

# Refugees, the Courts, and the New World Order\*

Harold Hongju Koh\*\*

I come here before honored guests<sup>1</sup> to tell two stories. The first is a personal story of my work over the last few years on behalf of Haitian refugees in a lawsuit that went to the United States Court of Appeals for the Second Circuit seven times and to the Supreme Court six times.<sup>2</sup> It is a legal and human story: of courts and clients, personal victories, and judicial defeats.

The second, larger saga is the historical, geopolitical story into which the Haitian refugee episode ultimately fits. We live in a radically changed world. Just five years ago, a "New World Order" was

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\*\* Gerard C. and Bernice Latrobe Smith Professor of International Law and Director of the Orville H. Schell, Jr., Center for International Human Rights, Yale University; Counsel of Record for the Haitian refugees in *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993), and in *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993); Of counsel for Cuban refugees in *Cuban American Bar Ass'n v. Christopher*, No. 94-2183-Civ-Atkins (S.D. Fla. filed Oct. 24, 1994). I am grateful to Dean Lee Teitelbaum, Perrin Love, and Professors Scott Matheson and Karen Engle for their friendship and hospitality.

1. An earlier version of this paper was delivered on November 10, 1993 as the 28th annual William H. Leary Lecture at the University of Utah College of Law. Parts of that lecture were later incorporated into Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994) [hereinafter *Haiti Paradigm*]. While keeping the lecture format, I have revised and updated the text in light of subsequent developments, through the end of 1994.

One veteran who heard that Veterans' Day lecture was my first boss, Judge Malcolm Richard Wilkey, accompanied by his wife Emma. Judge Wilkey, for whom I clerked in 1980-81, is one of our finest public servants and international lawyers. Not only did he sit on the U.S. Court of Appeals for the D.C. Circuit with great distinction for fourteen years, he was also the only federal judge to serve as an advisor to the American Law Institute's THIRD RESTATEMENT OF FOREIGN RELATIONS LAW (1987). Judge Wilkey served as Assistant Attorney General under President Eisenhower, Ambassador to Uruguay, and as Co-Chair of the President's Commission on Government Ethics, and Special Counsel in the House Banking Scandal under President Bush. He has written and lectured widely on international law topics and served as an editor of the *International Lawyer*. See Harold Hongju Koh, *Judge Wilkey's Contributions to International Law and the Foreign Relations Law of the United States*, 1985 B.Y.U. L. REV. 647. Judge Wilkey steered me toward my career in international law, always reminding me of the normative role of law in a political world. It is to Judge and Mrs. Wilkey that I dedicate this Leary Lecture.

2. *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (concerning Haitian refugees interdicted and returned on the high seas); *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (concerning Haitian refugees unlawfully detained at Guantanamo).

nafoot. The United States was flush with its "victory" over Communism. Democracy was breaking out all over. Multilateralism resurged with the United Nations' defeat of Saddam Hussein in Operation Desert Storm. The Cold War's end left the United States as the only surviving superpower, ostensibly disproving those who had glumly predicted the decline of the Great Powers.

Today, the picture seems far bleaker. We see ethnic nationalism in revolt; a world in recession; states fragmenting; failed states like Bosnia, Somalia, Rwanda, and Haiti. As a byproduct of this tumult, we face refugee outflows that challenge our compassion, tax our charity, and pose political dilemmas for policymakers and legal dilemmas for courts. It is against this background that we should view the continuing drama in Haiti—the crisis of democracy, the refugee flight, the judicial decisions, the policy confusions—not as isolated events, but as a paradigm of what we face in the New World Disorder.

### I. THE LEGAL STORY

The Haitian refugee saga can be recounted here quickly.<sup>3</sup> In 1981, pursuant to an unusual executive agreement with Haiti,<sup>4</sup> the United States Coast Guard began "interdicting" fleeing Haitians on the high seas. The Coast Guard quickly interviewed, or "screened" the refugees, bringing to the United States only those few "screened-in" Haitians found to have "credible fears" of political persecution.

In 1990, more than sixty-seven percent of the voters in a United Nations-monitored election chose a Catholic priest, Jean-Bertrand Aristide, as Haiti's first freely elected President. But less than a year later, Aristide was ousted by military coup. As boatloads of refugees began fleeing Haiti, the Coast Guard stopped bringing screened-in Haitians to the United States, and instead de-

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3. For additional background, see Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 1 (1994), and Koh, *Haiti Paradigm*, *supra* note 1, from which this part is adapted. See also Victoria Clawson et al., *Litigating as Law Students: An Inside Look at Haitian Centers Council*, 103 YALE L.J. 2337 *passim* (1994) (examining *Haitian Centers Council* litigation). For a book-length account of the Guantanamo phase of the litigation, see HAROLD HONGJU KOH, GERALD NEUMAN & MICHAEL RATNER, *CAPTIVE ON GUANTANAMO* (forthcoming 1996).

4. The September 1981 bilateral agreement called "for the establishment of a cooperative program of interdiction and *selective return* to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti." Agreement Effected by Exchange of Notes, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559 [hereinafter 1981 U.S.-Haiti Agreement] (emphasis added).

tained them behind razor barbed wire at the U.S. Naval Base at Guantanamo Bay, Cuba. In November 1991, the Haitian Refugee Center ("HRC") sued various United States government officials in Florida federal court to block the practice of returning screened-out Haitians with insufficient process. After the Eleventh Circuit twice ruled against HRC, the Supreme Court denied HRC's petition for certiorari.<sup>5</sup> Only Justice Blackmun dissented,<sup>6</sup> indicating the shape of things to come.

At that moment, some 3000 screened-in Haitians—those found to have credible fears of political persecution—were being held at Guantanamo. Had they been brought to the United States, they would have been entitled to asylum interviews with lawyers present.<sup>7</sup> But in March 1992, the Immigration and Naturalization Service ("INS") decided to subject those Haitians to asylum interviews *at Guantanamo*, without lawyers, and to send those who failed the interviews back to possible persecution and death in Haiti.<sup>8</sup> This news shocked my students enrolled in the Allard K. Lowenstein International Human Rights Clinic, a clinical course at the Yale Law School that I had taught for several years with Michael Ratner of New York's Center for Constitutional Rights.<sup>9</sup> Our very first case had been an international tort suit against the former dictator of Haiti, seeking civil damages for international human rights abuses he had worked upon his own citizens.<sup>10</sup> If, our students argued, we could turn to United States courts to enforce internationally recog-

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5. *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992).

6. *Haitian Refugee Ctr.*, 112 S. Ct. at 1246 (Blackmun, J., dissenting).

7. Under 8 U.S.C. § 1158 (1988), "an alien physically present in the United States or at a land border or port of entry" may apply for asylum. By federal regulation, an asylum applicant "may have counsel or a representative present" at such an adjudication. 8 C.F.R. § 208.9 (1994).

8. See Clawson et al., *supra* note 3, at 2353-54 (describing evidence that INS was conducting asylum proceedings without counsel on Guantanamo).

9. The Clinic originated, by student request, as an arm of the Allard K. Lowenstein International Human Rights Project, a student-run organization founded at Yale Law School in 1981 to educate and inspire law students, scholars, practicing attorneys, and policymakers in the defense of international human rights.

10. *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993). In July 1994, following a default hearing in that case, a federal judge ordered the defendant, Prosper Avril, to pay \$41 million in compensatory and punitive damages. *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993); see also *Ex-Haitian Strongman Ordered to Pay*, NAT'L L.J., July 18, 1994, at A8. At this writing, the Clinic has similar suits pending against the former Defense Minister of Guatemala. *Ortiz v. Gramajo*, No. 91-11612WD (D. Mass. filed June 13, 1991); *Xuncax v. Gramajo*, No. 91-11564WD (D. Mass. filed June 6, 1991). A client of the Clinic was also recently awarded a \$14 million judgment in a suit against an Indonesian general responsible for the 1991 massacre at East Timor. *Todd v. Panjaitan*, No. 92-12255PBS (D. Mass. decided Oct. 26, 1994).

nized human rights standards against foreign officials, why not do the same when United States government officials violate international human rights?

Our first step was to recruit able co-counsel: Joe Tringali, a talented trial lawyer from New York's Simpson, Thacher & Bartlett; Lucas Guttentag, the gifted Director of the ACLU's Immigrants' Rights Project; and Robert Rubin, an outstanding refugee lawyer from the San Francisco Lawyers' Committee for Civil Rights. In March 1992, we filed suit in Brooklyn federal court on behalf of the class of screened-in Haitian refugees and several Haitian service organizations against an array of United States government officials. Our core claim was that lawyers and clients have a right to talk to each other before the clients are returned to political persecution. The Haitian refugee plaintiffs asserted a Fifth Amendment due process right to counsel before being returned to persecution. The Haitian service organizations asserted a reciprocal First Amendment right of access to Guantanamo for the purpose of giving the Haitian detainees legal counsel.<sup>11</sup> Because the new INS policy effectively authorized the return of bona fide political refugees, we further argued that it violated the ban against *refoulement* or "return" of refugees found in Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees;<sup>12</sup> Article 33's domestic statutory analogue, section 243(h) of the Immigration and Nationality Act ("INA");<sup>13</sup> and the 1981 executive agreement between the United States and Haiti.<sup>14</sup>

In the first phase of the *Haitian Centers Council* litigation, *HCC-I*, we won a temporary restraining order and a preliminary injunction requiring, pursuant to the Fifth Amendment, that the Haitians be afforded counsel before repatriation.<sup>15</sup> In a frenzy of

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11. *Cf. In re Primus*, 436 U.S. 412, 426-32 (1978) (First Amendment protects advocacy organization's right of access to particular persons to disseminate legal advice).

12. Convention Relating to the Status of Refugees, *done* July 28, 1951, art. 33, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176 ("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 . . . political opinion.") [hereinafter Convention on Refugees]. The United States became a party to the Convention on Refugees when it acceded to the United Nations Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, 189 U.N.T.S. 150 (entered into force Nov. 1, 1968).

13. 8 U.S.C. § 1253(h)(1) (1988) ("The Attorney General shall not deport or *return any alien* . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of [his] . . . political opinion.") (emphasis added).

14. 1981 U.S.-Haiti Agreement, *supra* note 4.

15. *Haitian Ctrs. Council, Inc. v. McNary*, 789 F. Supp. 541, 547-98 (E.D.N.Y.

activity, the government twice asked the Second Circuit to stay that right-to-counsel ruling before winning a stay pending appeal from a bare majority of the Supreme Court.<sup>16</sup> While fighting these stays, our Clinic enlisted over 100 Yale law students—whites, Asians, Hispanics, African-Americans, Jews, gays and straights—all working around the clock for people that they had never met. In June 1992, the Second Circuit upheld our right-to-counsel injunction on appeal, although the Supreme Court later vacated that decision as moot.<sup>17</sup>

On Memorial Day 1992, as the numbers of fleeing Haitians surged, President Bush changed course and issued an order from his Kennebunkport vacation home authorizing the Coast Guard to return all fleeing Haitians to Haiti without any process whatsoever.<sup>18</sup> In our view, the “Kennebunkport Order” constituted textbook *refoulement*, for it effectively prevented Haitians from fleeing anywhere, not just to the United States. We sought a new temporary restraining order, and relied on counts from our existing complaint to challenge this “floating Berlin Wall” around Haiti as a violation of section 243(h) of the INA, the 1981 U.S.-Haiti Agreement, and Article 33 of the Convention on Refugees.<sup>19</sup> These laws, we argued, all said the same thing: that executive officials shall not summarily return political refugees to a country where they will face political persecution.

In this second, “nonreturn” phase of the case, *HCC-II*, the Second Circuit declared the *refoulement* policy illegal, finding that the Bush administration’s new policy violated the plain language of section 243(h)(1) of the INA.<sup>20</sup> Presidential candidate Bill Clinton immediately praised the Second Circuit for making “the right decision in overturning the Bush administration’s cruel policy.”<sup>21</sup> But

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1992).

16. *McNary v. Haitian Ctrs. Council, Inc.*, 112 S. Ct. 1714 (1992) (5-4 decision) (Blackmun, Stevens, O'Connor & Souter, JJ., dissenting).

17. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1347 (2d Cir. 1992), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993).

18. Exec. Order No. 12,807, 3 C.F.R. 303 (1993).

19. See 8 U.S.C. § 1253(h)(1) (1988); 1981 U.S.-Haiti Agreement, *supra* note 4; Convention on Refugees, *supra* note 12.

20. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1367-69 (2d Cir. 1992), *rev'd sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).

21. *Clinton Statement on Appeals Court Ruling on Haitian Repatriation*, U.S. Newswire, July 29, 1992, available in LEXIS, News Library, USNWR File. This statement echoed remarks Governor Clinton had made only three days after the Kennebunkport Order issued. See *Statement of Clinton on Haitian Refugees*, U.S. Newswire, May 27, 1992, available in LEXIS, News Library, USNWR File (“I am appalled by the decision of the Bush administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to

shortly before assuming the presidency, Clinton endorsed that summary return policy and defended it before the Supreme Court. The Supreme Court stayed the Second Circuit's ruling almost immediately,<sup>22</sup> and ultimately reversed it<sup>23</sup> in a ruling from which only Justice Blackmun dissented.<sup>24</sup> In an opinion by Justice Stevens, the Court held that the *nonrefoulement* obligations of section 243(h) and Article 33 did not apply to Haitians apprehended on the high seas.<sup>25</sup>

Meanwhile, nearly 300 Haitian men, women, and children continued to languish on Guantanamo. Although all had credible claims of political persecution—i.e., they were screened-in—the INS barred them from entering the United States because most were afflicted with the HIV virus. Soon after the Supreme Court argument in *HCC-II*, the Guantanamo phase of the case returned to Brooklyn federal court for consideration of permanent relief. Following a two-week trial, Judge Sterling Johnson, Jr. issued a permanent injunction, ordering the Guantanamo Haitians immediately released and declaring illegal our clients' confinement in America's first HIV concentration camp (*HCC-III*).<sup>26</sup> In June 1993, the Clinton administration chose not to seek a stay of that order, eventually settling the case and bringing the Guantanamo Haitians to the United States.

But the end of the litigation marked only a pause in the political crisis. Several weeks later, the Clinton administration helped broker an accord between President Aristide and the coup leaders at Governors Island, New York, which provided for Aristide's return to Haiti by October 30, 1993. Two weeks later, the parties agreed to a separate "New York Pact," which called upon the armed forces to respect the Governors Island agreement and to end an array of human rights violations. But it soon became clear that the coup leaders would honor neither pact, as numerous Aristide supporters and cabinet ministers were murdered on the streets of Port-au-Prince.<sup>27</sup>

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political asylum. . . . This policy must not stand."). For an extensive listing of Clinton's statements, see Clawson et al., *supra* note 3, at 2348 nn.61–63.

22. McNary v. Haitian Ctrs. Council, Inc., 113 S. Ct. 3 (1992).

23. Sale v. Haitian Ctrs. Council, Inc., 113 S. Ct. 2549, 2567 (1993). For published excerpts of our Supreme Court merits brief, see 35 HARV. INT'L L.J. 21 (1994).

24. *Sale*, 113 S. Ct. at 2567–77 (Blackmun, J., dissenting).

25. *Id.* at 2565–67 (explaining Article 33 was not intended to "say anything at all about a nation's actions towards aliens outside its own territory").

26. Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028, 1045 (E.D.N.Y. 1993).

27. Howard W. French, *Haiti Justice Minister Slain in Defiance of U.S. Warning to Military to Keep Peace*, N.Y. TIMES, Oct. 15, 1993, at A1. As a private lawyer, the slain justice minister, Guy Malary, had been our co-counsel in the *Avril* suit. See

As the October 1993 deadline for Aristide's return approached, the U.S.S. *Harlan County*, a warship carrying lightly armed military personnel, was sent to Haiti with the stated goal of retraining the Haitian military. When Haitian gangs staged an anti-American demonstration at the dock, the ship retreated. The Clinton administration began enforcing a multinational blockade off the coast of Haiti, while Coast Guard cutters intercepted and returned fleeing boat people directly to Haiti.<sup>28</sup> With the collapse of the Governors Island Accord, the deadline for Aristide's return passed. Violence and human rights violations in Haiti surged. In early 1994, President Aristide condemned the Clinton administration's summary repatriation policy and announced that he would terminate the 1981 U.S.-Haiti Agreement as of October 1994.<sup>29</sup>

In May 1994, President Clinton finally conceded that his Haitian policy had failed. He appointed former Congressman William Gray as his new special envoy, imposed tough comprehensive economic sanctions on Haiti's military regime, and announced that he would shift to a policy of subjecting fleeing Haitian boat people to refugee interviews aboard United States Navy ships docked in the harbor at Kingston, Jamaica.<sup>30</sup> The policy change, which coincided with favorable weather and new desperation in Haiti, spurred a new refugee outflow that soon swamped the capacity of the Jamaican processing facility.

In July, the administration switched course again, now announcing that henceforth, all fleeing refugees would be given "safe haven" in various offshore camps, most prominently in Panama, Honduras, and various Caribbean countries. At the same time, however, Special Envoy Gray cautioned that refugees in the safe havens would not be permitted to seek resettlement in the United States. For Haitian boat people, the good news was that, in principle, no one would be involuntarily returned to Haiti; the bad news was that they could no longer seek asylum in the United States from Guantanamo.<sup>31</sup>

By August 1994, the Haitian drama had taken several new

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*supra* note 10 and accompanying text (discussing *Avril*).

28. R.W. Apple, Jr., *President Orders Six U.S. Warships for Haiti Patrol*, N.Y. TIMES, Oct. 16, 1993, at A1.

29. *See Aristide Ends U.S.-Haiti Pact on Refugees*, L.A. TIMES, Apr. 7, 1994, at A15.

30. Remarks Announcing William H. Gray III as Special Adviser on Haiti and an Exchange with Reporters, 30 WEEKLY COMP. PRES. DOC. 1010 (May 8, 1994) [hereinafter Clinton Announcement].

31. Tom Masland et al., *Should We Invade Haiti?*, NEWSWEEK, July 18, 1994, at 40.

turns. The Clinton administration reopened the Guantanamo camp under United States military command, establishing a safe haven for more than 16,000 Haitian detainees. Large numbers of Haitians continued to repatriate "voluntarily," raising concerns about the administration's claim that any Haitian who articulated a fear would be given "safe haven," no questions asked.<sup>32</sup> The United Nations Security Council approved a Desert Storm-type resolution, authorizing member states "to form a multinational force under unified command and control and, in this framework, to use all necessary means [including a military invasion] to facilitate the departure from Haiti of the military leadership"<sup>33</sup> and to restore Aristide's government.<sup>34</sup> But popular opinion in the United States ran strongly against a Haitian invasion, and President Clinton's Republican adversaries denounced the prospect of invasion as bearing no relation to our national interest.<sup>35</sup> Meanwhile, the Haitian regime, finally faced with serious economic sanctions, remained defiant. It expelled international monitors, elected a figurehead president, and announced plans to hold new elections to replace Aristide.<sup>36</sup>

Almost simultaneously, in August, a massive outflow of Cuban refugees began, spurred in part by Fidel Castro's announcement that he would permit persons seeking exodus to leave Cuba.<sup>37</sup> On August 19, President Clinton ordered that "illegal refugees from Cuba will not be allowed to enter the United States. Refugees rescued at sea will be taken to our naval base at Guantanamo."<sup>38</sup> In early September, the United States and Cuba issued a joint communiqué on migration, announcing that the United States would accept a minimum of 20,000 refugees per year, but confirm-

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32. Roberto Suro, *Haitians' Guantanamo Bay Camp Is Long on Lines, Short on Space, Officials Say*, WASH. POST, July 19, 1994, at A12.

33. S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (1994).

34. Richard D. Lyons, *U.N. Authorizes Invasion of Haiti to Be Led by U.S.*, N.Y. TIMES, Aug. 1, 1994, at A1.

35. Riche L. Berke, *Presidential Hopefuls at a Republican Forum Jab at Clinton's Foreign Policy*, N.Y. TIMES, July 28, 1994, at A10; Eric Schmitt, *U.S. Move on Haiti Seen as Weeks Away*, N.Y. TIMES, Aug. 1, 1994, at A6.

36. Larry Rohter, *Haitian Military Greet Invasion Vote with Defiance*, N.Y. TIMES, Aug. 2, 1994, at A3.

37. Governor Lawton Chiles declared a state of emergency in Florida and announced that Florida law enforcement and National Guard personnel would blockade Key West in an effort to contain the flotilla. Leon Harris, *Florida's Governor Chiles Declares State of Emergency*, CNN, Aug. 6, 1994, available in LEXIS, News Library, CNN File.

38. President's News Conference, 30 WEEKLY COMP. PRES. DOC. 1682, 1683 (Aug. 19, 1994).



ing that Cuban refugees rescued at sea would remain in safe-haven facilities at Guantanamo or elsewhere for indefinite detention.<sup>39</sup> At this writing, roughly 32,000 Cubans remain detained in camps at Guantanamo or in Panama, amid a mood of rising frustration.<sup>40</sup>

Meanwhile, in mid-September, the Clinton administration began to threaten a military invasion of Haiti. The President claimed that he did not need congressional approval for the invasion, over the objection of numerous constitutional law scholars.<sup>41</sup> On September 15, President Clinton gave the Haitian military junta an ultimatum to leave or be driven out. But almost simultaneously, a presidential delegation led by former President Jimmy Carter negotiated an agreement with the Haitian coup leaders which averted the invasion, and called for the leaders to leave by October 15, 1994, or whenever the Haitian Parliament enacted an amnesty law. On September 19, 1994, American soldiers began landing in Haiti as part of a multinational force,<sup>42</sup> which within days numbered in the tens of thousands. Within a month, amid continuing street violence, the Haitian Parliament had granted a limited amnesty,<sup>43</sup> the coup leaders had resigned, and President Aristide had returned to Haiti in triumph.<sup>44</sup> At this writing, the United States has begun to pull its troops out of Haiti, while the Aristide government continues the daunting task of governance and restoring civil society. Meanwhile, many of the remaining Haitian refugees have been repatriated from Guantanamo,<sup>45</sup> although tens of thousands of Cuban refugees—and several thousand Haitians—still linger there in indefinite detention.<sup>46</sup>

By fall 1994, nearly 40,000 Haitians and Cubans were being held on Guantanamo. In late October 1994, our Clinic joined twenty-five Cuban-American attorneys in filing suit against Clinton

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39. See U.S.-Cuba Joint Communique on Migration (Sept. 9, 1994), in 5 DEP'T ST. DISPATCH No. 37, at 603 (1994).

40. See James Bock, *Rescued into Limbo: Crisis in the Caribbean*, THE SUN (Baltimore), Sept. 18, 1994, at A1.

41. See Ruth Marcus, *Administration Is Challenged on Issue of Haiti Invasion Vote*, WASH. POST, Sept. 14, 1994, at A18.

42. Larry Rohter, *2,000 U.S. Troops Land Without Opposition and Take Over Haiti's Ports and Airfields*, N.Y. TIMES, Sept. 20, 1994, at A1.

43. Larry Rohter, *Haitian Bill Doesn't Exempt Military from Prosecution*, N.Y. TIMES, Oct. 8, 1994, at A4.

44. John Kifner, *Aristide, in a Joyful Return, Urges Reconciliation in Haiti*, N.Y. TIMES, Oct. 16, 1994, at A1.

45. See *Haitian Repatriation from Cuba Seen Over by Early November*, Reuters, Oct. 8, 1994, available in LEXIS, News Library, CURNWS File.

46. Virginia I. Postrel, *Refugees on Rafts: 'Invasion' or Opportunity?*, THE SUN (Baltimore), Oct. 4, 1994, at A11.

administration officials regarding the plight of 30,000 Cuban refugees being indefinitely detained on Guantanamo and in Panama.<sup>47</sup> Ira Kurzban and Michael Ratner promptly filed a motion intervening on behalf of the Haitian detainees on Guantanamo.<sup>48</sup> On October 31, 1994, we won a temporary restraining order, which was largely left undisturbed by the Eleventh Circuit on the government's motion for a stay.<sup>49</sup> At this writing, the matter is on expedited appeal to the Eleventh Circuit.<sup>50</sup>

In late July 1994, I returned to Guantanamo, along with representatives of several other nongovernmental organizations, to inspect the newest Haitian refugee camp. On three earlier occasions, I had traveled to Guantanamo as part of our litigation effort to counsel and free the HIV-positive Haitians held there. As our plane left Guantanamo after each visit, I had silently asked that I would never have to go back again. In June 1993, when Michael Ratner and I welcomed the last of the Guantanamo Haitians into the United States, I thought that my Haiti experience was finally over. But now, more than a year later, tents housing more than 16,000 Haitians stretched as far as the eye could see on the Guantanamo airstrip. As the plane landed, my head filled with grim thoughts of

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47. *Cuban American Bar Ass'n v. Christopher*, No. 94-2183-Civ-Atkins (S.D. Fla. filed Oct. 24, 1994). For a description of the case, and a comparison of it to prior Haitian litigation, see Andres Viglucci, *Refugee Suit Revisits Landmark Court Case*, MIAMI HERALD, Oct. 31, 1994, at B1.

48. Order on Motion to Intervene and Motion for Temporary Restraining Order, *Cuban American Bar Ass'n v. Christopher*, No. 94-2183-Civ-Atkins (S.D. Fla. filed Nov. 2, 1994).

49. Order Granting Plaintiffs' Emergency Motion for Temporary Restraining Order, *Cuban American Bar Ass'n v. Christopher*, No. 94-2183-Civ-Atkins (S.D. Fla. filed Oct. 31, 1994). The court's order barred the government "from denying Cuban Refugee Service Organizations and other counsel reasonable and meaningful access to the detained refugee plaintiffs," and "from repatriating any detained plaintiff refugees . . . without permitting them access to counsel and receipt of full information so as to assure an informed and voluntary decision to seek repatriation." *Id.* at 12-13.

50. Following oral arguments on the government's emergency motion for stay, summary reversal, and/or mandamus of the District Court's October 31 order in *Cuban American Bar Ass'n v. Christopher*, the Eleventh Circuit unanimously denied the government's extraordinary motion and set an expedited appeal in December 1994 of two issues: (1) the First Amendment right of the Cuban Refugee Service Organization to access to, and communication with, their clients; and (2) the right of refugees detained on Guantanamo to resist coerced repatriation to Cuba. *Cuban American Bar Ass'n v. Christopher*, No. 94-5138 (11th Cir. Nov. 7, 1994). In a two-to-one decision, however, the Eleventh Circuit partly granted defendants' motion for a stay pending appeal, but held that "defendants shall afford reasonable and meaningful access for legal counsel" to named plaintiffs and other detainees who request counsel by written declaration. *Id.* para. a. [Editor's Note: In January 1995, the Eleventh Circuit reversed Judge Atkins's Order. See *Cuban American Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995)].

Sisyphus and his boulder, back at the bottom of the mountain.

## II. THE POLITICAL PARADIGM

I have recently argued that we should view the Haitian saga not as *sui generis*, but as illustrating a paradigmatic crisis of the New World Disorder.<sup>51</sup> A powerful developed nation, here the United States, announces its support for democracy and human rights abroad. An underdeveloped nation, here Haiti, seeks to construct civil society and political order, but fails, because of coup d'état, insurrection, civil strife, or external invasion. In this first stage, the United States' response is *executive inaction*, which characterizes, for example, its recent responses to human rights violations in Somalia, Rwanda, Bosnia, and Burma.

As unchecked human rights abuses worsen and proliferate, refugees start fleeing in increasingly large numbers. The United States' executive branch finally reacts forcefully, but only to the *fallout of the crisis*, not to the underlying political crisis itself. Thus, in Kurdistan, Somalia, and Rwanda, the United States reacted by joining the relief effort belatedly, but left the root cause largely unaddressed. On rare occasions, Congress has overcome inertia and pressed the executive branch to take firmer action earlier. Examples of such rare timely action include supporting Corazon Aquino's fledgling government in the Philippines, pressing for human rights in South Africa, urging sanctions against China, and voting to lift the Bosnian arms embargo. But more frequently, this second phase, *belated executive action*, is followed by a third phase, *legislative inaction*.

At this juncture, the courts play a pivotal role. In some cases, stymied by the political branches, private litigants—nongovernmental organizations and human rights advocates—initiate a fourth phase: a *transnational public lawsuit*, designed to prod our government to more proactive, human rights-sensitive measures.<sup>52</sup> If the private litigants prevail, their judicial victories will force amelioration of the harsh executive position. But if the courts rebuff their challenge, then the fifth phase, *legitimation of executive action*, will result in upside-down human rights policy. The official United States government position, thus legitimated by judicial endorsement and legislative acquiescence, will be anti-refugee and curiously

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51. See generally Koh, *Haiti Paradigm*, *supra* note 1. Parts of that article grew directly out of this Leary Lecture.

52. See generally Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2371 (1991) (summarizing characteristics of transnational public law litigation).

tolerant of human rights abusers, a far cry from the policies of democracy and human rights that are officially enunciated. Thereafter, only international or domestic political pressure, or renewed legislative action can force reconsideration of a misguided human rights policy.

### A. *Refugees and the Courts*

The two wings of the *Haitian Centers Council* litigation—the Guantanamo phase (*HCC-I* and *HCC-III*) and the nonreturn phase (*HCC-II*)—illustrate the two roles the judiciary can play in such a human rights crisis. In the Guantanamo phase, the federal district court played a pivotal role in checking human rights abuses by our own government. The *HCC-I* plaintiffs began with a relatively modest aim: securing the right to counsel for Haitians being subjected to de facto asylum interviews at Guantanamo. Upon winning preliminary relief from both the Eastern District of New York and the Second Circuit, however, we widened our focus and transported those norms to other fora for other purposes: to draw press attention,<sup>53</sup> to score points in Congress,<sup>54</sup> to influence the Clinton campaign and transition team,<sup>55</sup> and to win concessions in negotiations with the Justice Department. Through the court's injunctive orders we became de facto partners with the district judge and government in running the Guantanamo camp. Thus, even though the government denied our right-to-counsel claim to the end and argued that lawyers would disrupt the operation of the naval base, during the last nine months of the case the defendants acquiesced in the nearly continuous presence of lawyers for the refugees at Guantanamo.<sup>56</sup>

Even before trial, we used the threat of further injunctive orders to win the parole of individual refugees for health and humanitarian reasons.<sup>57</sup> By the time the trial in *HCC-III* began, our narrow right-to-counsel case (*HCC-I*) had expanded into a broad legal

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53. See Clawson et al., *supra* note 3, at 2370–79.

54. See, e.g., *U.S. Human Rights Policy Toward Haiti: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 102d Cong., 2d Sess. 97–206 (1992) (statement of Prof. Harold Hongju Koh and Sarah Cleveland) (urging House committee to investigate abuses on Guantanamo by citing district court memorandum and preliminary injunction order); *U.S. Policy Toward Haitian Refugees: Joint Hearing and Markup on H.R. 5360 Before the Subcomms. on Western Hemisphere Affairs and on Int'l Operations of the House Comm. on Foreign Affairs*, 102d Cong., 2d Sess. 67–85 (1992) (statement of Prof. Harold Hongju Koh).

55. See Clawson et al., *supra* note 3, at 2373–74.

56. *Id.* at 2375–76.

57. *Id.* at 2361–63.

challenge to the sustained offshore internment of HIV-positive Haitians at Guantanamo. After Judge Johnson finally granted permanent classwide relief, we bartered vacatur of those trial orders in exchange for the freedom of the Haitians held at Guantanamo, a governmental decision not to appeal, and a compensatory award of fees and costs.<sup>58</sup> Equally important, we won judicial declarations that even when aliens are held outside the United States, they have due process rights to decent medical care, living conditions, fair disciplinary procedures, and assistance of counsel in asylum hearings, all of which are violated by indefinite incommunicado detention in an HIV-internment camp.<sup>59</sup> These rulings should serve as important precedents now that the United States is once again running a much larger offshore detention camp at Guantanamo.<sup>60</sup>

The nonreturn phase of the case (*HCC-II*) took a different path, in which the Supreme Court chose not to restrain, but to legitimate, the executive's actions. The Court's reasoning permitted executive officials to return refugees to their persecutors, notwithstanding express treaty and statutory prohibitions against such action. By legitimating the return policy, the Court left our broader Haiti policy curiously upside down: unduly soft on the regime, while unduly hard on the refugees.

Elsewhere, I have criticized the Court's decision for misconstruing international law and treaties, favoring presidential power, discriminating against aliens and refugees, and undervaluing human rights.<sup>61</sup> But even accepting the Court's decision as controlling, its precedential weight now seems quite limited. The Coast Guard stops Haitian boats on the high seas pursuant to the 1981 U.S.-Haiti Agreement, a unique accord that the United States has yet to extract from any other nation. Nothing in the Court's decision

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58. We ultimately agreed that Judge Johnson's orders (but not his opinions) could be vacated on the ground that defendants had fully complied with those orders, in exchange for defendants' agreement to dismiss their appeal and to pay an award of fees and costs totalling \$634,100. *See Haitian Ctrs. Council, Inc. v. Meissner*, No. CV-92-1258 (SJ) (E.D.N.Y. Feb. 22, 1994) (order approving stipulated class action settlement agreement).

59. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1042-45 (E.D.N.Y. 1993) (explaining refugees' specific due process rights). We also won a preliminary injunction to the same effect in *HCC-I*, which was affirmed by the Second Circuit, but later vacated by the Supreme Court on other grounds. *See Haitian Ctrs. Council, Inc., v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993).

60. These are precisely the issues that Cuban plaintiffs now being detained on Guantanamo are seeking to establish in *Cuban American Bar Ass'n v. Christopher*, No. 94-2183-Civ-Atkins (S.D. Fla. filed Oct. 24, 1994). *See supra* notes 47-50 and accompanying text (discussing ongoing litigation in *Cuban American Bar Ass'n*).

61. Koh, *Haiti Paradigm*, *supra* note 1, at 2413-23.

provides general authority under either domestic or international law for the Coast Guard to intercept and summarily return refugees from other countries for whom no such accord exists. Now that President Aristide has announced that the accord will be terminated as of October 1994,<sup>62</sup> the withdrawal of Haiti's prior consent arguably would deprive the United States of any legal justification under international law for stopping, boarding, inspecting, and returning Haitian vessels to Haiti.

Perhaps most important, in the summer of 1994, President Clinton did what he should have done upon taking office. He abandoned the policy of summary repatriation in favor of a safe-haven policy, finally recognizing that summary repatriation is not "a sustainable policy, either practically or morally, given the level of indiscriminate violence."<sup>63</sup>

The two branches of the *Haitian Centers Council* litigation thus reveal both the restraining and the legitimating role of the courts when our own government violates the rights of refugees. The litigation also revealed, however, how limited and reactive a role courts play when dealing with refugee crises. The Supreme Court in *HCC-II* took pains to specify that the "wisdom of the policy choices made by Presidents Reagan, Bush, and Clinton is not a matter for our consideration."<sup>64</sup> The question thus lingers: what is the wisest way to deal with mass refugee outflows in the New World Order?

### B. *Human Rights and Refugees in the New World Order*

I recently argued that six basic propositions should govern the conduct of the United States toward human rights violations: (1) taking a non-neutral stance in the face of gross violations; (2) keeping the pressure on human rights violators; (3) avoiding "too little, too late" reactions, such as freezing bank accounts only after the deposits have been withdrawn; (4) granting refugees safe haven; (5) demanding accountability for gross abuses; and (6) pursuing a regional burden-sharing approach with regard to both restoration of democracy and refugees.<sup>65</sup> Until very recently, the United States policy toward Haiti systematically violated each of these principles.

As a presidential candidate, Bill Clinton had campaigned on changing George Bush's Haiti policy, but upon becoming President, he continued its basic elements: attempting to broker a deal be-

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62. See *supra* note 29 and accompanying text.

63. Clinton Announcement, *supra* note 30, at 1013.

64. *Sale*, 113 S. Ct. at 2556.

65. Koh, *Haiti Paradigm*, *supra* note 1, at 2428-29.

tween President Aristide and the Haitian coup leaders; relying on modest economic sanctions to pressure the regime; summarily returning fleeing refugees; and urging grants of amnesty as a condition of political settlement. By so doing, the Clinton administration breached the above principles, undercut its own human rights objectives, and severely damaged its moral credibility.

The failure of the Governors Island Accord graphically illustrated these errors. In trying to broker a neutral settlement, Clinton's envoys did not insist that the coup leaders leave Haiti, although our government had successfully made similar demands upon Jean-Claude Duvalier, Prosper Avril, and Ferdinand Marcos. Instead of keeping the pressure up, the administration urged that the trade sanctions be lifted *before* President Aristide returned to Haiti, which allowed coup leaders to stockpile oil for months. When coup leaders violated the pact and killed key Aristide supporters, the administration issued weak protests and waited too long to broaden economic sanctions, thus freezing bank accounts that contained only nominal sums.<sup>66</sup> Moreover, United States representatives supported a broad grant of amnesty to Haiti's military leaders even for major human rights abuses, forsaking accountability and eliminating the junta's incentives to avoid such abuses. Most egregiously, the Clinton administration continued to repatriate refugees summarily, rather than granting them safe haven. The administration developed no regional burden-sharing mechanism to deal with refugee outflows or to protect Aristide upon his return. Thus, as of May 1994, our government was pursuing a Haiti policy that was both fundamentally unsound and strikingly ineffective.

The administration's May 1994 policy changes finally signaled a better policy. Dropping his passive posture toward human rights abuses, President Clinton announced a new policy premised on firmer support of Aristide, full-scale economic sanctions, the threat of military intervention, rejection of amnesty for the coup leaders, and a regional burden-sharing approach to both the political and the refugee problems.<sup>67</sup> After experimenting with processing refugees aboard ships, the administration agreed in July to grant any refugee who articulated a fear of persecution a form of safe haven in Guantanamo, Panama, or elsewhere. Finally, adopting an energized

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66. When finally frozen, one U.S. bank account of a Haitian general contained less than five dollars. See *U.S. Policy Toward Haiti: Hearing Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations*, 103d Cong., 2d Sess. 85 (1994) (testimony of Michael Barnes, counsel to President Aristide) ("[The general] is not a fool. They have been warned for two years that their bank accounts might be frozen, so they have put their funds elsewhere.").

67. See Clinton Announcement, *supra* note 30, at 1010-14.

regional strategy, the administration turned to other Caribbean nations, both to establish "safe-haven" camps and to commit troops to a multinational force that would occupy Haiti after a multilateral invasion.

Clinton's surprising policy turnabout raises two questions. First, why did the Clinton administration give up the summary repatriation principle, which it had fought for and won at the Supreme Court only one year earlier? And second, where do we go from here?

### III. TRANSNATIONAL LEGAL PROCESS

The first inquiry implicates the greatest unanswered question in international law: not *How Nations Behave*,<sup>68</sup> but *Why Nations Obey*. If it is true, as Louis Henkin has argued, that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,"<sup>69</sup> why is this so? Why do nations obey international law, and what factors bring nations who flout international laws back into compliance with them?

The answer, in my view, is *transnational legal process*, a complex process that transpires in a variety of fora, under a variety of laws—both public and private, domestic and international—triggered by both governmental and nongovernmental actors.<sup>70</sup> As nations participate in this process, international law becomes one of several factors driving their international relations. How does this happen? Let me count three ways: rational *self-interest*, norm-*internalization*, and transnational *interaction*.

First, nation-states obey international law when it serves their self-interest to do so. As contemporary international relations theorists have long recognized, nations are not exclusively preoccupied with maximizing their power vis-à-vis one another in zero-sum games. Rather, they employ *cooperative* strategies to pursue a more complex and multifaceted long-run national *interest*, in which compliance with negotiated norms serves as a winning strategy in a reiterated "prisoner's dilemma" game.<sup>71</sup> Governmental and private

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68. LOUIS HENKIN, *HOW NATIONS BEHAVE* (2d ed. 1979).

69. *Id.* at 47 (emphasis omitted).

70. See Harold Hongju Koh, *Transnational Legal Process*, Gerard C. and Bernice Latrobe Smith Professorship Inaugural Lecture, Yale Law School (Apr. 19, 1994) (video transcript, on file with author).

71. Game theory predicts that states, as rational, self-interested actors, will pursue a variety of strategies to achieve both short- and long-term gains, depending on the relative costs and benefits of competition, cooperation, or "defection" from a cooperative scheme. Thus, even when competition or defection provides a short-term



participants in a given issue area will develop a set of governing arrangements—called regimes—along with a set of ideologies and expectations, that both restrain the participants and provide the means for achieving their common aims. Within these regimes, there is conceptual space for international law: law plays a critical role both in stabilizing the expectations and in reinforcing the restraints that the regimes seek to foster. Among rational states, legal rules promote compliance with regime norms by reducing transaction costs, providing channels for dispute settlement, triggering retaliatory actions, signaling states when negative responses by other states may ensue, and requiring states to furnish information that will highlight defections on their own part. This pattern is best illustrated in issue areas where states are the primary players and traditional realist assumptions prevail: for example, arms control, international trade, and environmental regulation.<sup>72</sup>

Second, law-abiding states *internalize* international law by incorporating it into their domestic legal and political structures through executive action, legislation, and judicial decision. Domestic decision making becomes “enmeshed” with international legal norms, as domestic legal and political processes take account of and incorporate international norms.<sup>73</sup> One prime example in the refugee area is the international law norm of *nonrefoulement*. Not only is that norm embodied in the 1951 Convention on Refugees, it has been internalized in section 243(h) of the INA and in the 1981 U.S.-Haiti Agreement.<sup>74</sup> The *Haitian Centers Council* litigation can thus

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advantage, patterns of cooperation may nevertheless emerge from anarchy because “the logic of collective action” convinces self-interested states that cooperation better serves their long-term interests. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION passim* (1984); ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY passim* (1984); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS passim* (1971); Robert O. Keohane, *The Demand for International Regimes*, in *INTERNATIONAL REGIMES* 141, 152–70 (Stephen D. Krasner ed. 1983); Robert O. Keohane, *International Institutions: Two Approaches*, 32 *INT’L STUD. Q.* 379, 380–81 (1988).

72. For recent scholarship espousing this “rationalistic” view of international law in trade and arms control law, see, e.g., Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT’L L.* 335, 351–54 (1989); Kenneth W. Abbott, *The Trading Nation’s Dilemma: The Functions of the Law of International Trade*, 26 *HARV. INT’L L.J.* 501 *passim* (1985); Kenneth W. Abbott, “Trust But Verify”: *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 *CORNELL INT’L L.J.* 1 *passim* (1993).

73. See Robert O. Keohane, *Compliance with International Commitments: Politics Within a Framework of Law*, 86 *AM. SOC’Y INT’L L. PROC.* 176, 179 (1992) (describing concept of “enmeshment”).

74. See Convention on Refugees, *supra* note 12; Immigration and Nationality Act § 243, 8 U.S.C. § 1253(h)(1) (1988); 1981 U.S.-Haiti Agreement, *supra* note 4.

be understood as an unsuccessful attempt by private litigants to convince the Supreme Court to internalize the norm of extraterritorial *nonrefoulement* as United States domestic law.

Third, nations obey international law as a result of repeated *interaction* with other governmental and nongovernmental actors in the international system. A state's violation of international law creates inevitable frictions and contradictions that affect its ongoing participation within the transnational legal process. When the United States engages in governmental kidnapping of Mexican citizens, for example, that activity impairs its ability to negotiate the North American Free Trade Agreement with the Mexican government.<sup>75</sup> When a developing nation defaults on a sovereign debt, that activity impairs its ability to secure new lending. When the United States denies the jurisdiction of the International Court of Justice in a suit in which it is a defendant, that decision impairs its ability to invoke that court's jurisdiction as a plaintiff.<sup>76</sup> Thus, a nation's leaders may shift over time from a policy of violation of international law to one of compliance to avoid such frictions in its continuing interactions. "This reasoning," I argued shortly before the Clinton administration's policy change, "predicts that in time, the United States will comply with the norm of 'extraterritorial *nonrefoulement*.'"<sup>77</sup>

Does the most recent U.S. policy shift on Haitian refugees support this theory? In part, the explanation for the shift turns on self-interest. As a presidential candidate, Bill Clinton had campaigned on changing Bush's Haiti policy, but upon becoming president, he chose to continue its basic elements. The Supreme Court's decision in *HCC-II* freed him to continue that policy. Yet, Clinton's decision subjected him to enormous media criticism for breaking promises and for failing to exhibit foreign policy leadership. Although the summary repatriation policy stanching the outflow of refugees, it in no way addressed the underlying causes of that outflow: the violence, poverty, and loss of democracy in Haiti itself. Moreover, by punishing the refugees and sparing the regime, the direct return policy made a mockery of the Clinton administration's announced interests in promoting democracy and human rights.<sup>78</sup> In short, the

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75. See Koh, *Haiti Paradigm*, *supra* note 1, at 2405-06 (describing aftermath of Supreme Court's decision in *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992)).

76. See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

77. See Koh, *Haiti Paradigm*, *supra* note 1, at 2408.

78. See Warren Christopher, *Democracy and Human Rights: Where America Stands*, Address Before the Vienna World Conference on Human Rights (June 14,

old Haiti policy simply was not working. In announcing the May 1994 policy change, the President repeatedly mentioned that he no longer "believe[d] the [direct return] policy we have now is sustainable, given the level of political violence against innocent civilians."<sup>79</sup> Thus, the new policy, which comported more fully with the six principles sketched above,<sup>80</sup> better served our national self-interest.

A second explanation for the policy shift turns on norm-internalization. The United States' African-American community responded to the upsurge of violence in Haiti by drawing attention to the inconsistencies between our Haitian policy and our international obligations, and between the blatantly discriminatory treatment of Haitians vis-à-vis Cubans and other immigrant groups. When Transafrica leader Randall Robinson undertook a hunger strike to publicize the Haitians' plight, he personalized the issue and became a focal point for media attention. The African-American community magnified its voice through the increasingly powerful forty-member Congressional Black Caucus ("CBC") which, in March 1994, sent President Clinton a letter announcing that "[t]he United States' Haiti policy must be scrapped."<sup>81</sup> The CBC had played an increasingly pivotal role in the enactment of several pieces of important domestic legislation, including the President's budget package and crime bill.<sup>82</sup> In selecting William Gray, a former CBC member, as his new special envoy on Haiti, President Clinton undertook to respect Gray's own demands, which apparently included the administration's abandonment of its direct return policy.<sup>83</sup> Thus, gradually, American domestic political processes took account of and incorporated the international norm against *refoulement*, substituting in its place the norm of temporary safe haven.

Third, the policy shift was also spurred by the process of transnational interaction. Even after the Supreme Court's *HCC-II* decision, international pressure to abate the repatriation policy continued. Other human rights groups pressed arguments similar to those urged by the *HCC* plaintiffs as a basis for challenging the United States government's policy before the Inter-American Commission

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1993), in 4 DEP'T ST. DISPATCH No. 25, at 441 (1993).

79. Clinton Announcement, *supra* note 30, at 1012.

80. See *supra* note 65 and accompanying text.

81. Peter J. Boyer, *The Rise of Kweisi Mfume*, NEW YORKER, Aug. 1, 1994, at 26, 34.

82. *Id.* at 26.

83. *Id.* at 34. Other personnel changes, for example, the appointment of Strobe Talbott (a "hawk" on Haiti) as Deputy Secretary of State, may also have played a role in promoting policy reconsideration.

on Human Rights.<sup>84</sup> The United Nations High Commissioner on Refugees, whose aid the United States has solicited for other troublespots around the globe, declared "the Court's decision a setback to modern international refugee law."<sup>85</sup> President Aristide declared his intent to terminate the 1981 U.S.-Haiti Agreement, opening the door to further international legal challenges against the United States by the government of Haiti. The Clinton administration faced the unappetizing prospect of rallying regional and global support for coercive isolation of the Haitian regime, while simultaneously pursuing a refugee policy that many of those allies viewed as repugnant.

In short, the United States' belated withdrawal from a policy of summary repatriation illustrates the *normativity of transnational legal process*. To survive in an interdependent world, even the most isolated states—North Korea, Libya, Iraq, Cuba—must eventually interact with other nations. Even resisting nations cannot insulate themselves forever from complying with international law if they regularly participate, as all nations must, in the transnational legal process. Once nations begin to interact, another complex process begins, whereby international legal norms seep into and become embedded in domestic legal and political processes. In this case, the net result was that after many months of flawed policy, we finally have a Haiti policy that strikes the proper chords.

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84. The Inter-American Commission on Human Rights is considering a petition brought by the Center for Human Rights and Constitutional Law challenging the Haitian interdiction program as a violation of the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights, OAS Treaty No. 36. *Petitioners Release Petition of the Inter-American Commission on Human Rights Concerning U.S. Program of Haitian Refugee Interdiction*, 32 I.L.M. 1215, 1215-16 (1993). In March 1993, the Commission issued an interim Resolution adopting Provisional Measures, "[c]alling upon the United States Government to review as a matter of urgency its practice of stopping on the seas vessels destined for the USA with Haitians and returning them to Haiti without affording them an opportunity to establish whether they qualify as refugees." *Id.* at 1216. The interim resolution noted that the U.S. policy prevents the exercise by the Haitians of the right to seek refuge. *Id.* at 1215-16 (discussion of Case No. 10.675). In late September 1994, the Inter-American Human Rights Commission promulgated questions to the parties and announced that it would make a decision on the case at its 88th session later that fall. See Letter from Alvara Tirado Mejia, Vice Chairman, Inter-American Commission on Human Rights, to Peter Schey, Executive Director, Center for Human Rights and Constitutional Law (Sept. 26, 1994) (on file with author).

85. See *UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council*, 32 I.L.M. 1215, 1215 (1993) ("[T]he obligation not to return refugees to persecution arises irrespective of whether governments are acting within or outside their borders.").

## IV. THE FUTURE

Where, then, do we go from here? Since July 1994, there have been dramatic developments with regard to United States policy toward both Haitian refugees and Haitian democracy. Let me address each in turn.

A. *The Refugees*

In early summer 1994, the United States government made herculean efforts to reestablish the Guantanamo refugee camp, building on short notice a tent city with a capacity of nearly 27,000 people. After the Haitian influx, a whole new wave of Cuban refugees swamped Guantanamo, and now outnumber the Haitians there and in camps hastily erected in Panama and elsewhere. At this writing, our government is building other offshore "safe-haven" camps across the Caribbean—in Antigua, Dominica, St. Lucia, Suriname, and the Turks and Caicos Islands. Some of these camps will likely serve as detention sites for at least some refugees for as long as a year.

We must acknowledge that, for better or for worse, our country is now in the business of running offshore refugee camps. But history suggests that our government has not done this well. The two closest parallels, the Japanese internment camps of World War II<sup>86</sup> and the Guantanamo camp for Haitian refugees in 1991–93, proved to be unmitigated disasters. In both cases, the United States military treated detainees like prisoners of war, denying them due process and other rights, including access to counsel, adequate medical care, and decent living conditions. Our government's new challenge is to create lawful, humanitarian safe havens for both Haitians and Cubans at Guantanamo and the other Caribbean sites. These sites must have the following features: shelters capable of withstanding the elements; refugees housed in family groups and allowed freedom of movement within the camp; religious, education, and recreational services run not by the United States military, but by private voluntary agencies, nongovernmental organizations, and the United Nations High Commissioner on Refugees; health care provided not by the military, but by the United States Public Health Service; mail and phone services made available to the refugees; and ready access of the press, human rights monitors, volunteer religious organizations, doctors, and lawyers.<sup>87</sup>

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86. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 221–24 (1944); *Civilian Restrictive Order 1*, 8 Fed. Reg. 982 (1943).

87. Initial signs, however, are that these basic necessities are *not* being provid-

As the most recent Cuban and Haitian cases reveal, a fine line separates a desirable policy of temporary safe haven from a counter-productive one of indefinite arbitrary detention. Quickly made arrangements to establish refugee camps should not become entrenched as the "necessary" arrangements to run the camps in the medium or long term. Nor should refugees be treated like criminals; disciplinary procedures should protect their rights to due process, and disciplinary conditions should be humane and fair.<sup>88</sup> Social activities at the camps—education, religion, books, recreation, intracamp communication and the like—must be greatly expanded to maintain morale and to reduce tensions and frustration. In the current Guantanamo camps, for example, internal communication is virtually nonexistent.<sup>89</sup> In effect, our government has built cities devoid of constructive outlets for more than 35,000 people, with little for them to do besides getting frustrated. Boredom, rising tensions, and inevitable frictions between detainees and the military make the camps potential powderkegs unless our government moves in an enlightened way to correct the errors of the past.<sup>90</sup> The most disturbing feature of the current Guantanamo situation is

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ed. *See Cuban American Bar Ass'n v. Christopher*, No. 94-2183-Civ-Atkins (S.D. Fla. filed Oct. 24, 1994). During the *HCC* litigation, the government gradually realized that lawyers served a useful mediating role with the refugees and thus permitted us continuous access to the base for the last nine months of the suit. *See supra* note 56 and accompanying text. Although the government appears currently to be restricting the access of lawyers to the new Guantanamo camps, that decision seems based not on space or logistical considerations, given the available space in tents pitched in existing camps. For that reason, a First Amendment challenge to the government's restrictive access policy is a key part of the *Cuban American Bar Ass'n* case. *See supra* notes 47-50. Both nongovernmental organizations and lawyers warrant much broader access to the Guantanamo camps than is available at this writing.

88. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1044-45 (E.D.N.Y. 1993) (explaining that due process requires "written notice of the allegations, a hearing, a written decision, an opportunity to call witnesses and present evidence, access to counsel, and an impartial decisionmaker"). The continuing denial of disciplinary due process on Guantanamo is another count in the *Cuban American Bar Ass'n* complaint.

89. At this writing, Haitian and Cuban detainees on Guantanamo have little or no news of the outside world. There is no rumor control or regular place to confirm or deny information. No mail or telephone access to Haiti, Cuba, or the United States exists. Nor do televisions or radios appear to be available, although a camp radio station is being contemplated. Similarly, adequate medical and public health counseling are sadly lacking; for example, condoms are available at camp aid centers, but the Haitian refugees we met in July seemed unaware of this, a troubling fact in a population likely to have a high incidence of HIV.

90. Numerous violent incidents have already erupted at Guantanamo, in both Cuban and Haitian camps. *E.g.*, Patrick J. McDonnell, *Frustration Builds at Cuban Refugee Camp*, HOUS. CHRON., Sept. 8, 1994, at A20; Eric Schmitt, *Haiti Refugees and U.S. Forces Clash in Cuba*, N.Y. TIMES, Aug. 16, 1994, at A7.

that the United States government has asserted, as a defense for its conduct, the breathtaking claim that noncriminal Cuban and Haitian children, women, and men imprisoned behind barbed wire on territory subject to exclusive United States jurisdiction "are without rights under our Constitution" or any other United States laws.<sup>91</sup> There is little hope for a humane and enlightened U.S. refugee policy if our government refuses to take the most basic step of acknowledging that human beings held in its long-term custody have certain fundamental human rights.

What broader solutions are available for the refugee problem writ large? Guantanamo represents but the tip of the worldwide refugee iceberg. In 1993, there were more than sixteen million refugees in the world, a number that grows as nations fragment.<sup>92</sup> At this writing, over two million Rwandan refugees fleeing tribal genocide are overwhelming the humanitarian capacities of Zaire and other neighbors.<sup>93</sup> The United States and a few other countries are shouldering the lion's share of the refugee burden, while desperately seeking other sanctuaries for unwanted refugees: buffer zones, interdiction, and invasion, as in the case of Haiti.<sup>94</sup> Other wealthy countries, including Japan and those of the European Community, make only token contributions.<sup>95</sup> Meanwhile, a large and growing number of refugees languish in deplorable conditions in Guantanamo-type refugee camps worldwide.

How should we deal with such outflows? While attractive in theory, refugee burden-sharing has proven extremely hard to implement in practice. Nations have strong political and financial incentives to free ride, sit back, and hope that the United States or other states will pay the way. The latest Haitian and Cuban episodes

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91. See Transcript of October 25, 1994 Hearing on Plaintiffs' Emergency Motion for Temporary Restraining Order, Cuban American Bar Ass'n v. Christopher, No. 94-2183-Civ-Atkins, at 73 (S.D. Fla. 1994) (statement of U.S. government attorney).

92. U.S. COMM. FOR REFUGEES, IMMIGRATION & REFUGEE SERVS. OF AM., WORLD REFUGEE SURVEY 40-41 (1994) (table of 1993 world refugee statistics).

93. Raymond Bonner, *Cholera Stalks the Rwandan Refugees*, N.Y. TIMES, July 22, 1994, at A1.

94. See S.C. Res. 940, *supra* note 33, at 1-2 (noting plight of Haitian refugees and authorizing member states "to use all necessary means" to facilitate departure of Haitian military leadership); cf. Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT'L L. 503, 503-06 (1993) (describing buffer zone and interdiction strategies).

95. Prominent exceptions are Germany, Iran, and Pakistan, which border on countries from which large numbers of asylum seekers are fleeing. See *Over 10,000 Refugees Arrived in Germany in August, Reversing Lull*, Deutsche Presse-Agentur, Sept. 6, 1994, available in LEXIS, News Library, CURNWS File; *Refugees*, Inter Press Service, May 24, 1994, available in LEXIS, News Library, CURNWS File (noting Iran and Pakistan are top nations accepting refugees).

illustrate the problem: in recent months, the United States has been relegated to tin-cup diplomacy, begging its regional allies to take in their share of refugees.<sup>96</sup>

My colleague, Peter Schuck, has recently suggested a new approach.<sup>97</sup> Recognizing that nations, for ideological, cultural, and political reasons, differ greatly both in their preferences for refugees and in their capacity to absorb them, he proposes that cross-national differences in preferences and assets be used to promote, rather than impede, refugee burden-sharing.<sup>98</sup>

Schuck suggests that the United Nations or some similar body—perhaps the United Nations High Commissioner on Refugees—establish for each member nation a refugee quota based on that nation's absorptive capacity. Refugees could then be assigned to particular countries, and nations could trade their quota obligations.<sup>99</sup> If these obligations and bargains could be enforced,<sup>100</sup> cash-rich nations like Japan would discharge their obligations by paying cash-poor nations like Russia to accept their quota. In the end, all refugees would be some nation's responsibility, even if no refugee could be guaranteed of going to any *particular* nation. Schemes to trade legal obligations are not unprecedented, even in the international context. Under the Montreal Protocol on Substances that Deplete the Ozone Layer,<sup>101</sup> for example, member states of regional organizations may trade obligations with other parties within certain limits.<sup>102</sup>

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96. Honduras, for example, has reportedly agreed to accept 5000 Haitian refugees in exchange for the United States' promise to help resolve the Honduran energy crisis and to forgive some or all of a \$150 million debt. See WALL ST. J., July 28, 1994, at A1.

97. See Peter Schuck, *Share the Refugees*, N.Y. TIMES, Aug. 13, 1994 (late edition), at A21.

98. *Id.* Schuck notes that nations vary in terms of wealth, population density, and cultural receptivity to newcomers. Thus, some nations, like Japan, are cash-rich but crowded, while Russia is the opposite. When individuals have diverse preferences and assets, they usually turn those differences to mutual advantage through trading.

99. *Id.*

100. Under Schuck's scheme, the United States and Canada might condition trade, immigration benefits, or foreign aid on other states' compliance with the quota system. Other multilateral enforcement mechanisms might be devised, such as those used in the General Agreement on Tariffs and Trade ("GATT") and international environmental accords. The agency would need to regulate this system and address possible market failures like discrimination and information, while continuing to monitor human rights conditions in countries of origin to permit safe repatriation.

101. *Opened for Signature*, Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1989).

102. *Id.* at 1552-54; see Elizabeth Barratt-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 YALE J. INT'L L. 519, 539-40 (1991).



Schuck's approach has the failing of permitting richer nations to bargain away their refugee obligations. On the other hand, it recognizes the simple reality that we can no longer rely on charity alone to handle mass refugee outflows. By seeking to exploit voluntarism and self-interest to distribute refugee burdens more fairly, Schuck's approach may make more sense than the present system, which relies too much on the altruism of a few and too little on harnessing the incentives of the many. However underdeveloped this approach may be, it would be hard to do worse than its current alternatives: interdiction, summary repatriation, buffer zones, and begging.

### *B. Promoting Haitian Democracy*

As this Article went to press in the fall of 1994, new hope finally appeared in the apparently endless Haitian saga.<sup>103</sup> At this writing, the Clinton administration seems finally to be lurching toward an end to the crisis.<sup>104</sup> In many senses, the solution was always within our grasp. The Clinton administration simply opened its eyes to basic realities that human rights advocates had urged upon it for years: the grotesque human rights abuses in Haiti, the need to grant refugees safe haven against such abuses,<sup>105</sup> the need to take forceful action against the junta that had caused the abuses, and the imperative of restoring the democratically elected regime. Following the principles sketched above, the Clinton administration finally pursued regional burden-sharing, took a non-neutral stance in the face of gross violations, put pressure on human rights violators, granted refugees a form of "safe haven," and demanded accountability for gross human rights abuses. Sadly, all of the actions which the United States took in the fall of 1994 could have been taken three years earlier, probably with similar results, saving thousands of lives.

Even in the Haitian endgame, the Clinton administration's choices reflected a puzzling confusion of priorities. For example, after deciding that the severity of human rights abuses in Haiti warranted an invasion, President Clinton agreed to a deal with the

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103. John Kifner, *Aristide, in a Joyful Return, Urges Reconciliation in Haiti*, N.Y. TIMES, Oct. 16, 1994, at A1; see *Haitian Repatriation from Cuba Seen Over by Early November*, Reuters, Oct. 8, 1994, available in LEXIS, News Library, CURNWS File.

104. See Hendrik Hertzberg, *Haiti So Far*, NEW YORKER, Oct. 17, 1994, at 7, 7-8.

105. Nor has this need wholly abated with the return of Aristide. As the Haitian intervenors' pleadings in the *Cuban American Bar Ass'n* case point out, *supra* note 48, even after Aristide's return, Haitian paramilitary groups continue to terrorize the countryside.

Haitian military that apparently averted the invasion in exchange for amnesty of the human rights abuses.<sup>106</sup> After sending United States troops to stop abuses by the Haitian authorities against the Haitian people, the administration seemed initially confused about whether those troops should in fact intervene to stop the very abuses they were sent to prevent.<sup>107</sup>

Yet during the weeks of the United States' occupation, these initial policy mishaps were finally righted, leading to Aristide's ultimate return, and the repatriation of thousands of Haitian refugees. We can only hope that when all is said and done, history will remember the reopening of Guantanamo to Haitians in 1994 as only a temporary measure, pending the final return of Aristide, in contrast to the permanence of the ill-fated HIV-detention camp of 1991-93. We can also only hope that the Cuban detention experiment on Guantanamo will come swiftly to an end.

In the end, what should be remembered about the Haitian crisis of the 1990s is a salient fact: that after several years of counterproductive noncompliance with international law regarding Haitian refugees, the most powerful nation in the world finally obeyed. In the process, the United States served its own national interests, reaffirmed its liberal identity, and belatedly underlined its own commitment to a policy of democracy and human rights. In the end, the historical episode thus illustrates the power of law and legal process to shape interest and identity, playing a driving role in international relations.

## V. CONCLUSION

Refugees have become an immutable feature of the New World Disorder. Yet courts confront refugee crises too much like pathologists confront disease: only *after* an outbreak, and with little ability to affect the underlying causes. Broader policy responses to refugee crises must mix legalism with realism, humanity with pragmatism, altruism with natural self-interest.

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106. Although President Jimmy Carter's September 18, 1994 deal clearly contemplated a broad amnesty, even for gross human rights abuses, see *Text of Jimmy Carter Interview on Haiti*, CNN, Sept. 19, 1994, available in LEXIS, News Library, CNN File, the Haitian Parliament fortunately enacted an amnesty that was ultimately much narrower in its scope, see Larry Rohter, *Haitian Bill Doesn't Exempt Military from Prosecution*, N.Y. TIMES, Oct. 8, 1994, at A4.

107. John H. Cushman, Jr., *Haitian Police Crush Rally as American Troops Watch*, N.Y. TIMES, Sept. 21, 1994, at A1. The United States government subsequently changed the rules of engagement to permit American soldiers to protect Aristide supporters and to root out the notorious Haitian paramilitary group. Rod Norland et al., *We'll Hunt You Down Like a Dog*, NEWSWEEK, Oct. 17, 1994, at 46, 46-48.

The latest twist in our Haitian policy illustrates the normativity of transnational legal process. As the Haitian crisis progresses, time will test whether or not we realize our humanitarian ideals: in the specific way we run off-shore refugee camps, in the broader approaches we develop to implement refugee burden-sharing, and in the way we do or do not help, after all this time, to restore democracy to that troubled island nation.