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*by Cathleen Caron**

Emma Lazarus' poem, *The New Colossus*, memorialized the Statue of Liberty, the U.S. national symbol of freedom, as the "Mother of Exiles." For many Americans, the statue represents the United States' proud heritage as a land that welcomes immigrants seeking a better life and offers safe harbor to refugees fleeing persecution. Yet immigration law and policy in the United States has never been straightforward, and it is, in fact, marked by a turbulent history that swings from relatively liberal open-door policies to eras of xenophobia. Unfortunately, for the asylum seeker of 1998, current laws may make it more difficult than ever to find safe haven on U.S. shores.

International Norms Protecting Refugees

The modern concept of refugee protection developed in the wake of World War II, which produced huge numbers of refugees fleeing political violence and war. One seminal international achievement was the UN Convention Relating to the Status of Refugees (Refugee Convention), which entered into force in 1954. Although the United States is not a party to the Refugee Convention, it acceded to its major provisions by ratifying the 1967 UN Protocol Relating to the Status of Refugees (Protocol). Article 33 of the Refugee Convention sets the standard for the international protection of refugees through the *non-refoulement* principle, stating that no country shall return a refugee to a country "where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion."

Refugee law is one of the few areas of U.S. domestic law that incorporates international human rights standards. The 1980 Refugee Act, passed by Congress to bring the United States into compliance with its obligations under the Refugee Protocol, mirrors the Refugee Convention's principles and adopts its definitions of "refugee" and "*non-refoulement.*" Furthermore, the U.S. Supreme Court held that the UN High Commissioner for Refugees (UNHCR) Handbook, an interpretive manual for the Refugee Convention and Protocol, provides "significant guidance" for understanding U.S. obligations under international refugee law. Accordingly, U.S. immigration courts frequently cite the UNHCR Handbook and other UNHCR documents. Because of U.S. law's reliance on international refugee standards, immigration advocates frequently utilize international law and its developments successfully in U.S. asylum cases. This situation is unlike many other areas of law, where international norms typically carry little weight in U.S. courtrooms.

History of Asylum in the United States

In the United States, the 1980 Refugee Act marks the beginning of modern refugee law. Before that time, no procedures existed to accommodate the special needs of asylum seekers and, moreover, safe haven was available only for people fleeing persecution from Middle Eastern or Communist-controlled countries. The Refugee Act, however, made asylum available to people from any country and provided a statutory definition of "refugee," modeled on the Protocol. By 1990, ten years after the initial reforms, a separate professional corps of Immigration and Naturalization Service (INS) officers was finally established and trained to exclusively handle asylum claims. Underbudgeted and understaffed, however, the new corps was ill equipped to handle the 100,000 unadjudicated claims that awaited them. In 1992, the asylum corps was able to schedule hearings for only 37% of this caseload, and by 1993 the number of pending claims had risen to over 300,000. As a consequence, many asylum cases remained pending for years in the overwhelmed system.

Although the INS Asylum Office requested more funds to expedite the processing of asylum applicants, several events occurred that triggered a major overhaul of the system in 1996. Under the old law, asylum applicants were allowed to lawfully work either after a preliminary interview or by default if 90 days passed without an interview. Due to the backlog of cases, however, few interviews occurred and many applicants received work authorizations by default, regardless of the validity of their asylum claims. As a result, reports emerged alleging systematic abuses of the default system by undocumented immigrants who lacked valid asylum claims but nonetheless applied for asylum as a way to obtain work permits.

In addition, three highly publicized incidents in 1993 added to the growing sentiment that the U.S. asylum system needed to be revamped. First, an asylum applicant shot and killed two people near the Central Intelligence Agency headquarters outside of Washington, D.C., in January 1993. Second, in the aftermath of the World Trade Center bombing in New York City in February 1993, the press discovered that several of the aliens who were charged with the crime were in the country legally, awaiting their asylum hearings. Finally, the "Golden Venture," a Chinese immigrant smuggling ship, ran aground in New York City's harbor in June 1993, full of hundreds of immigrants attempting to enter the United States illegally. Several immigrants drowned while swimming to shore after the early morning accident, and the rest applied for asylum.

These incidents compounded the public's perception that the asylum system was an unruly back door to regular immigration procedures. Despite changes in 1994 that curtailed some abuses, the momentum for major reform of the asylum system was in motion. Lost in the fray of public debate, however, were the voices of immigrant advocacy groups who insisted that the cause of the abuses lay in inadequate support of the INS Asylum Office, not in existing asylum laws.

Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) in 1996. One of its goals is to establish a more efficient asylum system and prevent abuses by speeding up the asylum process and enhancing enforcement efforts. According to U.S. immigrant advocacy groups, however, several of the IIRAIRA's provisions unacceptably risk the return of *bona fide* asylum seekers to countries where their lives may be in danger. This policy, they allege, is a violation of international *non-refoulement* principles. Much of the controversy surrounds IIRAIRA's "expedited removal" procedure, a screening process utilized at U.S. ports of entry to quickly identify and remove individuals who are not entitled to enter the United States. This expedited procedure may jeopardize some valid asylum claims by rushing applicants through a process that lacks adequate procedural protections.

The Expedited Removal Process

Before 1996, asylum seekers were automatically entitled to full evidentiary hearings before an immigration judge and, if necessary, appellate review by a U.S. federal court. In the IIRAIRA's complicated new process, however, an asylum seeker faces several procedural hurdles and must demonstrate the facial validity of his fear of persecution to different administrative officials along the way, before obtaining a hearing in front of an immigration judge. If the asylum seeker is unsuccessful at any stage in this preliminary process, he is denied judicial review and will be deported.

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Initial Detection. Immigration inspectors at U.S. ports of entry activate the expedited removal process when they suspect that an arriving foreigner has invalid or false travel documents and thus is attempting to enter the United States through fraud or misrepresentation. The alien is either removed from the country immediately or, if he indicates that he is fleeing from persecution or intends to request asylum, referred to the asylum interview process. The premise underlying this trigger is that inadmissible aliens generally arrive with questionable immigration documentation and, therefore, it is appropriate to immediately sort out these false claims. Immigrant advocacy groups contend, however, that this assumption relies on the misgiven notion that legitimate asylum seekers have sufficient time to obtain legal travel documents and exit their countries in a regular manner. This perspective grossly misrepresents reality for most asylum seekers, who often must leave their countries quickly, without time for extensive travel preparations.

Secondary Inspection. If an alien with suspicious travel documents requests asylum or claims to be fleeing from persecution, he is referred to the secondary inspection procedure, where an immigration official asks questions that are designed to solicit information about the alien's fear of return. The official informs the alien that this will be the alien's only opportunity to reveal such information. If the alien does not express a fear of persecution or affirmatively request asylum, he will be immediately "removed" from the United States. This removal order is final and subject only to a supervisor's approval. There is no right to counsel, judicial review, or even a phone call before an alien is sent back. An individual summarily removed is barred from re-entering the United States for five years.

Immigrant advocacy groups have expressed serious reservations about several aspects of the secondary inspection process. The most overarching concern is that the process risks violating *non-refoulement* principles by empowering low-level immigration officials who are frequently inadequately trained to issue critical judgments in an expedient and nonreviewable manner. Most legitimate asylum seekers leave their countries in haste, some risking their lives to escape persecution. When they first arrive, they know little if anything about U.S. asylum law and may hesitate to share intimate details of their oppression with uniformed government officials. Expedited removal risks the return of asylum seekers who, scared and unprepared, are unable or unwilling to persuade immigration officials of their need to stay.

Other flaws in the secondary inspection process further impede the proper identification of valid asylum seekers. Although regulations mandate "interpretive assistance if necessary," immigrant advocacy groups claim that such assistance is often inadequate, which may hinder applicants' capacity to convince immigration inspectors that they suffer from a valid fear of persecution. Normally, an immigration officer who speaks the asylum-seeker's language will serve as the translator. If none are available, however, it is common in airport INS offices to utilize other passengers or even airline employees. Although the use of government employees from the individual's country is expressly prohibited during other phases of the asylum process, this safeguard is not in place for secondary inspection. The use of extra-official translators, therefore, not only risks low quality translation but also renders the applicant vulnerable to possible hidden agendas of *ad hoc* translators.

Another concern is the lack of privacy during secondary inspection interviews. Numerous nongovernmental immigration advocacy groups contend that immigration officials violate INS requirements, which require asylum claims to be kept confidential, by asking asylum applicants to explain their fear of persecution in rooms that afford little privacy. For example, the Lawyers Committee for Human Rights noted in a recent report that, in New York's John F. Kennedy International Airport, immigration officials conduct interviews at large tables that can seat as many as 25 applicants. This lack of privacy may discourage applicants from revealing details of their persecution that may help to substantiate their asylum claims. A non-private interview may be an especially humiliating and traumatic procedure for victims of torture or rape, who may have difficulty describing their experiences.

Credible Fear Interview. For the individuals who successfully pass secondary inspection, the next phase of the expedited removal process is the credible fear interview. In this interview, which may happen as soon as 48 hours after an alien's arrival in the United States, an asylum officer determines if there exists a "significant possibility" that the asylum seeker's fear of persecution is "credible." A positive finding takes the applicant out of the expedited removal process and entitles him to an asylum hearing before an immigration judge at a later date. Judicial review by an immigration judge of an asylum officer's negative finding is immediately available, but the applicant must affirmatively request such review and will be summarily removed if he fails to do so. Approximately 85% of applicants request review.

Prior to the credible fear interview, an asylum seeker is allowed, for the first time during the expedited removal process, to consult with whomever he chooses. This consultation, however, is at the applicant's own expense and may not unreasonably delay the expedited removal process. Due to time and financial constraints, it is difficult for most asylum applicants to obtain legal assistance. Even if an applicant can retain a lawyer, counsel may only offer minimal assistance because lawyers may only speak on their clients' behalf during credible fear interviews at the asylum officer's discretion. The short time frame provided by expedited removal also limits lawyers' ability to gather evidence and prepare applicants for the interview.

Review by Administrative Judges. The final procedural phase an asylum seeker may need to pass during the expedited removal process is an immigration judge's review of a negative finding in the credible fear interview. A reversal of a negative finding results in a referral of the applicant's case to a full asylum hearing before another immigration judge, which is the same procedure that occurs for applicants who receive positive rulings during their credible fear interviews. If a negative ruling is upheld, however, no further recourse exists and the individual is deported from the United States. Again, counsel's role during the judicial review may be limited by the fact that these procedures grant no right for counsel to speak. At no point during this process do asylum seekers have access to the regular U.S. court system; they are strictly limited to administrative review by INS immigration courts.

International Law Criticisms of Expedited Removal

An additional critique of expedited removal regards the possible violation of UNHCR standards for when an abbreviated immigration process may be appropriate. Sensitive to countries' difficulties in managing overwhelmed immigration systems, the UNHCR suggested that in circumstances of "manifestly unfounded" or "clearly abusive" asylum claims, it may be possible to design an expedited process that complies with international refugee norms. According to Karen Musalo, an immigration expert with the International Human Rights and Migration Project, a manifestly unfounded claim is one that clearly does not reflect the known conditions of the asylum seeker's country. The U.S. system of expedited removal, however, utilizes standards considerably lower than the threshold envisioned by the UNHCR. Although U.S. procedures may not be a violation of international law

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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 administrating 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 determining 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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