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Human and Environmental Rights in the Trial of Alexander Nikitin

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BRIEF

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The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights

by Dr. Sabine Schlemmer-Schulte*

Introduction

In September 1993, the Board of Executive Directors of the World Bank adopted the Resolution Establishing the Inspection Panel (Resolution). On the basis of this Resolution, the Inspection Panel was subsequently created when the Bank's Board appointed the first three Panel members in April 1994. They took office in August 1994, and the Panel's office opened for business in September 1994.

The Bank established the Inspection Panel to provide a formal mechanism for receiving complaints from people directly affected by Bank-supported projects on the grounds of the Bank's failure to abide by its own policies, including environmental and social policies, when designing, appraising, and supervising the implementation of projects.

The creation by the Bank of an independent mechanism to assess whether the Bank lives up to its own standards in its operations was unprecedented in the work of international organizations. The European Court of Justice at the European Union (EU), which has jurisdiction over EU decisions, cannot be counted as a comparable precedent because of the distinct supranational nature of the EU. The World Bank's decision to create an inspection mechanism was followed by the Inter-American Development Bank and the

Asian Development Bank, which established internal inspection functions in 1994 and 1995, respectively.

Since the Inspection Panel started operating in September 1994, it has built up an impressive case record, with 13 requests received by October 31, 1998, from people allegedly adversely affected by the Bank's non-compliance with primarily environmental and social policies in the design, appraisal, and implementation of projects it finances. It has also been subject to two reviews by the Bank's Board of Executive Directors.

As an independent watch-dog mechanism driven by affected people's initiatives, the Panel has been able to enhance the efficiency of Bank operations, thereby enhancing these operations' contribution to the achievement of human rights.

The Panel's Creation

The Inspection Panel's creation was the result of both internal and external demands on the Bank to be more transparent and accountable in its operational work by providing the Bank's Board with an independent review of controversial Bank projects. This review capability improves quality control in project design, appraisal, and implementation.

Within the Bank, the impetus for creating an inspection function emanated from an internal review of Bank work, which started in the fall of 1991. The review task force submitted its report, which came later to be known as the "Wapenhans Report," to the Board in November 1992.

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Human and Environmental Rights in the Trial of Alexander Nikitin

by Stephen L. Kass*

Introduction

Human rights and environmental rights are adjacent pillars in the fragile structures we erect to bring a sense of justice, harmony, and permanence to our lives and our communities. But they are not the same thing. Sometimes these pillars appear as one, sometimes they seem to lean in opposite directions, and sometimes they are overshadowed by other pillars on which our societies rely, like defense from invasion, protection against epidemics, or an acceptable allocation of wealth. Both pillars, however, are based on the rule of law, without which neither has meaning. The recent trial of Alexander Nikitin in Russia illustrates the interplay between these two sets of rights, including their points of convergence and conflict.

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Intersection of Environmental and Human Rights

The principal points of intersection—whether of congruence or conflict—of environmental and human rights principles vary greatly, reflecting the broad reach of both fields. These intersections include at least the following areas of state and private action:

Freedom of Expression and Association. The human rights dimensions of free expression and its twin, free association, are easily observed. These rights require continuing assertion by their defenders to protect those who hold politically unpopular views. What is less widely appreciated is the significant link between protection of free speech and effective environmental advocacy, which in some countries is viewed by governmental officials, or entrenched private interests, as a step on the road to sedition. The murder of Chico Mendes in Brazil for championing the efforts of his fellow rubber tappers to save the western edge of the Amazon rain forest and Nigeria's execution of Ken Saro-Wiwa and other environmental activists for opposing corporate exploitation of their native lands illustrate the continuing risks faced by environmental advocates, who are perceived, rightly or wrongly, as advancing opposition political agendas.

Environmental Warfare. The 1991 Gulf War provided a conspicuous example of environmental manipulation in modern warfare. Iraq's flooding of the Persian Gulf with oil and the enormous impact of well field fires led the UN Security Council to impose, for the first time, environmental remediation penalties as a condition to its cease-fire agreement with Saddam Hussein. The analogy between intentionally indiscriminate environmental impacts and the indiscriminate use of Scud rockets and land mines against civilians made clear the overlapping concerns of human and environmental rights in seeking to limit warfare to combatants and legitimate military targets.

Refugee Conditions. The poor conditions in which millions of refugees and internally displaced persons live in developing countries are often characterized by massive violations of both human rights and minimally acceptable environmental conditions. Both human rights abuses and environmental degradation are often causative factors in refugee migrations as well, in places as varied as the Sudan and Haiti.

Indigenous Peoples' Rights. The right of ethnic minorities and indigenous communities to continue to speak their own languages, practice their own religions and customs, and be free from threats to

their lives and homes finds support in many human rights agreements. For environmentalists, many of these values are expressed through protection of native lands and natural resources, upon which indigenous peoples often depend for survival. Thus, Brazil's failure to protect the Yanomami people's land and customs can be characterized either as a violation of Brazil's obligations under international human rights law or as a failure to comply with its environmental obligations under the Biodiversity Convention.

Corporate Conduct. Environmental groups seeking to monitor corporate pollution practices in developing countries demand that transnational firms adhere to the same standards abroad as they do in their own countries. Similarly, just as anti-apartheid activists once called on transnational corporations to curtail their business in South Africa during the

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apartheid era, human rights organizations today ask corporations to avoid complicity in governmental abuses in China. Royal Dutch Shell's pipeline operations in Nigeria are an example of a direct link between corporate environmental degradation and ensuing human rights abuses by government forces called upon to suppress protests stemming in part from that degradation.

Population and Income Policies. In this area, environmental and human rights concerns are more likely to conflict than to reinforce each other. Thus, population pressures drive many environmental problems by consuming marine and terrestrial resources at an accelerating rate. Human rights advocates, however, focus on government intrusion into private reproductive choices. This conflict is also true of some income redistribution policies, which alleviate some forms of environmental degradation associated with poverty (for example, soil erosion or lack of potable water), while exacerbating others that tend to rise with income (increased consumption of material goods, auto usage, and waste disposal).

Clean Air, Water, and Soil. These substantive goals, central to environmental non-governmental organizations (NGOs), may sometimes reinforce a community's claimed right to preserve indigenous customs or its traditional way of life. But environmental claims may also conflict with development plans that are intended to serve a larger community or to advance national economic development. Some "environmental justice" claims, such as the persistent siting of hazardous waste facilities in minority neighborhoods, can be equated with the invidious discrimination often challenged by human rights groups. Other environmental objectives, such as meaningful environmental impact assessments, are more analogous to due process claims in the human rights fields because they are intended to lead to informed environmental decision-making, rather than to specific substantive results.

Institutional Protection. Both human and environmental rights depend on the accountability of states for their actions. Both also depend on domestic, as well as international, institutions to enforce laws upon the complaint of interested private parties, though environmental claims are more often adjudicated in specialized administrative tribunals rather than courts of general jurisdiction. Most human rights, however, are individual rights capable of being asserted against the collective judgment of the community. In contrast, environmental claims more often assert the legitimacy of broader community interests against those of an individual property owner, industry, or governmental agency.

As this brief listing suggests, the relationship between environmental rights and human rights is complex and far from clearly defined. The time has not yet come for a comprehensive synthesis of these relatively young and still growing areas of international law. Although a grand unifying theory would surely be welcome, that goal requires a broader international consensus on the standards and institutional mechanisms appropriate for each of these developing areas of law. To begin that process, however, it is useful to examine free expression—the first area of intersection noted above—and to consider in greater depth the extent to which human rights and environmental rights lead to similar conclusions with respect to free speech by environmental advocates. We are able to explore a current example of this relationship in the pending treason trial of Alexander Nikitin in St. Petersburg, Russia.

The Nikitin Case

Alexander Nikitin, a 46 year old retired ship captain, submarine commander, and nuclear fuel inspector for the Russian

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Navy, was charged with treason because he contributed to a 1996 report, based on publicly-available information, issued by Norway's highly-respected *Bellona* Foundation. The report discussed the nuclear radiation risks posed by the Russian Navy's irresponsible engineering, fuel storage, and nuclear waste disposal practices. Shortly before the report's publication, Nikitin was detained by Russia's federal security service (FSB), the KGB's successor, for two months without access to his lawyer, then held for another eight months before being released on the condition that he remain in St. Petersburg. Over the next two years, senior government officials publicly called Nikitin a traitor and attempted, unsuccessfully, to compel him to accept FSB-approved counsel on the ground that the charges against him involved "state secrets."

When, after seven drafts of the indictment, Nikitin's trial finally began in St. Petersburg on October 20, 1998, he found himself charged under two secret military decrees, one issued after his alleged crimes occurred and the other issued after he left the navy. Neither Nikitin, his lawyers (whom *Bellona* retained on his behalf), nor the court itself were permitted to see the secret decrees until the eve of the trial. Most of the trial was closed to the public because of the FSB's insistence that state secrets might be jeopardized by, among other things, reading the already-public indictment or permitting Nikitin's testimony in open proceedings. Nevertheless, those few witnesses who did appear in open court testified that the information Nikitin's former colleagues furnished to him was already in the public domain, and that such information—principally reports of submarine accidents caused by nuclear fuel leaks or reactor problems—was given to Nikitin in full knowledge that he was working on a report for *Bellona*.

At the end of October 1998, Judge Golets issued a ruling finding the current charges against Nikitin unfounded but remanding the case for still more "investigation" by the FSB. The FSB is thus free to re-charge Nikitin whenever it wishes. In view of the procedural abuses and secret decrees that have characterized the proceedings, Judge Golets and his two "lay assessors" deserve praise for finding that the current charges against Nikitin are unfounded. It seems highly improper, however, to continue to subject the defendant to further prosecution—particularly given the strong suspicion that the FSB will now shop for a local court less willing to challenge the FSB's historically unaccountable power. Both the Prosecution and Defense have filed appeals in the

Russian Supreme Court in response to the October 1998 ruling. The Supreme Court hearing is scheduled for February 4, 1999.

Whatever the trial's final outcome, the chilling effect on environmental discourse in Russia is profound. Other Russian scientists have told Nikitin, who remains confined to St. Petersburg, that they fear similar prosecutions for disclosing environmental risks that may embarrass influential present or former officials. After all, if a scientist working with the distinguished foreign foundation *Bellona*, which has ample funds to hire two prominent defense lawyers and the resources to bring worldwide attention to his case, can be prosecuted for treason and his career permanently destroyed in Russia, how can individual Russians or local environmental groups be expected to risk similar indictments?

Moreover, the substantive problems revealed in the *Bellona* report are profound, requiring immediate attention by Russia and, in all likelihood, sustained assistance from the international community for their resolution. Among these problems are faulty designs in Russia's first and second-generation nuclear submarines, including reports of the sinking of nuclear submarines, and insufficient quality controls in connection with the manufacture and acceptance of such vessels. The report also discloses the existence of shockingly inadequate containment facilities for spent or damaged nuclear fuel, some of which is stored, cased in concrete, in the naval vessel *Lepse*, which could easily capsize and cause a major explosion. If Russian scientists face charges of treason for discussing these issues with colleagues abroad, what are the prospects for effective international action to address a problem that threatens not only Russia's citizens and environment but that of neighboring states as well? Indeed, *Bellona* believes that the aggregate risks of a nuclear accident in the Murmansk region of northern Russia, the focus of its study, exceed that of the 1986 Chernobyl disaster, for which the Soviet Union was widely condemned for failing to disclose in a timely manner.

Environmental and Human Rights in Light of the Nikitin Trial

The Nikitin case thus poses, in the most direct way, a challenge to free expression with respect to publicly available data of grave environmental significance to millions of people. The procedural abuses of Nikitin's prosecution, including denial of counsel, prolonged pre-trial detention, prosecution based on secret, and, in one case, *ex post facto* decrees, and a partially secret trial, all contribute to a pattern of human rights abuse. These abuses rein-

force public outrage at the FSB's attempt to punish the communicator of embarrassing environmental news. The Nikitin case thus combines grave due process violations with suppression of urgent information bearing on the long-term safety of public health and the environment, both inside and outside of Russia. It is no surprise, then, that the case galvanized widespread support from both the human rights and environmental communities in the U.S. and Europe.

Suppose, however, that Russia's FSB and judicial system had afforded Nikitin due process by honoring his request for counsel promptly following his arrest, charging him under preexisting and publicly-available laws, granting his request for an open trial, and otherwise complying with reasonable standards of fairness in carrying out its investigation. Would curing these procedural failings eliminate the human rights, as opposed to the environmental, objections to Nikitin's prosecution? Clearly not, given the FSB's insistence on prosecuting Nikitin for contributing to a legitimate scientific report based on publicly available information. Due process aside, Nikitin and *Bellona* were still entitled to exercise their right to free expression on a legitimate issue of public discourse, despite the navy's embarrassment at the content of the *Bellona* report and despite Nikitin's former status as a naval officer.

But what if *Bellona's* information were not public and the only source for the foundation's report were military data that Nikitin acquired while on active duty and in violation of known military regulations. Under those circumstances, would *Bellona* and Nikitin still be entitled, as a matter of human rights law, to obtain and release that data to the public? That is a far more difficult case to argue, even for a civilian NGO such as *Bellona*. Few human rights advocates would contend, after all, that accepted international norms require Russia to acquiesce in the disclosure of classified military information as part of protected speech.

Yet environmental advocates might contend that such information must be released, at least where necessary to protect public health and the environment. Article 42 of the Russian Constitution of 1993 prohibits "secrecy in matters that may constitute hazards to the environment or the health of individuals." Russia's 1993 and 1995 Laws of State Secrets similarly exempt information concerning the environment from classified status. All of these provisions clearly reflect the painful lessons learned from the public outrage engendered by the 1986 Chernobyl explosion and appear, on their

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due to the non-binding nature of the UNHCR recommendations, the U.S. asylum system's conformance with other UNHCR standards adds credence to the argument that the United States should adhere to these recommendations as well.

Several immigrant advocacy groups, including Amnesty International, the Lawyers Committee for Human Rights, and Human Rights Watch, concerned about the adequacy of expedited removal procedures, petitioned the U.S. government for the opportunity to evaluate the process. However, the INS, the government agency charged with administering U.S. immigration services, has refused repeatedly to grant these requests. Although the U.S. government has allowed the UNHCR to observe the secondary inspection process, the UNHCR has functioned more as a cooperative consultant to the government rather than an independent monitoring body.

Results of Expedited Removal

After nearly two years of operation, U.S. government statistics offer the only insight into the impact of expedited removal. A study released by the U.S. General Accounting Office in March 1998 reveals that,

although a large number of individuals pass the initial inspection stage and are sent into secondary inspection, only a minority are referred for a credible fear interview. Between April 1997 and December 1997, the first seven months of expedited removal implementation, 79% of the 29,170 persons who entered secondary inspection failed to indicate a fear of persecution and, as a result, by December 1997, almost all were removed from the country. At the credible fear interviews for the remaining 21% who passed secondary inspection, asylum officers determined that between 17% and 41% of these applicants, depending on which asylum office conducted the interview, did not have a credible fear of persecution. Additionally, 15% of these applicants subsequently failed to affirmatively request judicial review of the negative finding. Finally, immigration judges upheld negative findings in credible fear interviews in 83% of cases by November 1997.

If the reduced numbers of individuals who arrive at asylum hearings measure the U.S. asylum system's effectiveness, then expedited removal is a great success. Statistics, however, conceal information about the fairness and thoroughness of immigration officials' decision-making processes, an integral factor in deter-

mining the system's adequacy. It is currently impossible to determine how many individuals summarily removed were, in fact, legitimate asylum seekers. Despite the difficulty of precise measurement, it is irrefutable that many individuals are quickly removed from the United States every day, without ever discussing their claims with anyone besides the immigration officials conducting the expedited removal process.

Conclusion

Expedited removal does not adequately take into account the special circumstances of refugees. By its very nature, therefore, it risks returning individuals to countries where they may be harmed or even killed, a scenario that international refugee norms strictly prohibit. Is the "Mother of Exiles," the proud beacon of liberty, now turning her back on immigrants seeking safe haven on her shores? Perhaps we may never know, because the voices of those denied entry are the most silent of all. ☹

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face, to be unequivocal commitments to the public disclosure of environmentally relevant information. Even if not compelled by international human rights law, such a commitment is crucial to informed environmental debate, particularly in a society where access to technical data was traditionally the exclusive prerogative of the state. Because unsafe nuclear practices threaten public health and the environment, environmentalists could fairly demand not only that Nikitin have the right to speak and write about these practices, but that the navy had an affirmative duty to disclose such information to the Russian public.

Nor is the safety of nuclear fuel in the Murmansk region solely a domestic Russian concern. Many of the vessels and storage facilities in Murmansk and elsewhere in northern Russia are sufficiently close to Norway, Finland, and Sweden to threaten their citizens through a major explosion or persistent release of radiation. Most of the nuclear submarine sinkings referred to in the *Bellona* report occurred in international waters and constitute, at the very least, a source of continuing international concern. Under customary international law, Russia has

an obligation to prevent the use of its territory, including its naval vessels, in a manner that causes environmental injury to other states and, in all likelihood, to the global commons as well. Although the Soviet Union and Russia were entitled to employ nuclear submarines as part of their defense forces, the long-term storage of spent nuclear fuel, which is no longer serving a military purpose and is stored in conditions that pose a serious threat to neighbors, is not justified either by military necessity or self-defense. When these unsafe practices are reinforced by the prosecution of those who seek to correct them, environmentalists can reasonably claim that Russia is not living up to either customary international environmental obligations or reasonable engineering standards for environmental safety and stewardship. Moreover, unlike human rights claims (which might distinguish between private speech by civilians and reasonable restrictions on public statements by military officers), environmentalists seek to hold the Russian government itself accountable for failing to disclose and mitigate environmental risks to the public, regardless of the validity of restrictions on public disclosure of secrets by individual members of the military.

Conclusion

As noted above, human rights and environmental rights often, though not always, support one another. Yet, on closer consideration, even the powerful link between human and environmental rights in the area of free expression has exceptions. It is likely that similar analyses of the remaining intersections of these twin rights would yield further insights into this relationship of sometimes congruent and sometimes conflicting rights. In the meantime, one can only hope that Russia honors both its human rights commitments and its environmental obligations by dismissing all remaining charges against Alexander Nikitin and turning its attention toward solving, rather than ignoring, the significant nuclear safety problems that drew the world's leading human rights and environmental organizations together, however briefly, in a St. Petersburg courtroom this past October. ☹

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