees to be denied access to the United States and suggests that political factors are given priority over legal considerations in the American refugee determination process.³⁷ Similar concerns are also rele-

34. See generally Bill Frelick, Address at the 1995 Meeting of the Latin American Studies Association, XIX Congress (Sept. 30, 1995), reprinted in U.S. COMMITTEE FOR REFUGEES, U.S. REFUGEE POLICY IN THE CARIBBEAN: NO BRIDGE OVER TROUBLED WATERS (1995).

35. See President Clinton, *Cuban Refugees*, 5 DISPATCH 35, 579 (Dept. of St. Bureau of Pub. Affairs, 1994) (opening remarks at the August 19, 1994 White House Press Conference). See also Tarnoff, *supra* note 31, at 580. For a critical view of the pre-1994 United States policy of accepting all Cuban asylum-seekers, see *Reason is on Our Side* (President Castro on Cuban television and Radio Havana, Aug. 24, 1994). According to President Castro, in the period from January 1990 to August 1994, the United States admitted all 13,275 Cuban asylum-seekers who arrived in the country. *Id.* See also Stephen Vasciannie, *Caribbean Political Refugees*, DAILY GLEANER, Feb. 5, 1996.

36. *U.S.-Cuba Joint Communique on Migration*, 5 DISPATCH 37, 603 (Dept. of St. Bureau of Pub. Affairs, 1994); Acting Secretary of Political Affairs Peter Tarnoff, *FY 1996 Refugee Admissions Programme*, 6 DISPATCH 34, 643-44 (Dept. of St. Bureau of Pub. Affairs, 1995). The 1994 policy change was arguably part of a broader shift in American policy to take account of global changes in the Post-Cold War period. Acting Secretary Tarnoff stated the concept in this manner:

Since the end of World War II, refugees resettled in the United States have—in the main—been persons fleeing communism. In most cases, communism became synonymous with persecution. While we continue to admit members of certain groups to whom commitments were made before the demise of most communist States, we are in a period of transition which is resulting in adjustments of worldwide admissions over time.

Id. at 643.

37. As a result of the U.S.-Cuba Joint Communique an increased number of Cubans may officially migrate to the United States annually. See *U.S.-Cuban Joint Communique on Migration*, *supra* note 36. In the years prior to the agreement, the U.S. Interests Section processed no more than approximately 6000 people per annum, but, as noted in the text, the number is now set at 20,000; the "in-country refugee program" of the United States in Cuba is now designed to process 7000 refugees per year, as opposed to a pre-1994 level of 3000. Tarnoff, *supra* note 31, at 580.

vant to the U.S. refugee policy on Haitians, for, at the very least, the changes of policy concerning Haitians have been manifestly political.³⁸ The deep politicization of the Cuban and Haitian refugee situations by the United States meant that when the Cubans arrived in Jamaica and sought refuge, their presence prompted broad discussion on the role of the United States in the post-Cold War Caribbean.³⁹

Another factor contributing to the attention paid to the 1996 Cuban refugee episode is that, since 1990, the question of refugees has gradually assumed greater prominence in Jamaica's policy-making. A notable turning-point was the Jamaican government's decision in 1994, to allow U.S. immigration authorities to use Jamaican territorial waters as a venue for American processing of Haitian asylum-seekers—a decision which made Jamaica an offshore base for the assessment of Haitian refugee claims during the Cedras regime.⁴⁰ That decision, which was the subject of criticism, sharpened Jamaican awareness of refugee issues.⁴¹ At the same time, the United States processing of Haitian refugees in Jamaican territorial waters was part of a general trend: owing to the prevailing circumstances in Haiti following the ouster of President Aristide, the steady stream of

38. See Karen Musalo, *Beating a Hasty Retreat*, 5 PEACE REV. 3, 293 (1993). Eckstein reminds us that in 1992 and 1993, the U.S. government warmly received Cuban *balseras*, while simultaneously turning away Haitian boat people. Given the clear possibility of political persecution in Haiti during the Cedras period, this approach appeared unjustifiable. *Government Takes Cuba Exile Threat Seriously*, *supra* note 33.

39. *Government Backs Down*, *supra* note 16, at 1.

40. Memorandum concerning the Siting of Refugee Processing Ships in Jamaican Territorial Waters, 1994, U.S.-Jamaica (on file with author). For the official United States position concerning the use of third states and vessels outside the United States for refugee-processing, see Statement by President Clinton, *U.S. Taking New Steps to Respond to Crisis in Haiti*, 5 DISPATCH 21, 325-26 (Dept. of St. Bureau of Pub. Affairs, 1994). See also *Address to an Ad Hoc Meeting of Organization of American States Foreign Ministers*, 5 DISPATCH 24, at 384 (Dept. of St. Bureau of Pub. Affairs, 1994); *U.S. Policy Toward Haiti, Hearing Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Senate Foreign Relations Comm.*, 103d Cong. 2d Sess., 96 (1994) (statement of Brunson McKinley, Acting Director of the Bureau of Population, Refugees, and Migration, Department of State) reprinted in 5 DISPATCH 28, at 468 (Dept. of St. Bureau of Pub. Affairs, 1994).

41. See, e.g., *Golding Queries Processing of Haitians Here*, DAILY GLEANER, June 17, 1994, at 3; Reginald Allen, *Jamaica Not Accepting Haitians*, DAILY GLEANER, June 21, 1994; Geof Brown, *Processing of Haitian Refugees*, DAILY GLEANER, June 19, 1994; *That Haitian Matter*, DAILY GLEANER, June 17, 1994; *Oppressive Regime Pushing Haitians Out*, DAILY GLEANER, July 1, 1994; *Processing Aborted: 'Comfort' Stop Taking Haitians*, DAILY GLEANER, July 7, 1994; *JLP Pleased at End to Processing of Haitians*, JAMAICA HERALD, July 8, 1994; *'Comfort's' Last Haitians to Get Asylum Hearings*, DAILY GLEANER, July 13, 1994; *'Comfort' Sails Today*, DAILY GLEANER, July 17, 1994.

refugees from that country primarily to the United States,⁴² but also to Jamaica and other regional destinations, placed refugee issues on the Caribbean agenda. For these reasons, sensitivity to refugee concerns grew in certain sectors of Jamaican society by the time the sixty Cubans arrived.

Several events in Jamaica also helped to stir public controversy surrounding the 1996 Cuban refugee episode. For example, the Jamaican government had allowed the Cuban applications to accumulate before it established the procedural mechanisms for review. Thus, the number of applications increased from sixteen to sixty-eight between January and March of 1996.⁴³ As the numbers grew, public curiosity and concern also increased.⁴⁴ Similarly, with the passing of time, a growing number of Jamaicans came into personal contact with Cuban asylum-seekers which prompted some Jamaicans to lend public support to the Cubans.

42. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *THE STATE OF THE WORLD'S REFUGEES 1993: THE CHALLENGE OF PROTECTION* 42 (1993). Morris notes that the route from Haiti to the United States is by far the longest of any of the major, unregulated, migratory routes by sea. MICHAEL A. MORRIS, *CARIBBEAN MARITIME SECURITY* 95 (1994). See generally Bill Frelick, *Closing Ranks: The North Locks Arms Against New Refugees*, in *ALTERED STATES: A READER IN THE NEW WORLD ORDER* 162 (Phyllis Bennis & Michel Moushabeck eds., 1993). There is substantial legal literature on recent decisions by the United States to return Haitian asylum-seekers to their homeland. See, e.g., Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 94 (1994); Thomas Davis Jones, *The Haitian Refugee Crisis: A Quest for Human Rights*, 15 MICH. J. INT'L L. 77 (1993); N. DeWayne Pope, *The Closing of America's "Golden Door": The Haitian Refugee Cases*, 23 CUMB. L. REV. 687 (1992-93). For a noteworthy U.S. case, see *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993). On the treatment of Haitian asylum-seekers in the pre-Aristide period, see JAKE C. MILLER, *THE PLIGHT OF HAITIAN REFUGEES* (1984); Josh DeWind, *Alien Justice: The Exclusion of Haitian Refugees*, 46 J. SOC. ISSUES 121 (1990).

43. Government sources indicate that the Cuban asylum-seekers who arrived in Jamaica between January 27 and March 15, 1996, did so in the following numbers:

Date	Numbers
January 27, 1996	16
February 11, 1996	12
February 21, 1996	13
February 23, 1996	10
March 8, 1996	15
March 15, 1996	2

Statement by the Honorable Mullings, *supra* note 1, at 1.

44. Public curiosity and concern grew with the increasing media coverage of the arrivals and of the government's perspective. See, e.g., *supra* notes 2 and 24. In May and June 1996, issues concerning the Cuban asylum-seekers were also the subject of extensive discussion on various popular talk-shows on television and radio in Jamaica.

This support was countered by those who maintained that the Jamaicans offered Cuban asylum-seekers preferential treatment on the grounds of race. The argument was that, in contrast to Haitians,⁴⁵ the Jamaicans gave the Cubans certain material comforts and benefits⁴⁶ for reasons of race, rather than humanitarian or legal reasons.⁴⁷ Regardless of whether this accusation was well-founded, it proved persuasive to some Jamaicans. Consequently, the incident of the Cuban asylum-seekers became a part of the long-standing discourse on race and racial attitudes within Jamaican society.⁴⁸ Again, the effect of this development was to focus considerable public attention on the Cubans.

In view of these circumstances, it is hardly surprising that partisan political influences increased the level of heated discourse. As suggested, both opposition parties in the country, together with the government, vigorously debated various aspects of refugee policy at the time of the final decision to repatriate the Cubans. To the extent of introducing the Jamaican public to national and international approaches to refugees, the debate proved to be enlightening. On the other hand, given the nature of partisan political discourse, it was inevitable that the debate was also misleading in some respects. Some party positions erred on the side of oversimplification, reducing difficult ques-

45. See, e.g., *Haitians Must Go*, DAILY GLEANER, June 15, 1992, at 1 (stating residents of Montpelier, Jamaica protested because their social activities were inconvenienced by the presence of Haitian asylum-seekers at the local community center).

46. For references to this aspect of the Cuban episode, see John Maxwell, *We Can Change Things in the Ghettoes, We Really Can*, JAMAICA OBSERVER, June 3, 1996; *Sponsors of Cubans Say Colour Didn't Matter*, JAMAICA OBSERVER, May 26, 1996; Stephen Vasciannie, *Cuban vs. Haitian Refugees*, JAMAICA OBSERVER, July 9, 1996; Stephen Vasciannie, *The Refugee Confusion*, DAILY GLEANER, May 26, 1996.

47. Stephen Vasciannie, *The Refugee Confusion*, DAILY GLEANER, May 26, 1996.

48. See generally Ernie P. Gordon, *Race, Class and Social Mobility*, in GARVEY: HIS WORK AND IMPACT 265 (Rupert Lewis & Patrick Bryan eds., 1988); Trevor Munroe, *The Left and the Question of Race*, in GARVEY: HIS WORK AND IMPACT 283 (Rupert Lewis & Patrick Bryan eds., 1988); Carl Stone, *Race and Economic Power in Jamaica*, in GARVEY: HIS WORK AND IMPACT 243 (Rupert Lewis & Patrick Bryan eds., 1988); H. Hoetink, "Race" and Color in the Caribbean, in CARIBBEAN CONTOURS 55 (Sidney W. Mintz & Sally Price eds., 1985); C. L. R. JAMES, AT THE RENDEZVOUS OF VICTORY: SELECTED WRITINGS 218 (1984); M. G. SMITH, CULTURE, RACE AND CLASS IN THE COMMONWEALTH CARIBBEAN 61-87 (1984); NORMAN GIRVAN, ASPECTS OF THE POLITICAL ECONOMY OF RACE IN THE CARIBBEAN AND IN THE AMERICAS (Institute of Social and Economic Research, Univ. of W. Indies, Working Paper 7 (1975)); AGGREY BROWN, COLOR, CLASS AND POLITICS IN JAMAICA (1979); DAVID LOWENTHAL, WEST INDIAN SOCIETIES 250-92 (1972); REX M. NETTLEFORD, MIRROR, MIRROR: IDENTITY, RACE AND PROTEST IN JAMAICA (1970); GORDON K. LEWIS, THE GROWTH OF THE MODERN WEST INDIES 15-94 (1968); M. G. SMITH, THE PLURAL SOCIETY IN THE BRITISH WEST INDIES 1-18 (1965).

tions to broad platitudes.⁴⁹ In addition, there was a marked and almost understandable tendency for party spokespersons to focus on broad political concerns regarding the final decision. In practical terms, this meant that partisan discourse sometimes ignored the legal aspects of the decision, and, in particular, the relevant provisions of the 1951 Refugees Convention⁵⁰ (Convention) and the 1967 Protocol relating thereto.⁵¹

IV. IDENTIFYING REFUGEES

A. *The Official Approach*

The Cuban asylum-seekers claimed that, as a matter of law, they were "refugees."⁵² They further claimed that they were entitled to remain in Jamaica pursuant to the principle of *non-refoulement*,⁵³ which provides that political offenders should not

49. For instance, at a Press Conference on April 11, 1996, the Minister of National Security and Justice insisted that "[t]he government cannot allow itself to become impotent because a few persons say they intend to violate the laws. Government must act, and in so doing we will ensure that all human rights measures are observed." *Government Backs Down*, *supra* note 16, at 1. At the same conference, the Minister of Foreign Affairs noted that foreign policy was often very sensitive, and added "[t]his is why I feel a sense of disappointment at those who have sought to make cheap political capital out of what has happened." *Id.*

50. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter *Refugees Convention*]. The Convention entered into force on April 22, 1954, and as of December 31, 1995, there were 126 parties. Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1995, U.N. Doc. ST/LEG/SER. E/14, at 218 (1996) [hereinafter *Multilateral Treaties 1995*].

51. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter *1967 Protocol*]. The Protocol entered into force on October 4, 1967, and as of December 31, 1995, there were 126 parties. Multilateral Treaties 1995, *supra* note 50, at 240.

52. Statement by the Honorable Mullings, *supra* note 1, at 2; REPORT OF THE ELIGIBILITY COMMITTEE, *supra* note 9, at 3.

53. See *Refugees Convention*, *supra* note 50, at 176, art. 33(1). For a discussion of the early legal support of *non-refoulement*, see UNHCR, COLLECTED PROCEEDINGS, *supra* 4, at 5. As a clear treaty rule, *non-refoulement* made its first appearance in Article 3(2) of the Convention relating to the International Status of Refugees of October 28, 1933. ATLE GRAHL-MADSEN, TERRITORIAL ASYLUM 40 (1980). For a further explanation of *non-refoulement*, see UNHCR, COLLECTED PROCEEDINGS, *supra* note 4, at 20. Bearing in mind the authoritative pronouncements of the International Court of Justice in *The North Sea Continental Shelf Cases* (1969) on when a treaty rule passes into the corpus of customary law, a strong case can be made that the principle of *non-refoulement*, as set out in the *Refugees Convention*, has achieved customary status. See also *Lee Bun v. Director of Immigration* 92 I.L.R. 651, 655 (H.K. 1990). For the view that the principle of *non-refoulement* was not part of customary law in the years immediately following the entry into force of the *Refugees Convention*, see ATLE GRAHL-MADSEN, TERRITORIAL ASYLUM 41 (1980). Cf. Paul Weis, *Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees*, 30 BRIT. Y.B. INT'L L. 478, 482-83 (1953); GUY S. GOODWIN-GILL,

be extradited but instead are entitled to remain in the receiving state. The Jamaican government did not challenge this second aspect of the Cubans' claim.⁵⁴ Instead, the government based its decision to repatriate the Cubans on the ground that they were not really refugees. According to the government, the Cubans were "economic refugees,"⁵⁵ or even "illegal aliens,"⁵⁶ but clearly not "refugees."

In assessing the validity of these competing views, the core issue for analysis is whether any of the Cuban asylum-seekers satisfied the internationally accepted definition of refugees.⁵⁷ The answer to this question depends on interpretation of the terms of the 1951 Refugees Convention and the 1967 Protocol to which Jamaica is party.⁵⁸

INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 141 (1978).

54. The government did not expressly oppose the principle of *non-refoulement*. Still, it did not elaborate on the international obligations arising under the 1951 Refugees Convention and its 1967 Protocol. See, e.g., Statement by the Honorable Mullings, *supra* note 1, at 2.

55. *Government Backs Down*, *supra* note 16, at 1.

56. *Id.*

57. There has been debate among international lawyers on whether the act of recognizing that a person has satisfied the definition of refugee in the Convention is a constitutive or merely a declaratory act. The wording of Article 1(A)(1) suggests that the latter view is preferable, since it merely requires the refugee-determining agency to declare that the applicant satisfies the definition. If the applicant satisfies the definition, he or she is *ipso facto* entitled to remain in the receiving state. Refugees Convention, *supra* note 50, at 152. See also Gilbert Jaegar, *Status and International Protection of Refugees* (INTER. INSTIT. OF HUMAN RIGHTS, 9th Sess., July 1978) (supporting the declaratory approach on prudential grounds). The Dutch Supreme Court has acknowledged the right of *non-refoulement* even for persons who do not fall within the Convention definition of refugees. See *Netherlands v. FV 99 I.L.R. 32* (Neth. 1988) (noting that the court applied the principle of *non-refoulement* to protect a Sri Lankan national when it found the Sri Lankan to be "objectively in a state of flight"). *Id.* at 33.

58. Jamaica became a party to the 1951 Refugees Convention, by succession, on July 30, 1964, and acceded to the 1967 Protocol on October 30, 1980. Multilateral Treaties 1995, *supra* note 50, at 240. Cuba is not a party to either the 1951 Refugees Convention or the 1967 Protocol. This point is of little significance for the purposes of this Article. The main issue for consideration concerns Jamaica's obligations under the Refugees Convention and 1967 Protocol, not Cuba's political rights or duties. Of course, there have been recent attempts to broaden the scope of refugee policy by concentrating greater attention on the international responsibility of the states from which refugees originate. Such attempts may ultimately help curtail refugee flows across borders, and inasmuch as they incorporate concepts from the traditional law of state responsibility and from human rights law, they have a sound legal basis. Nevertheless, refugee law, as currently configured, still focuses primarily on the legal duties of the receiving state. See generally Sadsko Ogata, *Keynote Address to the Colloquium organized by the Graduate Institute of International Studies in Collaboration with the United Nations High Commission on Refugees*, in *THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES* at xix (Vera Gowlland-Debbas ed., 1996); Christian Tomuschat, *State Responsibility and the Country of Origin*, in *THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES* 59 (Vera Gowlland-Debbas ed., 1996); GERVASE COLES, *STATE RESPONSIBILITY IN RELATION TO THE REFUGEE PROBLEM WITH PARTICULAR REFERENCE TO THE STATE OF ORIGIN*

Article 1(A)(2) of the Refugees Convention⁵⁹ defines a refugee as a person who:

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.⁶⁰

Consequently, the basic legal question put before the Eligibility Committee was whether any particular Cuban could establish that he or she had a well-founded fear that upon return to Cuba he or she would be subject to either political persecution or persecution on any of the other grounds enunciated in the Refugees Convention.⁶¹ The Eligibility Committee firmly answered this question in the negative,⁶² and the government accepted this answer.⁶³

The Eligibility Committee's approach was to concentrate on the individual status of each applicant.⁶⁴ Thus, the Eligibility Committee sought to ascertain why each applicant had left Cuba.⁶⁵ Details concerning individual responses have not been made public, but the Eligibility Committee has released a general description of responses.

4-8 (1993); Frelick, *supra* note 7.

59. The Refugees Convention restricts the definition of "refugees" expressly to events occurring before January 1, 1951, while the 1967 Protocol expressly removes this restriction to include events since that date.

60. For further discussion of the definition of the term "refugee," see Jaegar, *supra* note 57, at 12; GOODWIN-GILL, *supra* note 4, at 1-46; UNHCR, COLLECTED PROCEEDINGS, *supra* note 4, at 72, 83; J. G. Starke, *Refugee Status Under International Law*, 64 AUSTL. L.J. 88 (1990).

61. As various commentators have noted, the definition in the Refugees Convention does not fully cover the different categories of refugees that have arisen since 1967. Nonetheless, this is the provision which served as the applicable law for Jamaica in the Cuban episode. See Multi-lateral Treaties 1995, *supra* note 50, at 240.

62. REPORT OF THE ELIGIBILITY COMMITTEE, *supra* note 9, at 9.

63. The government never explained why three of the sixty asylum-seekers were allowed to remain in Jamaica. On this point, the Statement of the Minister of Foreign Affairs notes that the Eligibility Committee did not reach a conclusion in those three applicants' cases. Statement of the Minister of Foreign Affairs, *supra* note 1, at 6.

64. REPORT OF THE ELIGIBILITY COMMITTEE, *supra* note 9, at 6-9.

65. *Id.* at 6. The emphasis the Committee placed on why the applicants left Cuba originally may have been misplaced. The central question ought to have been why the applicants were unwilling to return to Cuba.

The applicants identified the following factors as the basis for their decision to leave Cuba: restrictions on freedoms of movement and speech; religious discrimination resulting in denial of opportunity for higher education or professional training; economic difficulties; and a preference for Jamaica and the Jamaican system of government.⁶⁶ In some cases, applicants complained that they were subject to state surveillance, home searches, detention for suspicious activities, and harassment by frequent interrogation.⁶⁷ These claims did not persuade the Eligibility Committee, which declared that the conduct complained of did not amount to persecution, especially in cases where there are no recent incidents to support the claims.⁶⁸

B. Critique

1. Individual Claims

There are at least two basic flaws in the Eligibility Committee's reasoning. First, given the degree of public interest surrounding the issue, the Eligibility Committee should have publicly disclosed the case presented by each of the applicants. Not only would this have been consistent with the Eligibility Committee's own claim that emphasis should be placed on the individuals seeking refugee status, but it would have also allowed interested persons the opportunity to assess the decision of the Eligibility Committee in each particular case. Instead, the Committee created a vacuum by establishing general principles to guide the review of the Cuban's claims, but neglecting to detail the application of these principles. This practice limits the jurisprudential value of the Eligibility Committee's decision because

66. *Id.* at 7-8.

67. *Id.*

68. A mild criticism of the Eligibility Committee's approach here is that the Committee did not elaborate on the relationship between past persecution and the existence of a "well-founded fear of persecution." Indeed, if incidents of persecuted refugee applicants are confined to the distant past, then this may suggest that future persecution is unlikely. However, this can be no more than a presumption, for in each case one needs to examine why the applicant had been free of persecution for the time period in question. The Committee does not seem to have considered, for instance, that changing conditions in Cuba may have led to stricter monitoring of political dissidents in recent years, and that this could have caused an increasing perception of persecution among some applicants. On the nature of time as a factor in determining persecution, see 1 GRAHL-MADSEN, *supra* note 4, at 176-77.

it remains uncertain how the Committee will apply its established principles in future refugee cases.

Specifically, the Eligibility Committee's decision provides little, if any, guidance on how it will apply the concept of a "well-founded fear of persecution" in future refugee applications. Indeed, fear is a subjective condition, a state of mind which may vary by individual. However, as Atle Grahl-Madsen argues, the notion of a "well-founded fear" is a technical term which suggests that those examining refugee claims should apply an objective standard,⁶⁹ so that "the nervous, the brave, and the foolhardy should be subject to the same gauge."⁷⁰

If this is so, then the issue becomes whether the objective standard that the Eligibility Committee applied in determining if each Cuban applicant had a well-founded fear is that of the general "reasonable person," of the "reasonable Jamaican who has no first-hand knowledge of conditions in Cuba," or of the "reasonable Cuban." The decision to repatriate the Cuban applicants may have turned on which of those three standards the Committee used in determining what constituted a well-founded fear in this particular case. Without any clear indication by the Eligibility Committee concerning the actual standard used, it is difficult to draw conclusions about the validity of the Committee's decision.

Notably, a central objective of the refugee determination process is the need to protect refugees.⁷¹ Awareness of this objective should prompt authorities in the receiving state to adopt a liberal approach in applying the criteria set out in the Convention for the identification of refugees.⁷² The Eligibility Committee appears to have accepted this proposition, evidenced by the

69. *Id.* at 177. Hence, the issue has both subjective and objective components. See also UNHCR, HANDBOOK, *supra* note 4, at 12; Patricia Hyndman, *Refugees Under International Law with a Reference to the Concept of Asylum*, 60 AUSTL. L.J. 148, 149 (1986); STARKE, *supra* note 60, at 88-89 (noting *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs*, 90 I.L.R. 138 (Austl. 1989)); *Rajudeen v. Minister of Employment and Immigration*, 92 I.L.R. 662 (Can. 1984).

70. 1 GRAHL-MADSEN, *supra* note 4, at 174.

71. Refugees Convention, *supra* note 50, at 150-51. The Refugees Convention's preamble provides that "the United Nations has, on various occasions manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of . . . fundamental rights and freedoms." *Id.* at 150. Likewise, the preamble also notes that the United Nations High Commissioner for Refugees "is charged with the task of supervising international conventions providing for the protection of refugees." *Id.* at 152.

72. GOODWIN-GILL, *supra* note 4, at 22.

reference in its report that most of the Cuban applicants were not eligible for refugee status "even on a liberal interpretation of the Convention."⁷³ Again, however, the analysis presented by the Committee is deficient; the stated intention is to be liberal, but there is no discussion as to what constitutes a liberal interpretation in the present context.

Unresolved issues surrounding the application of a liberal interpretation include the standard of proof utilized, and the factors influencing the standard of proof applied in each case. In accordance with applicable Jamaican common law principles, the Committee might have required each claimant to establish his case either "beyond a reasonable doubt" or "on a balance of probability." It would be within the Committee's discretion to reject such standards because, as Guy S. Goodwin-Gill notes, they usually refer to the situation in which a judicial body seeks to ascertain whether a proximate relationship exists between past causes and past consequences.⁷⁴ In the case of the refugee claimant, past causes have to be used to determine—or to foresee—possible consequences. With this in mind, the Eligibility Committee could have applied standards such as whether there was a "reasonable chance" of persecution, whether there were "substantial grounds for believing" that there would be persecution, or whether there was "a serious possibility" of persecution.⁷⁵ Unfortunately, the Committee was silent on this point.

2. Apprehensions Concerning the Cuban Government's Reaction

The second basic problem with the Eligibility Committee's approach is that the assumptions upon which the final decision is based contradict the political reality in Cuba. It is widely ac-

73. REPORT OF THE ELIGIBILITY COMMITTEE, *supra* note 9, at 9.

74. GOODWIN-GILL, *supra* note 4, at 23. See also *Fernandez v. Government of Singapore* [1971] 1 W.L.R. 987, 993-94.

75. GOODWIN-GILL, *supra* note 4, at 24 (suggesting these possible standards); See 1 GRAHL-MADSEN, *supra* note 4, at 175 (suggesting that the standard is whether it is "likely" that the person concerned will become a victim of persecution). Compare *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (adopting a "reasonable possibility" test) with *Regina v. Secretary of State for the Home Dep't, Ex parte Sivakumaran*, 1988 A.C. 958 (assuming the "reasonable likelihood" standard by the English House of Lords). See *Chan v. Minister for Immigration and Ethnic Affairs*, 63 AUSTL. L.J. 561 (1989) (favoring a "substantial chance" of persecution test); See also *Starke*, *supra* note 60, at 89.

knowledge that the Cuban regime has detained numerous persons as political prisoners.⁷⁶ In the month preceding the Eligibility Committee decision, the United Nations Human Rights Commission issued a report stating that "hundreds" of Cubans were imprisoned for their political views.⁷⁷ In the report, a special United Nations investigator also stated that "hundreds" of Cubans were harassed or dismissed from their jobs for political reasons, and noted "violations of freedom of expression, information, travel, assembly and peaceful demonstration."⁷⁸ The special investigator estimated that some 1500 prisoners in Cuba were political detainees during the period shortly before the Jamaican government's decision to return the asylum-seekers.⁷⁹ There may be differences of opinion concerning the number of political detainees in Cuba, but the Cuban authorities concede the fact that they sometimes arrest persons for purely political offenses.⁸⁰

It is also a matter of record that the Cuban regime is embarrassed whenever Cuban nationals flee the country in unauthorized boats.⁸¹ The reasons for this embarrassment are easily un-

76. For the official U.S. perspective on this issue, see U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FROM 1995: REPORT SUBMITTED TO THE COMMITTEE ON INTERNATIONAL RELATIONS U.S. HOUSE OF REPRESENTATIVES AND THE COMMITTEE ON FOREIGN RELATIONS U.S. SENATE 384, 447 (1996).

77. *U.N. Blasts Cuba's Rights Record*, JAMAICA OBSERVER, Apr. 22, 1996, at 1.

78. *Id.*

79. *Id.*

80. The Cuban Constitution stipulates that citizens may not exercise their legally recognized freedoms in a manner which is contrary to the "existence and objectives of the socialist state, or contrary to the decision of the Cuban people to build socialism and communism," CUBAN CONST., art. 62. Article 53 of the Cuban Constitution gives citizens "freedom of speech and of the press in keeping with the objectives of socialist society." *Id.* art. 53. Article 54 states that "while the State recognizes, respects and guarantees the liberty of religion it also recognizes, respects, and guarantees the liberty of every citizen to change religious beliefs or to have no beliefs, and to state, within the boundaries of the law, their own religious preferences." *Id.* art. 54. See also U.S. DEPARTMENT OF STATE, *supra* note 76, at 383-87; *The Breakfast Club* (Interview with Ricardo Alarcon DeQuesada, President of the Cuban National Assembly of People Power on Jamaica Radio, Sept. 22, 1995) (Transcript on file with author) (admitting that there are political prisoners in Cuba).

81. Naturally, this is not the stated position of the Cuban authorities. The official position is that asylum-seekers leave Cuba because of the economic hardships faced by Cuban nationals mainly as a result of the U.S. embargo. See *infra* note 100. In the recent past, the Cuban authorities have also argued that American encouragement has stimulated emigration through unofficial channels. See, e.g., *Reason is on Our Side*, *supra* note 35, at 21-22, 29, 41. For instance, a Cuban government memorandum indicates that "[t]he attitude adopted by the United States in admitting and facilitating the entering into its territory of Cubans who arrive illegally, even when, in many cases, these are people with criminal records and deplorable criminal behavior who normally would be denied entry via normal legal channels, has the direct consequence of encouraging illegal emigration." Cuban Government's Memorandum 1121, 29 (Nov. 12, 1993) (on

derstood: one who mounts a small, flimsy raft and faces the high seas under the cloak of nightfall in order to leave one's homeland is making a strong negative statement about conditions at home.⁸² In the context of the vestigial Cold War relations between Cuba and the United States, such departures may well be used for purposes of political persuasion by adversaries of the Cuban regime. Accordingly, the Cuban government is consistent in its desire to limit the outflow of unauthorized asylum-seekers. For example, in the period preceding the Immigration Agreement of 1994 between Cuba and the United States, President Castro openly opposed the prevailing U.S. policy of accepting Cuban asylum-seekers as political refugees.⁸³

Upon reconciling these two facts—the prospect of imprisonment in Cuba for political reasons and the Cuban regime's disapproval of clandestine departures—the second weakness of the Eligibility Committee's approach becomes apparent. In particular, the Committee, in assessing the Cuban claims for refugee status, has underestimated the possibility that the Cuban asylum-seekers in Jamaica would be open to political persecution in Cuba solely on the ground that they embarrassed the regime by leaving the country without authorization.⁸⁴ The argument is not that persecution for unauthorized departure is inevitable, but, rather, it is that the claimants could have had a "well-founded fear of persecution," based on their recognition of the Cuban authorities' attitude toward unauthorized asylum-seekers.⁸⁵

file with author).

82. For the view that refugees may embarrass their home country by "voting with their feet," see Panjabi, *supra* note 28, at 249-50. See also UNHCR, *WORLD'S REFUGEES*, *supra* note 6, at 245. "Refugees are in many ways a symbol of failure. No state likes to admit that its citizens have felt obliged to leave their own country. Similarly, returnees are a symbol of success." *Id.*

83. The Cuban President expressed his willingness to encourage the departure of various social deviants from Cuba if the United States did not modify its policy of unquestioning acceptance of Cuban asylum-seekers. At the time of the 1980 Mariel Boatlift, it was widely believed that a significant proportion of the *Marielitos* were also deviants. B. E. Aguirre, *Cuban Mass Migration and the Social Construction of Deviants*, 13 BULL. LATIN AM. RES. 155 (1994). For more information on the Mariel Boatlift, see FELIX ROBERTO MASUD-PILOTO, *WITH OPEN ARMS: CUBAN MIGRATION TO THE UNITED STATES* 71-110 (1988).

84. Sylvina dos Santos, the Cuban Ambassador to Jamaica, has challenged this view. In an interview on Jamaican television, Ambassador dos Santos argued that "[i]t is absolutely false that they will suffer any harassment or violation of their human rights," and added that suggestions to that effect were "anti-Cuba propaganda." *Government Backs Down*, *supra* note 16, at 1 (citing Television Interview with Sylvina dos Santos, Cuban Ambassador to Jamaica, *Thwaites and Company* (Apr. 11, 1996)).

85. In this regard, reference may also be made to occasional reports that some Cubans who

In fairness, the Eligibility Committee was not unaware of this claim. The Committee reports that some of the claimants mentioned the fear of "conviction and sentence of imprisonment for illegally leaving" as a part of their case for refugee status.⁸⁶ The Committee's response on this point requires careful scrutiny. It reads:

[The Cubans'] apprehension of conviction and sentence of imprisonment for illegally emigrating, *though not relevant to the determination of whether or not an applicant is a refugee*, ought not to be ignored. The apprehension of a sentence of imprisonment of long duration is understandably bona fide. We have been advised, based upon previous diplomatic talks between the respective Governments, that the Government of Cuba would be willing to give an undertaking not to prosecute or punish the returnees merely for leaving the country without permission. Having regard to the good relations existing between the two Governments, we must presume that the Cuban Government will honour such an undertaking. Whether or not an amnesty will be extended to other collateral or incidental offenses, past or present, is eminently a matter for the Cuban Government.⁸⁷

The foregoing statement raises at least two issues of general importance. First, the Committee posits, almost *ex cathedra*, that apprehension concerning illegal departure is irrelevant in the refugee determination process.⁸⁸ This is not convincing. One might wonder why this apprehension is not relevant.⁸⁹ Indeed, prosecution *per se* is not the same as persecution; but, in some circumstances, prosecution is the most obvious way in which per-

were repatriated from the United States in 1995 have been subject to retaliation in Cuba. The Cuban government has consistently rejected suggestions to this effect. See, e.g., *Returned Refugees Say Cuba, Defying Pact, Retaliates*, N.Y. TIMES, Mar. 9, 1996, at 1. See also *Cubans Flee to Puerto Rico*, JAMAICA OBSERVER, June 3, 1996, at 1. Cf. Tarnoff, *supra* note 31, at 580 (referring to the U.S.-Cuba Joint Communiqué on Migration, September 9, 1994, Tarnoff noted that, as of May 1995, the United States had "no evidence that violence or coercion have been used to deter [unauthorized] departures or that those attempting to leave the country using irregular means have been persecuted or discriminated against.").

86. REPORT OF THE ELIGIBILITY COMMITTEE, *supra* note 9, at 7-8.

87. *Id.* (emphasis added).

88. *Id.*

89. The discussion in the text does not dwell on what appears to be a logical fallacy in the Eligibility Committee's approach. One may question how the Committee supports its position that apprehension of arrest is irrelevant while maintaining that apprehension ought not to be ignored. If apprehension of arrest is irrelevant, then, by definition, it ought to be ignored.

secution manifests itself. Accordingly, apprehension of arrest for illegal departure must be a relevant factor in determining whether one is a refugee. Prosecution for illegal departure could easily constitute the pretext for an arrest, where the real reason for the arrest lies in the fact that the asylum-seeker has embarrassed the regime politically by fleeing the country.⁹⁰

Second, the Eligibility Committee appears to have attached considerable significance to the Cuban authorities' assurance that they would not prosecute or punish the returnees merely for leaving Cuba without permission.⁹¹ The Committee's apparently unquestioning acceptance of this assurance borders on the quixotic.⁹² Without undue cynicism, one could argue that the Cuban authorities had every reason to give assurance. The Cuban authorities wished to have their nationals returned home, and would have been embarrassed if the Jamaican government gave such nationals refugee status. It was, therefore, in Cuba's interest to give this assurance. Arguably, however, the assurance may be of limited value, especially considering that neither the Jamaican government nor the Eligibility Committee is in a position to monitor effectively the situation of the Cuban asylum-seekers once they are back in Cuba.

Furthermore, having relied on Cuba's assurance of non-prosecution, the Eligibility Committee appears to have simultaneously left open the possibility of prosecution. For, as the passage quoted above indicates, the Committee contemplated the possibility that the Cuban government could prosecute the asylum-seekers for "collateral or incidental offenses, past or pres-

90. For general comments on the relationship between prosecution and persecution, see UNHCR, HANDBOOK, *supra* note 4, at 15-16; 1 GRAHL-MADSEN, *supra* note 4, at 192.

91. The Jamaican government also placed reliance on assurances of the Cuban government. Statement by the Honorable Mullings, *supra* note 1, at 3; *Government Backs Down*, *supra* note 16, at 1. Similar assurances were given by the Cuban authorities to the U.S. government at the time of the U.S.-Cuba Joint Communiqué on Migration, September 9, 1994, and prior to the conclusion of a Migration Agreement of May 2, 1995 between both countries concerning asylum-seekers located at Guantanamo Bay. Tarnoff, *supra* note 31, at 580.

92. It is significant that, with respect to both the U.S.-Cuba Joint Communiqué on Migration, September 9, 1994, and the Migration Agreement of May 2, 1995, the U.S. authorities maintained that they be allowed to verify for themselves that persons who left Cuba in unauthorized vessels were not subject to threats or penalties upon return, and the Cuban government allowed such verification. Under the latter agreement, in the period between May 2 and May 22, 1995, the United States protested about two possible incidents (from a group of eleven persons returned to Cuba) in which "it appeared possible that returnees were being disadvantaged by their effort to leave Cuba illegally." Tarnoff, *supra* note 31, at 580.

ent."⁹³ Given that the Cuban judiciary is known not to be independent of the executive,⁹⁴ and recalling that the departure of the asylum-seekers from Cuba was an embarrassment to the state, it is reasonable to believe that if the Cuban authorities decided to prosecute the asylum-seekers, they could well identify a number of offenses "collateral or incidental" to the offense of leaving the country without permission. If this is so, then a Cuban asylum-seeker may justifiably have had a well-founded fear of persecution, notwithstanding the Cuban government's assurance.

Finally, the approach recommended in this section is not entirely without precedent. Within Cold War Europe, certain Eastern Bloc States placed travel restrictions on their citizens and imposed heavy penalties upon nationals for remaining outside the country beyond the time contemplated in exit permits.⁹⁵ In this context, there was a division of opinion among receiving states as to whether nationals who had departed the Eastern Bloc State without a permit, or had violated the permit, were *ipso facto* refugees.⁹⁶ According to some, if refugee status were granted in such circumstances, this would prompt an influx of bogus refugee claims. The other view, however, claims that restrictive exit rules were meant to bolster political authority in the Eastern Bloc States, and that those departing from such states could justifiably have a well-founded fear of persecution on the basis that they had violated the country's travel rules. The latter view, which received support in the courts of Austria and the Federal Republic of Germany, is similar to the argument proffered here.⁹⁷

93. REPORT OF THE ELIGIBILITY COMMITTEE, *supra* note 9, at 8.

94. The Cuban Constitution provides for independent courts, but it subordinates the courts to the National Assembly and the Council of State, which is headed by President Castro. See CUBAN CONST., arts. 5, 68, 73, 74, 86, 89(f), 122, 123(f), 123(g), 125. See also U.S. DEPARTMENT OF STATE, *supra* note 76, at 380, 383.

95. See GOODWIN-GILL, *supra* note 4, at 31-33.

96. *Id.*

97. In this connection, Guy S. Goodwin-Gill cites a Directive of the Austrian Minister of the Interior, which expressly provides for recognition of refugee status where penal sanctions would be applied to individuals who violate the terms of their exit permits by overstaying in a foreign country, and where such individuals are unwilling to return home for political reasons. GOODWIN-GILL *supra* note 4, at 32.

V. CONCERNING ECONOMIC REFUGEES

The Jamaican government maintained that the Cuban asylum-seekers were, in fact, economic refugees and, therefore, did not satisfy the definition of "refugees" set forth in the Refugees Convention.⁹⁸ The argument was that Cubans who left Cuba for economic, rather than political, reasons were not entitled to remain in Jamaica as a matter of law.⁹⁹

On preliminary examination, this perspective has some merit. Given the discontinuation of Soviet and Eastern Bloc assistance to Cuba and the stifling effects of the American embargo, it is undeniable that economic conditions in Cuba have deteriorated in recent years. It is reasonable, therefore, to conclude that some of the Cuban asylum-seekers fled their country because they suffered under, or were dissatisfied with, Cuba's economic conditions. This view is confirmed by the responses which some of the applicants made to the Eligibility Committee.

On the other hand, the fact that some, if not all, the Cuban asylum-seekers may originally have left Cuba for economic reasons does not necessarily resolve the issue of their status as refugees. Assuming that the many of the Cubans were economic refugees *simpliciter* at the time of their departure,¹⁰⁰ they may

98. See *supra* text accompanying notes 52-56.

99. Under the *lex lata*, it is undeniable that so-called economic refugees are not entitled to the right of asylum. There are circumstances in which it will be almost impossible to draw a real distinction between the terms "refugee," as used in the Refugees Convention, and "economic refugee." See Maluwa, *supra* note 7 at 663 (arguing the distinction is often used as an opportunistic device to mask the political biases of the receiving country). See also ALAN DOWTY, CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT 183 (1987). Nevertheless, in the present discussion, it is assumed that the distinction can validly be made in most circumstances. Suggestions to modify the definition of "refugee" in the Refugees Convention to embrace economic refugees have encountered a range of social and economic objections which fall beyond the scope of this Article. For a more thorough treatment of this issue, see J. H. Crabb, *The Law of Asylum For Refugees and Mass Movements of Populations*, in INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW: ROUNDTABLE ON SOME CURRENT PROBLEMS OF REFUGEE LAW 45, 47 (May 11, 1978).

100. The general perspective of the Cuban government is that the departure of its nationals is essentially a reflection of the economic pressures Cuba experienced in the wake of the U.S. embargo. President Castro described unauthorized migration from Cuba in July-August 1994 in the following terms: "We say that the blockade is the fundamental cause and their [the U.S.] response is further blockading . . . We say that the fundamental factor compelling mass emigration is economic compulsion and they adopt more compulsive measures." *Reason is on Our Side*, *supra* note 35 at 10-11. There is independent evidence to support the view that unauthorized Cuban migration is based primarily on economic considerations. See, e.g., ECKSTEIN, *supra* note 31 at 121 (citing N.Y. TIMES, June 2, 1991, at A24).

have become political refugees by the time the Jamaican government heard their claims. As previously stated, the asylum-seekers may have been entitled to refugee status on the ground that they had embarrassed the Cuban government by leaving the country and could reasonably have feared persecution for so doing; they could have become refugees by the very act of fleeing Cuba.¹⁰¹ If this is true, the original reason for departure would not have been determinative of their status as refugees; rather, their status would depend upon whether they had a "well-founded fear of persecution" at the time when they applied to the Jamaican government for asylum.

This approach is fully consistent with the actual wording of the "refugee" definition in Article 1(A)(2) of the Refugees Convention.¹⁰² The Convention does not say that a refugee is one who *leaves* his homeland owing to a fear of political persecution. Its wording is quite specific: a refugee is someone who is *outside* his or her homeland and who is unable or unwilling to return home.¹⁰³ This specific wording is not fortuitous. As indicated in the *travaux préparatoires* of the Refugees Convention, the reference in the definition to a person who "is outside" his country was deliberately chosen.¹⁰⁴ Even the alternative form of words which the drafters considered—reference one who "has had to leave, shall leave or remains outside"¹⁰⁵ his country—would also have covered the case of a national who becomes a refugee after departure from his country.¹⁰⁶ Therefore, refugee status should be based on events which have taken place both before and after the applicant has departed his homeland.¹⁰⁷ In other words, the ob-

101. See *supra* text accompanying notes 76-97.

102. See Refugees Convention *supra* note 50.

103. See also Goodwin-Gill, *supra* note 4, at 24-25; Hyndman, *supra* note 69, at 149; Chan Yee Kin v. Minister for Immigration and Ethnic Affairs 90 I.L.R. 138 (Austl. 1989); Somaghi v. Minister for Immigration and Ethnic Affairs 91 I.L.R. 169, at 177-79 (Austl. 1991).

104. 1 GRAHL-MADSEN, *supra* note 4 at 151 (citing U.N. Doc. E/1850, at 8; UN Doc. A/CONF.2/SR.23, at 9-10).

105. 1 GRAHL-MADSEN, *supra* note 4, at 151.

106. *Id.*

107. The United Nations High Commissioner for Refugees emphasizes this point. The United Nations High Commissioner on Refugees, Handbook on Procedures and Criteria for Determining Refugee Status states that:

The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. The asylum-seeker may have decided to ask for recognition of his refugee status after having already been abroad for some time.

jective of those who prepared the Convention was to allow refugees *sur place* to be entitled to full refugee protection.¹⁰⁸

It is unfortunate that the Jamaican government paid such little attention to the possibility that putative economic refugees from Cuba could have become political refugees by the time they applied for asylum in Jamaica. The Cuba-Jamaica episode also points to the need for immigration authorities to exercise special care in handling refugee issues in the future. In certain circumstances it will be insufficient to ascertain merely why the asylum-seekers departed from their country of nationality. The authorities should also ascertain why the asylum-seekers wish to remain outside their country.¹⁰⁹ This comprehensive evaluation is required by both the spirit and letter of the Refugees Convention.

VI. THE RELEVANCE OF LEGALITY

A basic feature of international refugee protection is that the granting of refugee status should not depend upon the circumstances under which applicants entered a foreign country.¹¹⁰ Thus, even though the Cuban asylum-seekers arrived in Jamaica without the requisite entry permits, this fact was irrelevant to their claim for *non-refoulement*.

Logically, this position is easy to defend. If an asylum-seeker has opted to traverse the seas as a means of escape, it is

UNHCR, HANDBOOK, *supra* note 4, at 22.

108. Certain multilateral treaties and other instruments prepared subsequent to the 1951 Refugees Convention also accept that refugee status may be determined on the basis of events which have occurred after the asylum-seeker has left the country of his nationality. See, e.g., The Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45, art. 1(1) *reprinted in* 8 I.L.M. 1288 (1969) [hereafter OAU Convention]; Asian-African Legal Consultative Committee, Principles Concerning Treatment of Refugees, 1966, art. 1(b) (with reservations on this point expressed by Japan and Thailand) *reprinted in* UNITED NATIONS HIGH COMMISSIONER ON REFUGEES, COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES, 201, 203 (1979).

109. As noted earlier, the question of cardinal importance for the Eligibility Committee was why the Cuban asylum-seekers had left Cuba. The argument here is that, in identifying whether a well-founded fear exists, the issue of why the asylum-seekers wished not to return to Cuba was of equal significance. The Eligibility Committee does not appear to have thoroughly examined this argument. REPORT OF THE ELIGIBILITY COMMITTEE, *supra* note 9, at 14.

110. See also the Memorandum to the *Ad Hoc* Committee on Refugees from the U.N. Secretary General, which states that "[i]t would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum and is recognized as a *bona fide* refugee." UN Doc. E/AC.32/2, at 46 (1950).

almost certain that he or she will not have the relevant documentation for entry into the first port of call.¹¹¹ However, the aim of the refugee determination process is for the receiving country to assess whether, having arrived without the necessary papers, it should grant the applicant the right to remain there.¹¹² Asserting that an asylum-seeker must be repatriated merely because he or she is an "illegal alien" is to summarily deny the person's refugee claim.

As to the law, the Refugees Convention also speaks with some degree of clarity. Article 31(1) stipulates that:

The Contracting States shall 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 in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.¹¹³

This provision effectively requires the asylum-seeker who arrives in a foreign country by clandestine means to declare himself and justify his emigration to the relevant authorities.¹¹⁴ Having done so, the asylum-seeker then becomes entitled to present his claim for refugee status and *non-refoulement* pursuant to Articles 1 and 33(1) of the Convention.¹¹⁵

111. See also 2 GRAHL-MADSEN, *supra* note 4, at 199-225; Hyndman, *supra* note 69, at 148.

112. For further analysis, see 1 GRAHL-MADSEN, *supra* note 4, at 94.

113. From the perspective of protection for asylum-seekers, this provision has weaknesses. First, the language of the Refugees Convention Article 31(1) could be read as providing protection for persons whom the receiving state has already declared as having refugee status. Then one could argue that asylum-seekers can be subject to penalties on account of their illegal entry or presence. By extension, one such penalty could be the denial of refugee status. However, this reading would only be acceptable to those who take a constitutive view of the refugee-determination process. Second, the provision appears to contemplate that Article 31(1) protection extends only to persons who have fled their country as a result of threats to life or freedom. However, some asylum-seekers only become subject to the possibility of persecution after they have fled their homeland—a point which is recognized in Article 1 of the Refugees Convention. Refugees Convention, *supra* note 50.

114. See also *In re Ouakli* 31 I.L.R. 327 (Belg. 1960). In this case, a Belgian Royal Decree of 1953 was interpreted to mean that asylum-seekers should declare their desire for refugee status to the relevant authorities at the moment of entry, unless factors beyond the control of the asylum-seeker make this impossible. The Belgian Court of Cassation found that Article 31(1) of the Refugees Convention "confirmed by analogy" to the interpretation given to the Royal Decree. *Id.* at 327-28.

115. See Yugoslav Refugee Case, 28 I.L.R. 297 (F.R.G. 1958). Cf. Frank E. Krenz, *The*

This interpretation of Article 31(1) is bolstered by Article 14 of the Universal Declaration of Human Rights,¹¹⁶ which maintains that "everyone has the right to seek and to enjoy in other countries asylum from persecution."¹¹⁷ Even if the Declaration is regarded as providing only minimal guidance on the point,¹¹⁸ it seems clear that if one has the right to seek asylum from persecution, this right ought not to be denied on the ground that the person seeking to enjoy this right is an illegal alien.¹¹⁹ The view that legality of entry should not be relevant in the refugee determination process is also supported by judicial opinion.¹²⁰ From as early as 1954, Paul Weis, Legal Advisor to the United Nations High Commissioner on Refugees, appeared to consider this axiomatic by noting that the principle that refugees should not be forcibly returned home applied "equally to persons whose residence in the territory has been authorized and to illegal entrants."¹²¹

Refugee as a Subject of International Law, 15 INT'L & COMP. L.Q. 90, 102-06.

116. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/180 at 71 (1948).

117. *Id.* This provision, as drafted, does not grant to individuals a "right of asylum," but merely affirms that each individual should have the right to seek and enjoy asylum. For the legislative history of Article 14, see Draft International Declaration of Human Rights, U.N. GAOR 3d Comm., 3d Sess., U.N. Doc. A/C.3/265 (1948). See generally Felice Morgenstern, *The Right of Asylum*, 26 BRIT. Y.B. INT'L L. 327 (1949); Weis, *supra* note 53, at 481; GOODWIN-GILL, *supra* note 53, at 137-38. For critical commentary, see HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 347 (1950).

118. The legal impact of the Universal Declaration on Human Rights is a matter of substantial discussion outside the scope of this Article. However, it is useful to recall that although the Declaration was not regarded as a statement of law or legal obligation at the time of its adoption, it has helped to influence state practice by providing a yardstick against which state actions are assessed. See, e.g., Statement by Eleanor Roosevelt, 19 DEPT ST. BULL. 751 (1948) (Chairman of the U.N. Commission on Human Rights at the time of the drafting of the Declaration); Humphrey Waldo, *General Course on Public International Law*, 106 HAGUE RECUEIL 5, 32-33, 198-99 (1962-II); EGON SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY: THE ROOTS AND GROWTH OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948-1963* (1964); IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 570-71 (4th ed., 1990).

119. Cf. 2 D. P. O'CONNELL, *INTERNATIONAL LAW* 740 (1970) (stating Article 14 is "only exhortatory"). General Assembly Resolution 2312 (XXII) (1967) states, *inter alia*, that persons entitled to invoke Article 14 of the Universal Declaration of Human Rights shall be rejected at the border or expelled to any state where he may be persecuted. As a source of binding obligation, however, this resolution is limited by its rather vague language and by the limitations inherent in relying on General Assembly Resolutions as sources of international law.

120. Paul Weis, *The International Protection of Refugees*, 48 AM. J. INT'L L. 193 (1954). See also UNHCR, *COLLECTED PROCEEDINGS*, *supra* note 4, at 20-21; 1 GRAHL-MADSEN, *supra* note 4, at 303.

121. Weis, *supra* note 120, at 193.

Despite the force of these arguments, however, the Jamaican government stated that the Cuban applicants should be returned to Cuba because they were merely illegal aliens.¹²² The government advanced no reasoning in support of this conclusion.¹²³ At the same time, the position of the government was not considered in the report of the Eligibility Committee. It may be unduly speculative to draw conclusions about the views of the Committee on this point, but there is support for the view that the government, by asserting that the applicants were illegal aliens who were to be returned home, was sending a strong signal to the Eligibility Committee on the decision it expected the Committee to make.

VII. OPENING THE FLOODGATES?

At various points in the deliberations concerning the Cuban asylum-seekers, the Jamaican government expressed the fear that granting the refugees asylum would generate a massive flight of Cubans into Jamaica.¹²⁴ The risk of opening the floodgates to Cubans struck a significant chord among the Jamaican populace.¹²⁵ Even some Jamaicans supportive of the Cubans on humanitarian grounds were fearful that a heavy influx of Cubans could strain Jamaica's limited resources.¹²⁶

122. See *supra* text accompanying notes 52-56. The Joint Statement of the Ministries of National Security and Foreign Affairs on April 10, 1996, characterized the asylum-seekers as "illegal aliens," a view which was reiterated by the Minister of Foreign Affairs on the same day. *Asylum Request Rejected: Cubans to be Sent Home*, JAMAICA OBSERVER, Apr. 11, 1996, at 1.

123. In his presentation to the Jamaican Parliament, the Minister of Foreign Affairs confined his comment on this matter to one sentence: "[T]he government of Jamaica cannot countenance the illegal entry upon its shores and within its borders of unauthorized boats." Statement by the Honorable Mullings, *supra* note 1, at 8.

124. See, e.g., Statement by the Honorable Mullings, *supra* note 1, at 8; *Government Backs Down*, *supra* note 16, at 1. At the Press Conference at which the government announced its decision to have the asylum decision reviewed by the Eligibility Committee, the Minister of Foreign Affairs argued the following: "While [being] very sensitive to humanitarian considerations, the nation must also bear in mind, that to open the doors of Jamaica to asylum-seeking individuals on an open-ended basis, would be to open floodgates for an unending stream, which would have economic costs which the country simply could not afford." Statement by the Honorable Mullings, *supra* note 1, at 8.

125. Most likely for this reason the Minister of Foreign Affairs was careful to emphasize that the estimated cost of providing shelter, food, and other requirements for the Cubans was approximately two million Jamaican dollars. As the Minister neither itemized the costs, nor indicated the period of time under consideration, the accuracy of this estimate is difficult to assess. It does, however, create the impression that the asylum-seekers were a significant drain on local resources. See Statement by the Honorable Mullings, *supra* note 1, at 2.

126. In recognition of this consideration, Sister Joan Clare of the Franciscan Sisters of Alle-

The fear is shared by other Caribbean governments¹²⁷ which have expressed concern about the political circumstances giving rise to refugee problems, but have considered themselves unable to provide asylum for refugees in large numbers.¹²⁸ The explanation for this position lies in the level of poverty prevalent in the region. This problem is well articulated by former Prime Minister of Dominica, Dame Eugenia Charles, in a response to a 1992 letter of criticism from U.S. Congressman Charles Rangel concerning Caribbean reluctance to offer solace to Haitian refugees.¹²⁹

We have 10% unemployment and our unemployment is mainly among urban women and secondary school leavers Our housing plant has always been terrible Our drug problem is growing to our great dissatisfaction and despair To introduce refugees into our society—refugees for whom houses would have had to be provided and to whom some sort of stipend would have been paid—would have introduced explosive elements into our society with which we do not have the resources to cope.¹³⁰

This perspective, though understandable, does not fully resolve the issue of whether the Cuban asylum-seekers in Jamaica were accorded treatment consistent with international law. Notably, the Refugees Convention makes no mention of resource considerations in the refugee determination process. Arguably, the Convention should be more sensitive to the resource considerations, which influence the ability of individual countries to ab-

gany Refugee Office, in her Letter to the Minister of Foreign Affairs inquired whether the sixty asylum-seekers could be allowed to remain in Jamaica on the clear understanding that no additional Cubans would be given the same treatment in the future. The Minister responded mainly by repeating the government's concern about the economic costs of maintaining the asylum-seekers. *Foreign Minister Denies Cuban Refugee Deal*, JAMAICA OBSERVER, May 25, 1996, at 1.

127. For example, the Bahamas entered into an immigration agreement with Cuba concerning the repatriation of asylum-seekers on August 4, 1994. See *Jamaica Devuelve Emigrantes Ilegales*, *supra* note 24. Dominica has also denied admission to asylum-seekers primarily on economic grounds. Letter from Dame Eugenia Charles, Prime Minister of Dominica, to Charles B. Rangel, Member of the U.S. Congress (Mar. 17, 1992) (on file with author) [hereinafter Letter dated March 27, 1992].

128. *Id.*

129. Letter from Charles B. Rangel, Member of the U.S. Congress, to Patrick Manning, Prime Minister of Trinidad and Tobago in his capacity as the then Chairman of the Caribbean Community (Jan. 8, 1992) (on file with author).

130. Letter dated March 27, 1992, *supra* note 127.

sorb a large influx of refugees.¹³¹ Nevertheless, the clear language of the Convention is that if an asylum-seeker fits the definition of a refugee, then the principle of *non-refoulement* should apply.¹³²

Therefore, if there was a finding that the Cubans were, in fact, refugees, the Jamaican government could not employ the floodgates argument to deny its legal obligation not to return the Cuban asylum-seekers to Cuba. In the debate about the asylum-seekers, this point was often obscured by issues relating to Jamaica's resource problems and by nativist concerns.¹³³

In the case at hand—concerning only sixty asylum-seekers—it is not entirely clear that resource factors should bear much significance. However, where the inflow is more substantial, there is a real conflict if small developing countries, which ratify the Refugees Convention, must accommodate all refugees who come within their border. In such circumstances, the particular country concerned may be inclined to ignore the principle of *non-*

131. Writing in 1950, Hersch Lauterpacht argued that it would be impracticable to impose upon a state a rigid duty to receive any number of political offenders and victims of persecution, without limitation. In his draft of the Bill of Rights, he suggested that each state should have a duty of asylum, "within the limits of public security and the economic capacity of the State," as determined by the state. This approach was not taken in the Refugees Convention, but it underlines the notion that the drafters of Convention, and the early signatories, were fully cognizant of the resources issue. See, LAUTERPACHT, *supra* note 117, at 345-46. Today, it is also true that several Western states openly view asylum as a "restricted good"—an item that is made available only for the few who can document beyond reasonable doubt that they are particularly persecuted in their state of origin. This restrictive perspective may be a reflection, in large part, of resource constraints in receiving states. So, for instance, in Norway, the immigration authorities have recently emphasized that "[p]rotection must be viewed as a *limited resource*. Norway cannot provide protection to all who need it." Terje Einarsen, *Mass Flight: The Case for International Asylum*, 7 INT'L J. REFUGEE L. 551, 555 (1995) (citing *Flyktningepolitikken: En kortversjon av. St.meld.*, 3 (1994-95)). See generally UNHCR, *WORLD'S REFUGEES*, *supra* note 6, at 36-37.

132. Article 33(1) of the Refugees Convention is worded in unequivocal terms: "No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Refugees Convention, *supra* note 50, at 176.

133. Some supporters of the decision to repatriate the Cubans also argued that at the time the Refugees Convention and the 1967 Protocol each entered into force, neither was meant to cover the mass exodus of refugees. On this view, there has been a fundamental change in circumstances concerning refugee flows and, accordingly, the Convention and Protocol should be interpreted in light of the new circumstances. In response, it may be noted that: (a) if there has really been a fundamental change in circumstances, it is open to the states concerned to rely on the doctrine of *rebus sic stantibus* to modify their duty of *non-refoulement*; and (b) refugees have been departing hostile communities in mass numbers since before the Convention entered into force, and the mass exodus of refugees was certainly within the contemplation of those who negotiated the terms of the 1967 Protocol.

refoulement.¹³⁴ This serves to undermine the rule of law because the country, in effect, has opted to disregard a binding obligation. Alternatively, the concerned country may be tempted to withdraw from the Refugees Convention on the ground that the obligation to accommodate all refugees is simply too onerous. Clearly, this approach would give full respect to the principle of *pacta sunt servanda*.¹³⁵ On the other hand, it would imply that the country has reduced its commitment to humanitarian treatment for refugees, a point which could conceivably affect the country's reputation in interstate relations.

VIII. MUNICIPAL LAW ISSUES

In matters pertaining to the relationship between international law and municipal law, Jamaica does not follow the incorporation doctrine.¹³⁶ Hence, although the Refugees Convention is binding upon Jamaica in its international dealings, the particular rules in the Convention would need to be promulgated as a local act of Parliament in order to take effect at the municipal level. Due to the Jamaican Parliament's failure to incorporate the Convention into Jamaican law, the Cuban asylum-seekers had no access to the Jamaican courts, and no formal channels of appeal from the repatriation decision made by the Executive. Given that sixteen years have passed since Jamaica ratified the 1967 Protocol, it appears that the Convention and Protocol have been omitted from local legislation by deliberate acts of policy.¹³⁷ In strict legal terms, this approach is consistent with the Refugees Convention, which does not require states to enact its terms.

134. Here the "exilic" bias of refugee law comes sharply into focus, for small, developing countries may well see the need for a solution to the underlying problems which prompt the refugee flow, but, at the same time, find themselves unable to accommodate the refugees. GERVASE COLES, REFUGEES AND INTERNATIONAL LAW 373 (1989); Vera Gowlland-Debbas, *The Expanding International Concern*, 5 PEACE REV. 287, 288-89 (1993). Cf. George Okoth-Obbo, *Coping with a Complex Refugee Crisis in Africa: Issues, Problems and Constraints for Refugee and International Law*, in THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES, 7, 11 (Vera Gowlland-Debbas ed., 1996).

135. Agreements (and stipulations) of the parties (to a contract) must be observed. BLACK'S LAW DICTIONARY 1109 (6th ed. 1990).

136. On the relationship between international law and municipal law generally, see BROWNIE, *supra* note 118 at 32-57; Sir Gerald Fitzmaurice, *The General Principles of International Law Considered From the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 68-94 (1957-II); For a discussion on this relationship in the context of refugee law, see UNHCR, COLLECTED PROCEEDINGS, *supra* note 4, at 178.

137. Contrast with countries such as the United States, which has adopted the Refugees Convention into local law. See The U.S. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

From the perspective of refugee protection, however, it does not comport with the ideals of the Convention. Consequently, because there is no local legislation on refugee-protection, the Cuban episode was viewed primarily as a matter of political import. The idea that there were applicable legal rules and principles received little attention in much of the national debate on the right to asylum. The fallacy here was to assume that once the Jamaican courts were not involved in determining the matter, then the issues were not legal *strictu sensu*.¹³⁸ Once the issue lost its legal angle, public discussion rarely focused on the terms of the Refugees Convention.

More importantly, perhaps, the absence of local legislation on refugees has left the Executive with broad discretion. The government was prepared to grant a right of appeal to the Cuban asylum-seekers in this case mainly because of social pressure.¹³⁹ Or, as the Eligibility Committee stated, the review of the Cuban cases was an explicable response to the comments and observations of politicians and citizens, which tended "to imply that the Cubans were being summarily deported or that deportation was undeserved."¹⁴⁰

This situation is unsatisfactory because the right of appeal hinges upon the willingness of politicians and citizens to unite in support of asylum-seekers. A more reasoned approach is that recommended by the Executive Committee of the United Nations High Commissioner's Programme in 1977, under which all refugee applicants would have a reasonable time to appeal for a formal reconsideration of any repatriation order.¹⁴¹ In order to ensure that appeals exist as a matter of right the Jamaican legislature must incorporate the provisions of the Refugees Convention into Jamaican law.¹⁴²

138. In this regard, it is significant that the Statement by the Honorable Mullings, which reviewed the refugee issue for the Jamaican Parliament, contained only passing reference to the Refugees Convention. Statement by the Honorable Mullings, *supra* note 1, at 2, 4. See also Vasciannie, *supra* note 47.

139. REPORT OF THE ELIGIBILITY COMMITTEE, *supra* note 9, at 3. *Government Backs Down*, *supra* note 16, at 1.

140. REPORT OF THE ELIGIBILITY COMMITTEE, *supra* note 9, at 3.

141. UNHCR, HANDBOOK, *supra* note 4, at 46 (citing *Official Records of the General Assembly*, 32d Sess., Supp. No. 12, U.N. Doc. A/32/12/Add.1., para. 53(6)(e)).

142. See also *Refugee Law Good Idea*, JAMAICA OBSERVER, Oct. 28, 1996, at 6; Vasciannie, *supra* note 47.

Another municipal issue which arose in the Cuban cases concerns the composition of the Eligibility Committee, which reviews the original repatriation decision. Three out of the four members of the review body were also members of the original body, which had recommended repatriation.¹⁴³ Therefore, the review body is most likely biased in favor of repatriation.¹⁴⁴ The appearance of bias was buttressed by the fact that the three retained members of the reviewing Committee were civil servants¹⁴⁵ In complex cases, it is perhaps inappropriate for civil servants to be called upon to make decisions of a judicial character which could contradict the position advocated by the Executive. Such decisions are best left to the judiciary, and for this to occur, legislation incorporating the Refugees Convention is necessary.

Finally, it is noteworthy that the government provides no legal representation for asylum-seekers. This is a result of the fact that the government retains the right to determine not only the composition of the Eligibility Committee, but also the nature of the proceedings before the Committee.¹⁴⁶ Thus, in contrast with countries where there are judicial hearings to address asylum cases,¹⁴⁷ the asylum-seeker in Jamaica is often forced to establish

143. The review body had, as its additional member, a distinguished member of the Jamaican judiciary, while the proceedings of the review body were monitored by two nonvoting observers appointed by the government. The criticism advanced here concerns only the structure of the review body, because all its members are professionals of high integrity.

144. Cf. The 1977 Recommendations of the Executive Committee of the High Commissioner's Programme, paragraph 53(6)(e)(vi) the applicant should be allowed to appeal "either to the same or to a different authority, whether administrative or judicial, according to the prevailing system." See UNHCR, HANDBOOK, *supra* note 4.

145. The members of the Eligibility Committee were: Vilma McNish (Ministry of Foreign Affairs and Foreign Trade), Rerrie Reeves (Ministry of National Security and Justice) and Michelle Walker (Attorney-General's Department). The Chairman of the Eligibility Committee was Justice James Kerr, while Joan Taffe (United Nations Development Programme) and William Roper (Norman Manley Law School) were observers.

146. The Eligibility Committee reviewed information each of the asylum-seekers provided to representatives of the Ministry of Foreign Affairs in recorded interviews. The Eligibility Committee also interviewed each of the applicants. However, bearing in mind that the Eligibility Committee interviewed sixty applicants on three afternoons, during April 17, 18 and 22, 1996, it is likely that the proceedings for individual applicants were conducted with expedition. REPORT OF THE ELIGIBILITY COMMITTEE, *supra* note 9, at 3, 6-7.

147. Several countries have implemented legislation concerning the Refugees Convention, including the United States, the United Kingdom, Canada, Norway, and the Republic of Germany. Such legislation is contemplated in the Protocol to the Refugees Convention. Article II(2) stipulates that "[i]n order to enable the Office of the High Commissioner . . . to make reports to the competent organs of the United Nations, the States Parties . . . undertake to provide them with information . . . concerning . . . (c) Laws, regulations and decrees which are, or may hereaf-

a claim without legal or administrative assistance, or with assistance organized in haste and on an *ad hoc* basis. If the terms of the Refugees Convention were incorporated into Jamaican law, it is likely that there would be some degree of legal representation for asylum-seekers, at least in the most contentious cases.

IX. CONCLUSION

The arrival of approximately sixty Cubans on Jamaican shores in the first half of 1996 prompted a national debate on refugee policy and generated criticism about the current approach followed by the Jamaican government. Among other things, the process of refugee determination concerning the Cubans was somewhat opaque: the standard for determining whether a particular asylum-seeker had a well-founded fear of persecution was said to be liberal, but this liberalism was never clearly defined. Furthermore, there was no public dissemination of information concerning the way in which refugee principles were applied to any individual case. Members of the government appeared too willing to use the labels of "economic refugee" and "illegal alien" to foreclose careful examination of whether individual Cubans could satisfy the definition of refugee incorporated in the Refugees Convention.

In addition, owing to the Cold War nature of Cuban-U.S. relations, it is likely that broad political considerations influenced the Jamaican government's repatriation decision. Arguably, there was a particular desire to spare the Cuban government some degree of embarrassment because, had the Cubans been declared refugees, this would have implied that the Cuban regime could not be trusted to safeguard the human rights of the asylum-seekers. Given the cordial relations between the Jamaican and Cuban governments and the perception within the Caribbean that Cuba has been unfairly victimized through the U.S. embargo, it is not surprising that the Jamaican government may have preferred to forego the strict language of the Refugees Convention in this case.¹⁴⁸ This approach may be understandable,

ter be, in force relating to refugees." 1967 Protocol, *supra* note 51, at 270.

148. It is worthwhile to speculate whether the approach taken by the Organization of African Unity (OAU) would have allowed the Jamaican government to give refugee status to the Cuban asylum-seekers without embarrassing the Cuban regime. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa retains the definitions in the Refugees Convention. However, it also adds that refugees include persons who, "owing to external ag-

but it does little to encourage the idea of refugee protection, and it creates a bad precedent for future cases.

gression, occupation, foreign domination or events seriously disturbing public order". . . [are] compelled to leave their place of habitual residence in order to seek refuge . . . outside their country of origin or nationality. OAU Convention, *supra* note 108, at art. I(2). Would it be possible to argue that pressure by the United States against Cuba, including the economic embargo, amounts to foreign domination? The approach in the OAU Convention is also put forward in the Cartagena Declaration on Refugees. For a discussion on the OAU Convention and the Cartagena Declaration, see Jaegar, *supra* note 57, at 11-12 and Annex III; Maluwa, *supra* note 7, at 661; Eduardo Arboleda, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, 3 INT'L J. REFUGEE L. 185 (1991); Medard Rwelamira, *The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1 INT'L J. REFUGEE L. 557 (1989).