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# U.S. REFUGEE POLICY IN THE CARIBBEAN: NO BRIDGE OVER TROUBLED WATERS

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At its root, U.S. refugee policy in the Caribbean has been riddled with presumptions: for years, all Cubans were presumed to be refugees; all Haitians, to be economic migrants. Even as the political situation in Haiti deteriorated and political persecution became obvious, the U.S. government's bias holding all Haitians to be economic migrants seemed unassailable.

This bias was never shaken during the Reagan and Bush administrations. Before becoming president, candidate Bill Clinton raised hopes that he would break this pattern. He branded as "cruel" the Bush administration's policy of interdicting Haitians on the high seas and summarily returning them to Haiti, and said that a federal court had "made the right decision" when it found this policy to be illegal. On the eve of his inauguration, however, Clinton announced that he would adopt his predecessor's policy. Once in office, his administration reiterated the Bush argument for interdiction and summary return when the case was appealed to the Supreme Court. Nevertheless, despite winning *carte blanche* from the Court to do just this, Clinton later reversed course, deciding that Haiti was, in fact, too dangerous a place to return those fleeing. In July 1994, he reopened the U.S. naval base at Guantánamo Bay (on the eastern tip of Cuba) as a safe haven camp.<sup>1</sup> But in January 1995, the U.S. government determined that it was safe for all to return. Reinstating a policy of presumptive ineligibility, the United States repatriated nearly all of the remaining Haitian asylum seekers held at Guantánamo. Today, the Clinton administration continues, essentially unchanged, the previously long-standing practice of interdicting Haitian boat people and summarily returning them to Haiti without a hearing.

Presumptive status determinations have also characterized U.S. refugee policy with respect to Cubans. For three decades, U.S. policy presumed all persons fleeing Cuba to be refugees and gave them a hero's welcome if they

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made it to sea, where they were rescued and brought to the United States. Clinton reversed this policy, substituting a negative presumption for a positive one. In August 1994, in order to stop the massive outflow, the Clinton administration deemed Cuban rafters "illegal refugees" and ordered the Coast Guard to take them to Guantánamo.<sup>2</sup> For the next seven months, they—like the Haitians already there—were held in "safe haven," albeit behind barbed wire and guard towers. The Cubans were told they would not be admitted to the United States and informed that their only options were to return to Cuba proper and wait in line for processing as immigrants or refugees or put their names in a hat for a special lottery admissions program. U.S. immigration officers did not attempt to determine who among the rafters might be refugees with well-founded fears of persecution, for whom resettlement in the United States or other countries would represent the only humane solution.

In one fell swoop, the Clinton administration stood decades of U.S. refugee, human rights, and foreign policy on its head. On its face, the reversal of Cuban refugee policy in August 1994 appeared to put Cubans and Haitians on a more equitable footing, introducing a modicum of consistency in the treatment of these two nationality groups by the United States for the first time. But there were very real differences in the circumstances of these two refugee groups, opening fundamental questions about whether the safe haven model that might have made sense in terms of the political circumstances in Haiti applied at all to the Cuban situation. Put simply, Haiti is not Cuba. The situation inside Haiti was fluid, and the U.S. government was willing to commit the resources necessary to effect political changes in Haiti sufficient to convince most of the Haitians at Guantánamo to return. Cuba was static; the situation of chronic repression and economic stagnation that caused most of the Cuban rafters to leave was not likely to improve in the foreseeable future.

Each situation demanded its own response; alternative models should have been examined that would have better addressed the specific needs arising from the different political situations in each country while providing better screening mechanisms to distinguish between those migrants truly in need of protection and those who could return home without risk of persecution. Yet, the Clinton administration chose to replicate the Haitian safe haven model for Cubans without much regard for either the differences in the political conditions in each country or for the differences between individual migrants. Guantánamo was already in operation for the Haitians and it appeared easy to expand the operation for one more group; it seemed an economical way of handling the new refugee flow, because much of the infrastructure was already in place. It did not work that way.

Following a comparison of U.S. policy toward Haitians and Cubans, this essay will examine two alternative models of refugee management that have been successful in the past and that should have been considered by the United States. One is especially applicable to the Haitian situation and the other is most relevant for Cuba. Both of these alternative models differentiate between

different types of migrants and their reasons for flight and assess the likelihood of their safety upon return. Persons fleeing should not automatically be assumed to be either eligible or ineligible for refugee status and resettlement simply because of their country of origin. Nevertheless, all migrants should be accorded fair, adequate, and equal screening procedures that take into account their individual circumstances as well as the political and economic conditions in their home states. Implementation of policies based on the alternative models discussed would allow for the repatriation of as many migrants as possible while ensuring that those with real fears of persecution were not forcibly returned.

### The Haitian "Safe Haven" Approach in Guantánamo

The Clinton administration finally settled upon the idea of a safe haven for the Haitians after having unsuccessfully tried several other policy approaches. Clinton initially maintained the Bush policy of interdiction and summary return. Next, in June 1994, Clinton decided that the Immigration and Naturalization Service (INS) should end its negative presumption about Haitian requests for refugee status and look at each claim on a case-by-case basis. He thought this could be done aboard a ship sitting in Kingston Harbor, Jamaica. The *USNS Comfort* was quickly overwhelmed with refugee claimants, however, and adjudicators working around the clock were unable to keep up with the numbers; this attempt to conduct full refugee adjudications aboard ship was quickly terminated. Unwilling to bring these interdicted Haitians to the United States (where they could have availed themselves of legal counsel and full due process, not to mention being able to rest, find the support of family and friends, and document their refugee claims), the administration found itself in a quandary. On the one hand, it recognized its inability to keep up with individual adjudications aboard ship in the context of a mass outflow; on the other hand, it acknowledged that the widespread nature of human rights violations in Haiti and the country's fluid and volatile political situation appeared to make summarily returning Haitian asylum seekers untenable. Having run out of other options, the administration offered what in effect amounted to nearly blanket protection to all the Haitians detained at Guantánamo, without screening for refugee status.

The lack of screening cut both ways: while the Haitians would not be returned automatically to their country, nor would they be offered the option of entering the United States as refugees (as had been contemplated in ship-board processing) or to pursue asylum claims (as had been the Bush administration policy from the time of the overthrow of Aristide until May 1992).<sup>3</sup> It was clearly conveyed to the Haitians at Guantánamo that they would never be resettled in the United States and, sooner or later, that they would return—or be returned—to Haiti. Upon arrival at Guantánamo, groups of about 30 Haitians at a time were marched into a hangar off the McCalla airfield where INS personnel would greet them using the following script:

You will not be able to go to the United States. You have two options: to go back to Haiti, or to apply for temporary protection in Panama or some other country in the region. If you want to go back to Haiti, the Coast Guard will take you there. If you wish to seek temporary protection, you should understand what will be there for you. You will live in a camp and your basic needs will be provided for. You will be safe there. But you will not be able to leave the camp. You will be given shelter, food, and basic medical care. You will not be given money and you will not be able to work for money in or outside the camp. There will be some organized activities in the camp for you. You will be able to stay at the camp in Panama or elsewhere until conditions in Haiti allow for your return. During your time there, you will not have the opportunity to go to any other country except Haiti. Are there any questions?<sup>4</sup>

The price of temporary protection for the Haitians was detention. Conditions in the Guantánamo camps were stark; the Haitians were restricted behind barbed wire, communication with the outside world was completely unavailable from the camp's inception in July 1994 until mid-August, and phone lines (critical for those who were illiterate) were not installed until early October.

Implicit in the way Guantánamo was set up and run was the notion of "humane deterrence"—a term coined by Thailand in 1981 to describe its policy of grudgingly providing temporary asylum for Laotian refugees in austere conditions and foreclosing the possibility of third-country resettlement. This approach was based on the belief that if refugees were faced with the prospect of strict detention with no possibility for resettlement, only those with the greatest fears of persecution would endure the privations of life in a closed camp, whereas those whose fears of return were not as serious would choose to repatriate or not leave home at all. Thus, the Haitian safe haven model was predicated on the idea that the Haitians would return after a relatively short stay. Though seriously flawed in many respects, the Haitian safe haven exercise did succeed in its broad objective of providing temporary protection—for about six months—until U.S. forces were deployed to Haiti to stabilize the country and ensure President Aristide's return to power. By the end of 1994, at least three quarters of the Haitians repatriated voluntarily due to these resulting political changes.

### **Changing U.S. Refugee Policy Toward Cubans**

After decades of welcoming all fleeing Cubans to the United States and automatically granting them refugee status, the Clinton administration ended this policy in August 1994 and announced that those fleeing Cuba would now be granted temporary asylum at a "safe haven" at Guantánamo. This new U.S. policy toward Cuban rafters was confirmed in a "Joint Communiqué on Migration" issued by the Cuban and U.S. governments on September

9, 1994. The communiqué stated that Cubans “rescued at sea attempting to enter the United States will not be permitted to enter the United States, but instead will be taken to safe haven facilities outside the United States.” It also said that “the United States has discontinued the practice of granting parole to all Cuban migrants who reach U.S. territory in irregular ways.”<sup>5</sup>

In addition, the communiqué stated that the Cuban government would “take effective measures in every way it possibly can to prevent unsafe departures using mainly persuasive methods.” This flagrantly violates basic human rights precepts granting persons the right to leave their country, embodied in Article 13.2 of the Universal Declaration of Human Rights. It also conflicts with decades of U.S. policy with respect not only to Cuba, but with U.S. foreign policy as a whole, as indicated in the Jackson-Vanik Amendment that links most-favored-nation trade status to compliance with this right. Instead, the United States said it would reward a dictator for violating the right to leave by agreeing to admit 20,000 Cubans per year through legal and orderly procedures.

Leaving about 32,000 Cubans stranded and warehoused in Guantánamo with no hope for a permanent solution created explosive conditions. The Joint Communiqué of September 9 proved to be the spark: the next day, the Cubans rioted. Some 2,000 individuals breached the fence of the refugee compound and poured into the “downtown” area of the U.S. base. At great cost, the U.S. government established another safe haven site in the Panama Canal zone and shuttled about 8,000 detainees there. Although conditions were noticeably better in the Panama camps, the lack of any assurances about the future led to the same tensions and frustrations that had fueled the September riots in Guantánamo. In December 1994, two days of rioting broke out in the Panama camps, resulting in injuries to 221 U.S. servicemen and 28 Cubans. Six months after being brought to Panama, the Cubans were shuttled back to Guantánamo.

Gradually, the government came to recognize “humanitarian” exceptions to detention; children, the sick, and the elderly were offered “parole” to allow them to enter the United States. This resulted, however, in creating an even more prison-like environment in the Cuban camps because they became comprised almost exclusively of single males.

As the level of anger and frustration among the remaining detainees mounted, holding them indefinitely at Guantánamo (at an estimated cost of \$1 million per day) became less and less tenable. Therefore, completely reversing

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the 1994 emphatic declaration that none of the Guantánamo Cubans would be admitted to the United States, the Clinton administration announced in May 1995 that most would, in fact, be brought to the United States. However, at the same time, the administration announced a new policy for those fleeing Cuba in the future; it imposed a near blanket presumption of ineligibility on future rafters. Attorney General Janet Reno said that all future rafters would be interdicted and returned to Cuba, except for those who could show shipboard adjudicators a "genuine need for protection" that could not be satisfied by applying for refugee status with the U.S. Interests Section in Havana.

Under the new Cuban migration policy established in May 1995, when the U.S. Coast Guard interdicts Cuban asylum seekers on the high seas, a U.S. immigration officer aboard ship conducts cursory screenings to determine if the rafters have a "credible fear" of persecution upon return. So far, nearly all Cuban rafters have been returned to Havana, where a U.S. official meets them on the dock and informs them how to apply for "in-country refugee processing."

The first official words spoken to interdicted Cubans are:

You are being taken back to Cuba. You will not be taken to the United States. U.S. government officials in Havana will meet the ship and will provide information to you if you wish to apply to go to the United States through established migration programs. The government of Cuba has provided a commitment to the United States that you will suffer no adverse consequences or reprisals of any sort for illegal departure or for making application for legal migration to the United States at the U.S. Interests Section. Only those people who are approved by the U.S. Interests Section in Havana can be assured of entry to the United States.<sup>6</sup>

The statement read to interdicted Cubans does not mention the words "fear" or "rights." If they have "any concerns about returning to Cuba," they may speak with an official. Guidelines issued by the INS in August 1995 instruct INS adjudicators aboard Coast Guard cutters that if a Cuban expresses a fear of return, a "meeting" is to be held, in private, "to the extent possible." The purpose of the meeting is to "elicit the reasons the person fears return." Officers are instructed to "inquire whether the person has suffered any past mistreatment by the Cuban authorities, including but not limited to imprisonments, arrests, acts of discrimination or harassment, and threats of harm." If the person has not been the victim of previous harm, he or she is asked why harm is feared upon return.

Shipboard officers are directed to apply a "credible fear" of persecution standard in evaluating the claim. "Credible fear" consists of two parts. First, it requires a "substantial likelihood" that the applicant is telling the truth. The second part requires a consideration of the claim on the merits to determine if the person would have a "reasonable possibility of establishing . . . a

well-founded fear of persecution.”<sup>7</sup> Yet the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* prescribes less restrictive criteria for the determination of refugee status. The handbook does not call for a “substantial likelihood” of truthfulness, but rather states that a refugee claimant should be granted the benefit of the doubt if his or her statements are coherent and plausible and do not run counter to generally known facts. The UNHCR’s rationale is that the circumstances causing people to flee often cannot be independently corroborated and documented, and the circumstances of flight itself often create confusion on the part of the applicant. The INS instructions are also silent on standards for allowing sufficient time to rest, eat, clean up, and so on before the interview. The impression given is one of the Coast Guard cutter chugging back to Cuba as soon as possible.

In effect, shipboard adjudicators are expected to determine if there would be a “reasonable possibility” that the claimant would meet the definition of a refugee. Given the difficulty the courts have had in refining even less nuanced distinctions between the “well-founded fear” standard for asylum and the “clear probability” standard for withholding deportation, it seems unreasonable to expect a low-level INS officer on the high seas to be able to make any meaningful distinction between assessing if an asylum seeker has a “well-founded fear” (which they are not supposed to do) and assessing “the reasonable possibility of establishing a well-founded fear” (which they are supposed to do).<sup>8</sup>

It does not appear, therefore, that the credible fear standard as outlined for this program is “more generous to the claimant” than the well-founded fear standard, as claimed by the INS instructions. In fact, the INS memorandum itself clearly contradicts such a conclusion. Following the paragraph advising officers to take in-country processing into consideration in evaluating the objective basis of the claim, the next paragraph informs them that they should identify Cubans who would not meet the credible fear standard under the in-country program, but who nevertheless would meet the refugee definition under section 101(a)(42) of the Immigration and Naturalization Act (i.e., of having a “well-founded fear of persecution”). In other words, if one could meet the refugee standard while not meeting the credible fear standard, then clearly the refugee standard is the lower standard. Thus, the memorandum’s claim that “under this program, no refugee, even if he or she might be able to apply safely to the in-country refugee program in Cuba, shall be returned to Cuba” cannot be accepted at face value.

The same instructions tell the INS officers to consider the existence of in-country refugee processing and assurances by the Cuban government in evaluating claims:

In evaluating the objective basis for a person’s fear under the credible fear standard in this program, you should consider the formal assurances made by the Cuban Government to the U.S. Government that no Cuban migrant will suffer adverse consequences or reprisals of any sort for irregular departure or for applying for ref-

ugee status, the monitoring of Cubans returned under the program by officials from the U.S. Interests Section, and the existence of an in-country processing program.

Thus, the INS instructions place great weight on formal assurances by the Cuban government and on the ability of the U.S. Interests Section in Havana to monitor returnees. The INS guidelines also suggest to the interviewing officers that the *existence* of an in-country processing program is sufficient ground for them to doubt the objective basis of a refugee claimant's fear.

The INS does not give any indication how other nationalities interdicted on the high seas should be treated. Haitians who have been interdicted since the Cuban shipboard screening policy began in May 1995 have not been accorded the same treatment and have not received refugee screening instructions. Unfortunately, the Clinton administration has returned to preferential treatment of particular nationality groups interdicted under almost identical circumstances.

### **Attempts at Comparable Treatment of Cubans and Haitians at Guantánamo**

Were conditions in Guantánamo the same for Cubans and Haitians? This author visited Guantánamo in June 1994 (before the arrival of the Cubans) and October 1994 (when both Cubans and Haitians were being held there) to assess camp conditions. Based on these observations, it appeared that both Haitians and Cubans were housed in comparable conditions at the Guantánamo camps (although conditions for Cubans in Panama, also visited by the author, were considerably better). Food, shelter, medical care, and clothing were the same for Haitians and Cubans.

There were differences, however. The military appeared to keep a tighter rein on the Cuban side. This seemed justified at the time because the Cubans appeared to represent a greater security risk, being more prone to rioting and more aggressive than the Haitians in their demands. Another factor could have been the division of responsibility within the U.S. military's Joint Task Force (JTF) in Guantánamo, according to which the marines were assigned responsibility for the Cubans and the army for the Haitians. The army seemed to have a better appreciation that it was dealing with refugee civilians than did the marines. In October, marine guards at the perimeter of the Cuban camp were fully armed and clearly assumed the role of security guards; army soldiers, on the other hand, carried no weapons whatsoever and seemed more willing to fraternize with the refugees.

The major difference in the treatment of the two groups, however, was somewhat more subtle, reflecting the differing attitudes of the JTF (all branches) toward the two groups. The JTF appeared to take the Cubans more seriously and gave them greater responsibility for running their own affairs. The JTF even allowed a representative from Miami's Cuban-American community on

the base to act as an "ombudsman" to advocate on behalf of the Cubans. JTF officials told this author that when the ombudsman was not satisfied with the response of the authorities at Guantánamo, he would often go over their heads and call key officials at the White House, who were receptive to his calls. The Haitians, on the other hand, who had no such representative, appeared to be treated in a more patronizing manner. They were consulted less by the authorities about decisions affecting them and, though at Guantánamo for a longer period of time, the Haitians had not developed as extensive educational and social programs as had the Cubans (possibly due to their greater prospects for repatriation as well as to political opposition to such programs by certain elements within the refugee population).

Attitudes were also different on the part of the refugees themselves. The Cubans arrived with higher expectations that they would be resettled in the United States. They were aware of past U.S. favoritism and knowledgeable about the considerable political support and clout of the Cuban-American community based in Miami. Many saw the transfer of thousands to a new safe haven camp in Panama as a prelude to resettlement in the United States. In contrast, the Haitians were more fatalistic and pessimistic about any options other than repatriation. Although both Cubans and Haitians voiced similar complaints about conditions at Guantánamo, Haitians who did so tended to be morose; Cubans, in general, agitated.

Whether or not they succeeded in doing so at every level, the U.S. military commanders running the Guantánamo camps recognized the imperative of treating the two nationality groups comparably. What they had no control over was the different set of political and historical circumstances of each group.

### Regional Models: CIREFCA and CPA

The "safe haven" approach applied by the United States to both Cubans and Haitians suffered from many shortcomings. There are alternative policy models that may offer a better solution to Caribbean refugee/migration flows. Some have suggested modeling a response for the Caribbean situation on the CIREFCA process—the Plan of Action formulated at the May 1989 International Conference on Central American Refugees—that attempted to resolve the problem of refugees and displaced persons in that region. The CIREFCA model holds important lessons for the Haitian experience because of its emphasis on voluntary repatriation and development. However, the CIREFCA model is not relevant for Cuba because voluntary repatriation and development are not realistic solutions to the Cuban refugee problem given current political circumstances. The better model for the Cubans stems from a different regional agreement also dating from 1989, the Comprehensive Plan of Action (CPA), developed in Southeast Asia for the Vietnamese boat people. These two regional models, CIREFCA and CPA, and their applicability to the Cuban and Haitian situations are examined below.

### **CIREFCA as a Prototype for Haitian Development and Reintegration**

CIREFCA started from consideration of the following issue: how to create conditions for the repatriation and reintegration of refugees and displaced persons from the civil conflicts in El Salvador, Guatemala, and Nicaragua. The impetus for a solution to the Central American refugee crisis came from the states of first asylum within the region—namely, Costa Rica, Honduras, Mexico, and Belize. All seven of these countries participated in the 1989 CIREFCA meeting, even though the armed conflicts in the former states were by no means resolved at the time.

CIREFCA affirmed that all refugees should be treated in a nondiscriminatory manner and linked their repatriation and reintegration to national reconciliation and development. Since CIREFCA operated differently in each of the three major Central American refugee-producing countries, no all-encompassing model emerges. For Haitians, however, the CIREFCA experience in Nicaragua is the most relevant. Despite obvious social and political differences in the experiences of the two countries, there are certain similarities. First, Nicaragua, like Haiti, had a high degree of both external and internal displacement. Second, national reconciliation was a major obstacle to successful reintegration of refugees and displaced persons in both countries; specifically, how to overcome the bitterness and division of the preceding period of strife, build or rebuild civil institutions, and establish the rule of law were important questions. Third, restoring political stability in both countries hinged on the creation of credible democratic institutions and processes, including a disciplined, civilian-controlled, nonpartisan military and police force, and the promotion of economic development plans.

Clearly, CIREFCA deserves neither the whole of the praise or blame for Nicaragua's progress, or lack thereof, toward national reconciliation and development. The development model adopted by CIREFCA and promoted by the United Nations High Commissioner for Refugees (UNHCR), the lead U.N. agency in Nicaragua, was based on Quick Impact Projects (QIPs), small projects that could be implemented directly on the local level. The main innovation of the QIPs was to involve whole communities, both those who stayed during periods of conflict as well as those who had left and were now returning. QIPs focused on developing infrastructure, health programs, transportation, agricultural production, and income generation. Thus, former enemies had an incentive to work together to put the past behind them and create a mutually beneficial future.

CIREFCA demonstrated an awareness of the need to forge a bridge between repatriation and development. UNHCR was the lead agency for implementing CIREFCA for the first four years; in 1993, the U.N. Development Program (UNDP) assumed that role for CIREFCA's final year in an effort to create a continuum from short-term relief and rehabilitation to longer-term development. CIREFCA programs formally ended on December 31, 1994.

One of CIREFCA's most important legacies was its insistence on the

principle of voluntary repatriation. Governments made allowances for refugees who did not feel that it was safe to go home. Even though the primary thrust of the program was to promote repatriation, steps were taken to ensure that it was not coerced. This was evident in all three of the countries in which CIREFCA was implemented. For example, the elected representatives of Guatemalan refugees in Mexico were not convinced that they would be able to return in safety and dignity, and put a halt to the repatriation plan on their behalf. Likewise, in November 1992, the Costa Rican government issued a decree giving all remaining Nicaraguan refugees the opportunity to obtain permanent residency (about 10,000 did so). Assistance provided through CIREFCA enabled the Costa Rican government to integrate these refugees into their own economy and society.

CIREFCA's QIPs approach in Nicaragua seems particularly well-suited for Haitian development because the political and economic problems facing Haiti are so daunting and the lack of any central institutional capacity to organize reintegration is so great. The most sensible approach in Haiti would be to fund local projects that provide immediate, specific benefits to local communities to which return migration should be encouraged and that would also promote reintegration of returnees into these communities. Such projects should encourage rural development, especially because forced migration following Aristide's ouster led to hundreds of thousands of internally displaced persons, many of whom poured into Port-au-Prince where they became lost in the huge overcrowded slums, such as Cité Soleil.

Although the Haitian government has attempted to implement a QIPs-like approach, it has been hampered financially. In March 1995, the Haitian government created a National Office of Migration (ONM) to promote the reintegration of repatriates. The outline of the ONM program is closely modeled on the QIPs concept; it involves financing micro-projects in craft industries, fisheries, and agricultural production. One particularly intriguing project is geared toward setting up a village in northeastern Haiti for repatriates from the Dominican Republic. Unfortunately, a year after the creation of the office, these projects are still mostly on the drawing board due to a lack of funding. The Haitian Parliament has not approved ONM's budget, in part due to continuing stand-offs with international multilateral lending agencies about their willingness to contribute.

Another integral part of the CIREFCA approach, the principle of voluntary repatriation, has continuing relevance for Haiti. In January 1995, the State

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their country.

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Department, joined by the Department of Defense and the U.N. secretary-general, declared Haiti to be "secure and stable."<sup>9</sup> Determining that it was safe for Haitians to return, the Clinton administration, for a brief period of time, provided financial incentives for Haitians to do so voluntarily, before initiating forced repatriations from Guantánamo to Haiti. State Department opinion letters were sent to immigration judges considering asylum claims of Haitians in the United States, saying that "a completely different government [is] in power with no links to the deposed illegal one" and that "a returnee, even with a political problem beyond solution in one part of the country, might settle in another part (especially in Port-au-Prince) and continue with his life."<sup>10</sup> The INS, however, issued a contradictory memorandum cautioning that although the return of Aristide "represents the beginning of potentially significant changes in country conditions, there is no guarantee at the present time that they will produce fundamental changes which are durable over time."<sup>11</sup> The U.S. ambassador in Port-au-Prince responded with a blistering cable accusing the INS of sending out an instruction that does "not reflect the current reality, is a mistake of fact, and clashes with U.S. policy on Haiti."<sup>12</sup> The UNHCR deputy representative in Washington took issue with the State Department, writing a letter to the INS saying that "this Office believes that it would be clearly inappropriate to conclude generally that Haitian asylum seekers would no longer face persecution upon return to Haiti."<sup>13</sup>

Thus, Haitians faced problems similar to those confronted by Nicaraguans. In each case, there was a dramatic turnabout in political fortunes, such that yesterday's refugees were politically aligned with today's ruling party. However, the stability of each regime was open to question, as well as its ability to control rogue military and paramilitary forces. And in both cases, there were some refugees who had experienced past persecution, such that return at any time might be considered inhumane. One of the trickiest questions is when it is safe for refugees to return. It is generally recognized that time is needed to allow the dust to settle, to ensure that respect for human rights has become a reality in all parts of the country and not simply a rhetorical declaration of good intentions on the part of the national leadership. In the case of Haiti, a country that had seen its president deposed after eight months in office, it seemed reasonable to expect fearful Haitian refugees who had experienced past persecution to want to wait to see what would happen after the U.S. military left the country and whether the government would be able to survive. Yet the first forced repatriations occurred barely three months after Aristide was restored—while he was still under the protective umbrella of U.S. military forces.

The principle of voluntary repatriation was respected to a much greater extent in the CIREFCA approach than it was in Haiti. The United States especially demonstrated far more sensitivity to the ongoing concerns of Nicaraguan asylum seekers in the United States after their country underwent political changes. The reasons for this stance, however, were most likely due to residual Cold War policies, government inertia, and the political support for Nicaraguans in Florida. In 1987, then-Attorney General Edwin Meese

established a Nicaraguan Review Program, requiring the attorney general to review all denied Nicaraguan asylum claims. By the end of 1994, the relatively few Nicaraguans who were deported were persons who had committed serious crimes in the United States. There were about 34,000 Nicaraguans with cases still pending in deportation or exclusion proceedings, about 11,000 with final orders of deportation that had not been carried out (due to a combination of inefficiency and lack of political will),<sup>14</sup> and more than 24,000 asylum cases pending.<sup>15</sup> The Review Program remained in effect until June 1995, when the Clinton administration announced that Nicaraguans would be treated the same as other nationalities claiming asylum. That announcement, however, also informed Nicaraguans how to apply for suspension of deportation if they had been in the United States for seven years, were of good moral character, and would suffer severe hardship if returned.

Except perhaps for the Cubans, the INS treated no other nationality group as generously as the Nicaraguans in the 1980s and early 1990s. The treatment of Haitians stands in stark contrast. Most Haitians never reached U.S. shores because they were interdicted and automatically returned; those who did arrive in the country were routinely subject to immediate detention. The approval rate for Haitian asylum seekers stood at 1.8 percent of cases decided by INS district directors between 1983 and 1991.<sup>16</sup>

Given the depth of the biases running through the U.S. refugee and asylum system, it would be unrealistic to expect the level of generosity for Haitians to match that extended to Nicaraguans. However, U.S. policy would have been greatly improved through a CIREFCA-like approach, especially one that included a commitment to voluntary repatriations and a development component such as QIPs. Such a policy would have extended greater latitude to Haitians who still harbored fears of return and would have promoted voluntary repatriation by incorporating repatriation into the development plans for the country.

Steps should be taken to assure Haitians abroad that they will have a meaningful role to play in the rebuilding process. The Return of Talent program, run by the International Organization for Migration (IOM), offers such a model for voluntary repatriation for Haitians in the United States. Under this program, IOM, a Geneva-based intergovernmental organization, helps to stem the Third World "brain drain" by identifying Third World professionals familiar with working in developed countries and facilitating their return to their homelands. IOM is particularly well-situated to perform a function along these lines in Haiti because it serves as the implementing partner in the Haiti Assistance Program, directed by the U.S. Agency for International Development's Office of Transition Initiatives. IOM currently is engaged in what is called the "Reintegration Program," geared toward reintegrating former members of the Haitian military forces into mainstream Haitian society. Similar reintegration approaches, consistent with promoting development in local communities, should be pursued as a means of encouraging the tens of thousands of Haitians in the United States with still-pending asylum claims to return voluntarily. This would spare the expense, and the trauma, of protracted

deportation proceedings. The best solution for Haitians, and for Haiti itself, is not dumping deportees, but promoting and facilitating voluntary repatriation that will enable returnees to reintegrate and contribute to the rehabilitation of their country.

### CPA as a Model for Cuban Migration

The Comprehensive Plan of Action, a regional model implemented in Southeast Asia to manage the Vietnamese refugee flows, holds particular relevance as a potential model for the Cuban situation. The essential thrust of the Comprehensive Plan of Action was to dispel the presumption that every Vietnamese boat person was a refugee with an automatic right of resettlement. It proposed a program of screening according to international refugee determination standards, monitored by UNHCR, to assess refugee claims. Resettlement was still contemplated as a solution for those meeting the refugee standard but repatriation under international monitoring was established as the best solution for persons screened out as nonrefugees.

Cuba has many parallels with Vietnam. Like Cuba, Vietnam is a holdover from the Cold War, an old nemesis of the U.S. government. Both have suffered from the demise of their Soviet patron and from years of relative diplomatic and economic isolation. Although both now are opening trade links with the West—Vietnam more successfully—in neither has the communist monopoly on power been broken. There are also striking parallels between Vietnamese boat people and Cuban rafters. After the first wave of refugees in the mid-1970s, the vast majority of Vietnamese boat people, like later Cuban refugees, did not leave in active escape from a direct threat, but rather as victims of past persecution, of chronic restrictions, and divided families. For years, the United States accepted these second- and third-wave refugees from both Vietnam and Cuba as automatically as the first. By the 1980s, there were clear signs, however, that our welcome was creating a magnet effect, pulling out additional numbers. In response, a new objective emerged for the U.S. refugee program for both countries: to deter dangerous boat departures and to exercise greater control over who might enter and leave. The accompanying strategy was to offer an alternative means of exiting and entering through orderly, legal departures directly from Vietnam or Cuba. In 1979, Vietnam signed a memorandum of understanding with UNHCR, allowing Vietnamese with close family links abroad to depart legally. The resulting Orderly Departure Program has brought 429,102 Vietnamese to the United States between 1980 and 1995, as well as 136,673 to third countries. A similar program to directly admit Cubans as refugees in the United States began in 1987. In the six years prior to this change, an average of 319 Cubans per year were admitted to the United States as refugees; in the eight years after the 1987 in-country processing went into effect, an average of 2,865 Cubans were admitted annually as refugees.<sup>17</sup>

Although the orderly departure programs were relatively successful, they did not completely stop the flow of boat people. For both Vietnamese and

Cuban rafters, the United States decided that there could not be an unconditional welcome in perpetuity. For the Vietnamese, of course, the welcome was limited much earlier than in the Cuban case, following the establishment of the CPA policy in 1989. Under the prodding of Hong Kong, Thailand, Malaysia, Indonesia, and the Philippines (the "first asylum" states in Asia), UNHCR, the United States, and other governments involved with the Vietnamese boat people agreed to the CPA to bring the Vietnamese refugee dilemma to an end.

The CPA provided for the screening of boat people to determine whether they met the internationally accepted definition of "refugee"; the resettlement of genuine refugees in third countries; and the safe repatriation of nonrefugees to Vietnam.<sup>18</sup> The CPA included reassurances that temporary asylum would continue to be offered in the region until one of the above solutions could be implemented. In what perhaps was an unprecedented development, the country of origin was directly involved in the international effort to resolve the problem. Vietnam agreed both to allow the expansion of orderly procedures for exiting the country and to allow UNHCR to monitor the treatment of returnees. Vietnam pledged not to prosecute returnees or to take punitive or discriminatory measures against them.

The CPA initially envisioned that all returns of screened-out boat people would be voluntary. It was believed that those who were screened-out would realize they had no future in the camps and, because their safety upon return would be monitored, they would voluntarily repatriate (approximately 64,000 have done so). Only those with genuine fears of persecution would elect to remain in the camps. However, as the numbers of the screened-out who refused to repatriate grew, the key players, including UNHCR and the United States, gradually came to accept the idea of involuntary returns.<sup>19</sup> Generally, the CPA succeeded in its aim as a deterrent to new massive boat departures because of the combination of "humane deterrence" in first asylum countries and the refugee screening procedures that took away resettlement as an automatic option. From 69,968 Vietnamese boat departures in 1989, the number fell to 32,063 in 1990, 21,870 in 1991, and dropped to 41 in 1992, thereafter staying at a much lower level than during the 1980s—139 in 1993 and 370 in 1994.<sup>20</sup>

How would such a model work for the Cubans? U.S. policy currently bears similarities to certain aspects of the CPA. As in Vietnam, the United States has developed a program in Cuba for orderly departures as an alternative for persons seeking resettlement. Although this approach has some advantages

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and has worked relatively well in the Vietnamese context, it also has several shortcomings. The orderly departure programs, by their very nature, are less likely to benefit persons actively seeking to escape direct threats of persecution, but do provide a safe mechanism for emigration for victims of past persecution, such as former political prisoners, and for separated families. The more troubling aspect of the in-country refugee processing procedure is the extent to which it is being used, in both Cuba and Vietnam, in ways that raise serious questions about conformity with fundamental principles of refugee protection. In the Vietnamese context, the most recent proposal by the U.S. government promotes the use of in-country processing as the exclusive means through which screened-out Vietnamese would have their claims to persecution in Vietnam reviewed. In the Cuban context, the very existence of an in-country processing mechanism appears to preclude meaningful consideration of asylum claims from rafters leaving spontaneously.

The current U.S. policy of shipboard screening and in-country processing for Cuban asylum seekers, in place since May 1995, does not provide adequate protection. First, it is unlikely that any but a token few aboard ship will meet the "credible fear" standard given that the policy is predicated on U.S. acceptance of Castro's assurances that reprisals will not be made against returned rafters. Although Castro has so far kept his word, there is no guarantee that he (or his successor) will do so in the future, especially as Cuba's political and economic fortunes shift. Previous experience with shipboard screening has proved to be a farce: for example, between 1981 and 1991 only 28 of 24,559 Haitians interdicted by the Coast Guard were "screened in" to pursue their asylum claims in the United States.<sup>21</sup>

Second, in-country processing in Cuba runs the risk of being a smoke screen that leaves genuine refugees unprotected, as occurred when the policy was applied to Haitian asylum seekers. In Vietnam, in-country processing was originally designed to provide a safe alternative to boat departures. It was not contemplated as a substitute for asylum for persons who felt it too dangerous to apply openly for refugee status within their country. However, as the concept has been applied to Cubans (and Haitians), the existence of such an orderly mechanism is used as a rationale for denying spontaneous asylum seekers an opportunity to escape and find protection outside the country where they fear persecution. An orderly procedure is helpful for persons who are not in immediate danger at the hands of their government, but such procedures cannot protect those most threatened and vulnerable—the desperate asylum seeker who jumps on a boat in the faint hope that someone, somewhere, will show mercy. Such persons need protection that in-country processing alone cannot provide.

The emergency phase of the 1994 Cuban exodus has now passed. The U.S. government has paroled the last of the Cuban asylum seekers held in Guantánamo into the United States and closed the camp. Because of the Cuban Adjustment Act and the Fascell-Stone Amendment, Cuban parolees from Guantánamo will have most of the rights and benefits they would have had if they had been recognized as refugees.<sup>22</sup> Few Cubans are now departing the

island by boat or raft. Thus, the time is ripe to put U.S. policy with respect to Cuban asylum seekers on a more even keel for the future. Following the CPA model, the United States should offer temporary first asylum to Cubans arriving by boat. It should not be assumed, however, that the United States would be the country of permanent resettlement for such persons, especially for those with family ties elsewhere, nor that all would necessarily be deserving of protection as refugees.

If significant changes were made in U.S. domestic law, namely rescinding the Cuban Adjustment Act, Cubans could be brought to the United States and accorded a full refugee determination procedure. Persons found not to qualify as refugees could be returned to Cuba if cooperation with the Cuban authorities and monitoring of deportees remain in place. Guantánamo could be used not as a "safe haven" where asylum seekers are held indefinitely without refugee status adjudications, but rather as a refugee processing center, particularly for Cubans who still flee by boat or raft, given the complications inherent in bringing them to the United States.

As was the case for the surrounding Southeast Asian nations with respect to Vietnamese boat people, the responsibility of the United States as the country of first asylum for Cubans would be to conduct full and fair refugee status determinations. Only those qualifying as refugees under international law—or who had other exceptional and compelling reasons not to be returned—would be resettled in other countries or admitted to the United States.

Similar to the Vietnamese CPA, refugee determination procedures would include pre-interview counseling, perhaps provided by nongovernmental organizations; written decisions by refugee adjudicators; and a right of appeal against negative decisions. UNHCR would be involved in training adjudicators and observing the procedures, and, in cases where it found that U.S. officials failed to identify bona fide refugees, it would be able to extend its own mandate of protection.

There are two main obstacles to creating such a refugee processing center at Guantánamo. First, according to the 1903 lease agreement between Cuba and the United States, Guantánamo remains within the "ultimate sovereignty" of Cuba. This might preclude UNHCR from working on behalf of Cubans there because that agency considers them to be within the sovereign territory of Cuba. However, the same lease agreement says that the United States has "complete jurisdiction and control over and within" Guantánamo as long as it occupies that land, which might provide a basis for interpreting UNHCR's strictures differently.

The other obstacle is that U.S. courts have determined that aliens at Guantánamo are essentially outside the reach of U.S. law, thus precluding the establishment of due process rights for asylum seekers there.<sup>23</sup> The January 1995 cursory "evaluations" of Haitians at Guantánamo before their forced repatriation to Haiti provide ample evidence that in the absence of legal requirements, the government is inclined to deny asylum seekers due process rights. This ultimately increases the likelihood that the government will *refoule* them in violation of Article 33 of the 1951 U.N. Convention Relating to

the Status of Refugees, which prohibits the return of a refugee in any manner whatsoever to a place where his life or freedom is threatened. Unless the United States is willing to conform to international standards of refugee protection, particularly regarding the application of the principle of *nonrefoulement* in such offshore safe haven zones, then the use of Guantánamo or other such sites even in the context of a mass exodus would not be advisable. However, a regional agreement of the kind worked out in the CPA would hold the United States to a standard not currently required by U.S. courts for the treatment of persons taken into custody by the Coast Guard and held at offshore military facilities. With such an international agreement, the United States would bind itself to adhere to *nonrefoulement*—the most fundamental principle of international refugee law—which was so seriously undermined by the U.S. Supreme Court in *Sale v. Haitian Centers Council*.<sup>24</sup>

After an impartial INS adjudication, preferably monitored by UNHCR, Cubans determined not to be refugees would be encouraged to voluntarily repatriate, assuming that Castro, like his Vietnamese counterparts, continues to agree to their safe and dignified return. As a result of the Cuba-U.S. migration agreement, Castro has already given assurances that repatriates will not be harmed. Such a plan, however, also would include the possibility for eventual involuntary repatriation of screened-out Cubans after appeal and review (rather than quick determination aboard ship) and provide that their safety upon return be subjected to international monitoring.

Applying a CPA-type approach to Cuban asylum seekers raises several fundamental questions. The first one centers on whether high seas interdiction per se, in the absence of a treaty and not specifically involving rescue of vessels in distress, is a legitimate and legal means of enforcing national immigration laws. The U.S. courts have given the government a green light on this point. The other fundamental question is whether the government can be trusted to abide by fundamental due process standards and the principle of *nonrefoulement* if not required by U.S. courts to do so. Left to its own devices, the answer is probably "no." However, if the government commits itself to abide by a clear set of standards and procedures spelled out in an international agreement along the lines of the CPA, and sees some advantage to doing so in terms of sharing the burden of resettlement and legitimizing return of screened-out nonrefugees, then the international community will be able to hold it accountable to such standards.

In addition, a CPA-like arrangement for the Caribbean would help address inconsistencies in U.S. asylum policy toward other nationalities. For example, if the U.S. government had committed to a CPA standard of refugee determination, it would not have been able to forcibly repatriate Haitians refusing voluntary repatriation from Guantánamo in January 1995 in the way it did. Assuming that the United States will not end its policy of interdiction, and barring an unforeseen need to reconstitute Guantánamo as a safe haven due to a renewed outpouring of large numbers of refugees from Haiti or some other Caribbean nation, Guantánamo could be used as a processing center for

other nationalities as well—particularly if the alternative is summary repatriation. One would hope that Haitians and asylum seekers of other nationalities rescued at sea would be brought to the United States to pursue their asylum claims. However, current political realities—and current practices—suggest that the best other nationalities can hope for is to be treated on par with Cubans. For Cubans, refugee processing at Guantánamo would be preferable to the current shipboard screening procedure. Applying the CPA model to the Cubans, therefore, would provide a permanent solution to a problem that is not amenable to temporary approaches.

A CPA-like approach would end what, in effect, has been refugee status by presumption: either the positive presumption that for 35 years accorded refugee status to all Cubans, or the negative one that currently introduces a strong bias against any Cuban asylum seeker whose status is determined in a shipboard interview. Operating according to either presumption compromises the integrity of the U.S. refugee program and does a disservice to genuine refugees. Demonstrating a willingness to conduct fair refugee status hearings and to return nonrefugees would be a deterrent to those fleeing for economic reasons while providing a reasonable chance for durable protection for those with bona fide claims.

The CPA model also encourages the Cuban government to seek positive solutions to resolving the refugee problem, as has occurred in Vietnam. Regularizing legal and orderly immigration procedures directly from Cuba—already a component of the U.S.-Cuba migration accord—serves as an alternative outlet for those who might previously have embarked on a dangerous raft journey. Although promoting voluntary repatriation is already part of the U.S.-Cuba migration accord, this provision needs considerable development, especially in creating safeguards to monitor the security of returnees. These steps should obviate the perceived need of the Clinton administration to call upon Castro to do everything he “possibly can to prevent unsafe departures.” The United States should recognize, however, that as long as persecution of dissidents continues in Cuba, some refugees will be forced to flee by raft and are deserving of protection. The United States should not close the door to them or pressure Castro to do so. Managed properly, the United States should be able to discourage a mass influx of the kind that occurred in August 1994, while at the same time remaining consistent with international human rights norms relating to the right to leave and to seek asylum from persecution.

### Conclusion

What is needed for both Haitians and Cubans is a rational, consistent, and humane policy of refugee protection. The credibility of any policy rests on the fairness of refugee determination procedures and the access of asylum seekers to those procedures. The humanity of a policy relates not only to the time the refugee is in exile, but to promoting safe and dignified integration back into the home society after voluntary repatriation has occurred. For most

Haitians today, the latter need is the more pressing one. For Cubans, the former issue predominates.

Thus, for Haitians, the best refugee policy is one that promotes and facilitates voluntary repatriation, assists with reintegration, and helps returnees rehabilitate their country. Such a policy could be based on the CIREFCA approach, especially as applied to Nicaragua. For Cubans, however, the best refugee policy is one that provides careful refugee processing, the resettlement of "screened-in" refugees, and monitored, voluntary repatriation for those "screened-out." A model for this policy is provided by the CPA, as implemented in Vietnam. Nonrefugees who do not have other claims for entering the United States can legitimately be returned to Cuba or Haiti if international monitors have unfettered access to them and if a fair procedure is in place for determining who among them genuinely need protection. In-country processing may indeed help some refugees and provide them with an alternative to perilous boat escapes. But others who feel the risk is too great to apply for refugee status from within Cuba or Haiti should not be precluded from meaningful refugee status determination and from protection while their claims are pending.

### Notes

1. Following the overthrow of Haitian president Jean-Bertrand Aristide on September 30, 1991, the U.S. Coast Guard began bringing intercepted Haitians fleeing the country to Guantánamo. In May 1992, however, the Bush administration ordered the immediate return to Haiti of all Haitians intercepted on the high seas. Thus, the safe haven established at Guantánamo fell into disuse until July 1994.
2. The term "illegal refugees" was used by President Clinton in a news conference on August 19, 1994. Text of presidential news conference, August 20, 1994, *The New York Times*.
3. On May 24, 1992, President Bush issued the so-called "Kennebunkport Order," directing the Coast Guard to summarily return intercepted Haitians without conducting immigration interviews.
4. Counseling script from Guantánamo. (Document on file with author.) Despite this statement, no Haitians were ever settled in Panama.
5. *Interpreter Releases* 71, no. 35 (September 12, 1994): 1236. See Appendix I.
6. INS Memorandum, "Shipboard Processing of Cubans," August 9, 1995. (Document on file with author.)
7. *Ibid.*
8. For more information on the distinction between "well-founded fear" and "clear probability," see *INS v. Cardoza Fonseca* 107 S. Ct. 1207 (1987).
9. Douglas Farah, "Haitians Cite Risks as U.S. Continues Pullout of Forces," *Washington Post*, January 25, 1995, A20.
10. Advisory Opinion Letter, Office of Asylum Affairs, Bureau for Human Rights and Humanitarian Affairs, U.S. Department of State, April 5, 1995. (Document on file with author.)
11. INS Memorandum, "Adjudication of Haitian Asylum Applications Following President Aristide's Return to Haiti," October 27, 1994. (Document on file with author.)
12. Cable from U.S. ambassador in Port-au-Prince to the INS commissioner and to the director, INS Office of International Affairs, April 24, 1995. (Document on file with author.)

13. Letter from the deputy representative, UNHCR in Washington, DC to the director, INS Resource Information Center, February 22, 1995. (Document on file with author.)
14. Nancy San Martin, *Tampa Tribune*, August 3, 1995, 3.
15. U.S. Immigration and Naturalization Service, *Refugee Reports* XV, no. 12 (December 31, 1994): 12.
16. U.S. Immigration and Naturalization Service, *Refugee Reports* XIII, no. 12 (December 31, 1992): 12.
17. U.S. Department of State, Bureau of Population, Refugees, and Migration, *Refugee Reports* no. 12 (December 31, 1995): 5, 10-11.
18. The internationally accepted definition of a refugee is a person outside the country of his or her nationality who is unable or unwilling to return due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion.
19. In May 1995, the U.S. House of Representatives barred the use of U.S. funds for the repatriation or reintegration of screened-out Vietnamese and Laotians and voted to allow screened-out Vietnamese to be reconsidered for U.S. resettlement.
20. Vietnamese Migrants-Regional Situation: Monthly Arrivals at Countries of First Asylum, Form V. Ref.: SRD 704/1/1, January 1996, Hong Kong Government. (Document of file with author.)
21. Bill Frelick, "Haitians at Sea: Asylum Denied," *Report on the Americas* XXVI, no. 1 (July 1992): 2.
22. The Cuban Adjustment Act, enacted in 1966 and amended by the Refugee Act of 1980, permits Cubans admitted or paroled into the United States to adjust to permanent residence status after one year of physical presence in the United States. The Fascell-Stone Amendment provides federal funding for Cuban and Haitian entrants.
23. See *Cuban American Bar Association v. Christopher* 43 F.3d 1412 (11th Cir. 1995).
24. *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 3028 (1993).



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