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NOTES AND COMMENTS

RUNNING AFOUL OF THE PRINCIPLE OF *NON-REFOULEMENT*: EXPEDITED REMOVAL UNDER THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT

*“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”*¹

I. INTRODUCTION

While the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter “IIRIRA”)² brought about some of the most calculated and sweeping changes in the immigration laws of the United States in recent decades,³ the procedures established for the summary removal of certain arriving immigrants are among the most severe in effect. Under IIRIRA, persons who arrive in the U.S. with documentation “determined” by the inspecting immigration official to be insufficient or to have been procured by fraud are subject to “expedited removal” from the United States by the Immigration and Naturalization Service (I.N.S.).⁴ Too often, however, the

1. Convention Relating to the Status of Refugees, Geneva, July 28, 1951, Art. 33, 189 U.N.T.S. 137, 176 (*entered into force* Apr. 22, 1954) [hereinafter *Refugee Convention*]. The near-totality of the provisions of that Convention, including Article 33, were incorporated by reference into the U.N. Protocol Relating to the Status of Refugees, New York, January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, (*entered into force* October 4, 1967.) The Protocol, which the United States signed in 1968, removed the time and geographical limitations of the term “refugee.”

2. Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (Codified in various sections of Title 8 of the U.S. Code). The provisions of IIRIRA discussed herein went into effect on April 1, 1997.

3. The last comprehensive overhaul of the Immigration and Nationality Act is considered to have been the Immigration Act of 1952.

4. Under IIRIRA, an arriving alien who is found to be inadmissible under 8 U.S.C. § 1182 (a)(6)(C) (1998) (for seeking admission by fraud or willful misrepresentation) or under 8 U.S.C. § 1182 (a)(7)(A) (for lack of valid documents for admission at the time entry to the United States is sought) is subject to expedited removal under 8 U.S.C. § 1225 (b)(1) (1998).

inspection mechanisms established by IIRIRA fail to account for the circumstances that caused a particular immigrant to arrive in the U.S. in the first place. Indeed, the procedures set up under IIRIRA for determining an arriving immigrant's eligibility for political asylum do not provide adequate guarantees against "*non-refoulement*" of refugees as required of the U.S. by international law.

Until the advent of IIRIRA, the Immigration and Nationality Act contained measures that were designed to protect refugees. IIRIRA creates the possibility that individuals who meet the criteria for the basic protection of *non-refoulement* will nevertheless be summarily removed from the U.S. and returned to their country of origin. IIRIRA requires the application of standards more strict than those prescribed by international law for making eligibility determinations for refugee protections. IIRIRA transgresses the norms of international refugee law by allowing for the possibility that an arriving immigrant who meets the lower threshold prescribed by international law to be returned to his or her country of origin.⁵

The importance of *non-refoulement* cannot and indeed, under IIRIRA, will not often be told by persons who benefited from the protection IIRIRA pretends to offer. As it now stands, the consequences of expedited removal lie with those who have been removed to places from which they may never return to speak of its failings. Beneath the relegation of what has for so long been regarded as "the Golden Door"⁶ to the status of a mere 'revolving door' are violations of international law perpetrated by I.N.S. officials each day at ports of entry into the United States.

I.N.S. inspectors at ports of entry are now empowered to make determinations so crucial that the life of the immigrant seeking admission often hangs in the balance. If an arriving immigrant who is thought to lack proper entry documents does not express—to the satisfaction of the inspecting officer—(who are often overworked and largely untrained in asylum law) a "credible fear" of returning to his or her country of origin, he or she may be placed on the next plane bound for the very country he or she has fled.⁷ It is all

5. Carolyn Patty Blum, *A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms*, 15 BERK. J. INT'L LAW 38, 48 (1997). "[T]he appropriate screening standard for asylum seekers at the border is whether their claims are 'manifestly unfounded,' a standard requiring far less proof than the United States' credible fear of persecution." (Citing the position of the United Nations High Commissioner for Refugees (UNHCR) as expressed in UNHCR Executive Committee Conclusion No. 30 (1983)).

6. Emma Lazarus, *The New Colossus I*, (1888).

7. 8 U.S.C. § 1225 (b)(1)(A)(i) (1996) states "the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 [8 U.S.C. § 1158] or a fear of persecution."

the more disconcerting, then, that the decision of such inspecting officials to admit or exclude an immigrant is not subject to judicial review.⁸

By failing to ensure adequate means within the inspection process for identifying and giving meaningful notice of the protections available to persons who meet the international definition of “refugee”, the Immigration and Nationality Act as amended by IIRIRA violates both U.S. obligations under international treaties as well as peremptory norms of international law. Specifically, the obligation to honor the principle of “*non-refoulement*”⁹ is jeopardized severely by the limited access IIRIRA affords to the asylum mechanisms of U.S. immigration law. Further, many of the changes wrought by IIRIRA reverse any progress towards bringing U.S. domestic refugee law into line with international law in that same area.¹⁰ This comment will set forth the removal procedures instituted by IIRIRA and illustrate the manner in which they contravene U.S. obligations under international law. It will ultimately examine the difficulties associated with bringing international law to bear in U.S. courts in a potential challenge to some of the most severe provisions of IIRIRA as they relating to *non-refoulement*.

II. IIRIRA: A NEW IMMIGRATION REGIME

A. *Admissibility under IIRIRA*

Under the inspection process for persons arriving in the United States as established by IIRIRA, one who has not yet entered the United States is considered to be an “applicant for admission.”¹¹ Admissibility may be established by showing proof of U.S. citizenship, lawful permanent residency, or other similar status or by presenting a valid visa obtained abroad.¹² Non-citizens who possess facially valid entry documents may nonetheless be deemed inadmissible for any number of reasons, including having committed fraud in obtaining their visa, as a result of prior criminal convictions, or

8. See *Id.* and 8 U.S.C. § 1252 (a)(2)(A) (1998) (disallowing judicial review of any action taken in the context of expedited removal.)

9. The principle of *non-refoulement* is set forth in Article 33 of the U.N. Convention Relating to the Status of Refugees. (See note 1, *supra.*) This principle was incorporated into U.S. law at 8 U.S.C. § 1251 (b)(3) (1980).

10. The Refugee Act of 1980, Pub. L. No. 96-212, was enacted with the objective of bringing U.S. law into accordance with the provisions of the U.N. Protocol Relating to the Status of Refugees. See S. CONF. REP. No. 781, 96th Cong., 1st Sess. 20 (1980).

11. 8 U.S.C. § 1225 (a)(1) (1996) states “An alien present in the United States who has not been admitted or who arrives in the United States shall be deemed for purposes of this Act an applicant for admission.”

12. 8 U.S.C. § 1181 (1998).

pursuant to a previous order of deportation or removal.¹³ The forum in which the admissibility of different categories of applicants is determined varies.¹⁴

The *new* threshold determination of whether an immigrant has been “admitted” does away with the prior concept of “entry” into the U.S.¹⁵ The change, however, extends well beyond the difference in the term of art used. Under the previous legal regime, if an I.N.S. inspector felt an applicant for admission should be excluded from the U.S., the person was referred for an evidentiary hearing held before an immigration judge. Thus, to the extent that the decision rendered in the initial administrative procedure was adverse to the immigrant, a judicial procedure followed. The decision of an immigration judge made in exclusion proceedings was then subject to review by the Board of Immigration Appeals and the Federal District Courts. IIRIRA, on the other hand, authorizes the Attorney General to treat even persons who have not been admitted and are subsequently found within the United States in the same manner as arriving immigrants.¹⁶

Under the system established by IIRIRA, the availability of procedural safeguards against the return of *bona fide* refugees is severely limited, both by “restrict[ing] access to the adjudication system at the front end” and also

13. 8 U.S.C. § 1182(a) (1998).

14. Most determinations of admissibility are made by consular officers overseas during the visa application process, but similar determinations are made by the inspecting immigration officials at the port of entry. 8 U.S.C. § 1225(a)(3) (1998). Limited *habeas corpus* review is available to persons claiming to be U.S. citizens or who claim to have been previously admitted to the U.S. as a lawful permanent resident, refugee or asylee. 8 C.F.R. § 235.3 (b)(5)(iv) (1998). Such determinations, however, are limited to determining whether or not the person making such a claim possesses the status asserted. 8 U.S.C. § 1252(e)(2) (1998).

15. Under the I.N.A. prior to IIRIRA, one who had entered the U.S. but who could not establish the legal manner in which they did so was placed in deportation proceedings and ordered to show cause why they should not be deported. Conversely, one seeking to enter the U.S. was placed in exclusion proceedings, where they were required to show their eligibility for entry into the U.S. The legal fiction of the “entry” doctrine created the possibility of a person being present in the U.S. without having “entered.” Under IIRIRA, persons found within the U.S. who have not been “admitted” are deemed to be “unlawfully present” and are subject to removal proceedings. 8 U.S.C. § 1182 (a)(6)(A).

16. Lawyer’s Committee for Human Rights, SLAMMING “THE GOLDEN DOOR”: A YEAR OF EXPEDITED REMOVAL 4 (March, 1998) [hereinafter “SLAMMING ‘THE GOLDEN DOOR’”]. In spite of being so authorized, the Attorney General has stated that the provisions of expedited removal will only be applied to “arriving aliens,” as “application of the expedited removal provisions to aliens already in the United States will involve more complex determinations of fact and will be more difficult to manage.” The Department of Justice, has however, reserved the right to apply these provisions at any time and in any particular situation. *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10, 312-313 (1997). The Department of Justice subsequently announced in September, 1999 that the I.N.S. will begin to apply expedited removal to certain criminal aliens in three correctional facilities in the State of Texas on a trial basis for 180 days. 64 Fed. Reg. 51338 (1999).

through the use of “court-stripping provisions [that] virtually eliminate judicial review at the back end.”¹⁷ The former problem arises during the initial inspection process upon arrival into the U.S. IIRIRA did not change the structure of this inspection process.

B. *Inspection and Removal*

The use of a two-tiered inspection system whereby persons who are not immediately found to be admissible by the primary I.N.S. inspector are referred for “secondary inspection” is not a new process. Prior to IIRIRA, a secondary inspector who found a person to be excludable due to a lack of proper entry documents would place him or her in exclusion proceedings. Under IIRIRA, the same official may summarily exclude and simultaneously order the removal of a similarly situated immigrant to his or her country of origin. This process, dubbed “expedited removal,” has created many disturbing scenarios involving would-be asylum seekers, and leaves open the possibility of many more. What would previously have been a decision that could have been appealed to administrative and judicial authorities is reduced now to a unilateral decision that is subject to the review of a supervisory I.N.S. inspector, and, if requested by the immigrant, an immigration judge.

The consequences of the determinations that will now be made by a secondary inspector now greatly exceed the authority previously bestowed upon these lower-level officials. It must be noted that I.N.S. inspectors making such determinations will not receive training comparable to that received by the asylum officers¹⁸ previously charged with making such determinations in the case of affirmative asylum applications.¹⁹

A provision of the Act enables persons seeking admission to withdraw their application in order to avoid the five year bar to re-entry that accompanies an order of expedited removal.²⁰ Such a provision is of no consolation,

17. SLAMMING “THE GOLDEN DOOR” *supra* note 16, at 4.

18. Asylum officer, as defined by statute, is an immigration officer who—

- (i) has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 208 [8 U.S.C. §1158], and
- (ii) is supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.

8 U.S.C. § 1225(b)(1)(E)(i & ii) (1998).

19. While I.N.S. inspectors must successfully complete “a 14-week basic training program and a one-year field training and probationary period,” asylum officers receive training in “asylum law, current country conditions and interviewing skills, including techniques for interviewing individuals who may be survivors of torture. After initial training, asylum officers continue to receive ongoing training in these areas.” U.S. Immigration and Naturalization Service, Office of Public Affairs, *FY 1998 Update on Expedited Removals*, (June 21, 1999) <<http://www.ins.usdoj.gov/graphics/publicaffairs/factsheets/Expedite.htm>>.

20. 8 U.S.C. § 1225(a)(4) (1998).

however, to individuals whose arrival in the U.S. came as a result of persecution in their homeland.²¹ Further, the right to withdraw an application for admission is not automatic.²²

The use of expedited removal is limited to applicants for admission who either lack any documents entitling them to admission or whose documents appear to have been obtained by fraud.²³ Nevertheless, the circumstances surrounding the departure of many would-be asylum seekers from their country of origin are such that they may not have been able to acquire the proper documents for admission to the U.S.²⁴ It is for this reason that the process of expedited removal is most likely to place asylum-seekers at risk. By virtue of arriving in the U.S. without proper entry documents or with falsified documents used solely to escape the country in which they faced persecution, these individuals are subject to the most harsh treatment available under U.S. immigration law: removal without a hearing by an administrative or judicial official and a five year bar against re-entering the country.

Implicit in this harsh treatment of persons with falsified or inadequate documentation is the presumption that they are less likely to be genuine refugees than those aliens who may be in possession of a U.S. visa. In fact, given the urgency of the circumstances prompting the departure of most refugees from their homeland, the contrary would seem to hold true. Nevertheless, refugees arriving without a U.S. visa are singled out for adverse treatment without the safeguards needed to make an adequate determination as to the reason(s) for their lack of proper documentation.

The unavailability of judicial review of the determinations made by I.N.S. inspectors may be attributed in part to the long standing premise that “*physical* presence is not necessarily synonymous with *legal* presence for the purposes of determining constitutional guarantees.”²⁵ IIRIRA goes one step further, however, by eliminating the possibility of admissibility determinations being made in the context of exclusion proceedings before an immigration judge. Absent such substantive procedural review by a judge, the secondary inspection procedure proves to be entirely dispositive of a refugee’s ability to

21. Under 8 U.S.C. § 1225 (a)(4), an alien may withdraw his application for admission at the discretion of the inspecting officer, and depart immediately from the U.S.

22. Permission to withdraw an application for admission is granted at the discretion of the inspecting officer. 8 U.S.C. § 1225(a)(4). If the inspectors find no deliberate fraudulent intent or other serious violation, the individuals are generally allowed to withdraw their application for admission and depart the United States. U.S. Immigration and Naturalization Service, Office of Public Affairs, *FY 1998 Update on Expedited Removals*, (June 21, 1999) *supra* note 19.

23. *See supra* note 4.

24. “Refugees who flee frequently have no time for immigration formalities, and allowance for this is contained in Article 31 of the Convention [Relating to the Status of Refugees].” GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 152 (2d ed.1996).

25. GOODWIN-GILL, *supra* note 24, at 145.

receive the protection required by international law. The introduction of the summarily harsh “expedited removal” procedure is difficult to square with the long standing principle of *non-refoulement*—a landmark of international refugee law which the United States adopted many years ago.

III. THE EVOLUTION OF THE PRINCIPLE OF *NON-REFOULEMENT*

A. *The United Nations Convention Relating to the Status of Refugees and Its Protocol*

The United Nations Convention Relating to the Status of Refugees of 1951 provides for refugee protection from expulsion or return (“*refoulement*”) to a country where “his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”²⁶ Both the requirement of non-expulsion and that of non-return (“*non-refoulement*”) have received significant attention, focused largely upon the distinction that may exist between these two terms.²⁷ The significance of the terms stems from the fact that as their interpretation varies, so too may the responsibility of a State towards a refugee.

The term “expel” connotes a refugee’s presence within a State in the first place. Since the Convention does not require a State to offer admission to a refugee,²⁸ it is not entirely clear what responsibility a State has to an arriving refugee. However, the Convention prohibits States from returning refugees “in any manner whatsoever” to a land where “his life or freedom would be threatened.”²⁹ This restriction sets Article 33(1) apart from other provisions of the Convention in that it is not conditioned upon “degrees of presence and lawful residence.”³⁰ In fact, it may be considered demonstrative of the intent for Article 33 to be interpreted in light of Article 31, which guarantees the application of the Convention to refugees regardless of the illegality of their entry or presence.³¹

With the term “*non-refoulement*” being added to the Convention, it seems more clear that the prohibition against the return of a refugee would include the

26. *Refugee Convention*, *supra* note 1, Art. 33.

27. For more in-depth discussion of the various interpretations of these terms as used in the Convention, see Elwin Griffith, *Problems of Interpretation in Asylum and Withholding of Deportation Proceedings Under the Immigration and Nationality Act*, 18 LOY. L.A. INT’L & COMP. L.J. 255, 275-282 (1996).

28. The absence of such a requirement has been found to be a “major drawback” to the *non-refoulement* requirement in that it does not preclude temporary protection policies. See Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 237-39 (1996).

29. *Refugee Convention*, *supra* note 1, Art. 33.

30. GOODWIN-GILL, *supra* note 24, at 142

31. *Refugee Convention*, *supra* note 1, at Art. 31, sec. 1 and Art. 33, sec. 1.

return of one who is seeking admission.³² Even the U.S. Supreme Court in *Sale, Acting Commissioner, INS v. Haitian Centers Council* seemed to acknowledge that aliens who reach ports of entry are protected by both the 1951 Convention (Art. 33) as well as the U.S. statute.³³ Indeed, “if States avoid the mandate of Article 33 by arguing that the refugees are outside their borders, they dilute the meaning of “return. . . in any manner whatsoever.”³⁴ To allow a contrary reading of this Article would be to say “the extent to which a refugee is protected – in accordance with the humanitarian aim of the Convention – against return to a country in which he fears persecution would depend upon the fortuitous circumstance whether he has succeeded in penetrating the territory of a contracting State.”³⁵ For this reason, the interpretation of Article 33 that imposes two requirements: that of non-expulsion *and* of non-return (*non-refoulement*) provides a more clear notion of the intent of the Convention as it relates to the obligations of the party States.³⁶ It is this very interpretation that was advanced by the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR), when it reaffirmed “the fundamental importance of the observance of the principle of *non-refoulement* . . . irrespective of whether or not [individuals] have been formally recognized as refugees.”³⁷

B. *Non-refoulement as a Norm of International Law*

Aside from creating an obligation for signatory States to the Refugee Convention and the 1967 Protocol, the principle of *non-refoulement* can be said to have risen to the level of a binding norm of international law, if one that contains some exceptions.³⁸ Touted as “the most enduring contribution of the Convention,” the development of this norm “beyond the bounds of the

32. The French term “*refouler*” is most generally associated with the notion of refusing entry at the border. Griffith, *supra* note 27, at 276. The inclusion of both the term return and *refouler* in the Convention may be best attributed to the variance among the procedures for admission of persons to individual party States. Indeed, the issue of *non-refoulement* would not be an issue in a State where procedures were limited to expulsion and deportation as opposed to refusal of admission. *Id.* at 277, n. 113.

33. 509 U.S. 155, 182, 113 S.Ct. 2549, 2564 (1993).

34. *Refugee Convention*, *supra* note 1, (quoted in Griffith, *supra* note 27, at 280).

35. Paul Weis, *Territorial Asylum*, 6 *IJIL* 1966, 173, 183, (quoted in GUNNEL STENBERG, *NON-EXPULSION AND NON-REFOULEMENT*, 176 (1989)).

36. “The expulsion restriction prohibits the removal of an alien from a contracting State, whereas the “return” restriction prohibits the return of an alien at or outside of the border back to the place of danger.” Griffith, *supra* note 27. In support of this position, Griffith cites GOODWIN-GILL, *supra* note 18, wherein he establishes that “*Refoulement* is directed to the [category of refugees unlawfully within or outside a State’s territory.]” Griffith, *supra* note 22 at 279, n. 127.

37. Conclusion Endorsed by the Executive Committee on *Non-refoulement*, U.N. GAOR, 32nd Session, Supp. No. 12A, at 14, U.N. Doc. A/32/12/Add.1 (1977).

38. GOODWIN-GILL, *supra* note 24, at 167.

Convention” is of tremendous significance in that it creates a requirement even for States that are not parties to either the Convention or the Protocol.³⁹ The “crystallization” of the principle of *non-refoulement* into a customary norm is a process that has been traced by the UNHCR Executive Committee in its annual Conclusions.⁴⁰ In 1981, the ExComm urged that even in situations involving a mass influx, “the fundamental principle of *non-refoulement*—including non-rejection at the frontier—must be scrupulously observed.”⁴¹ The following year, the Committee noted that *non-refoulement* was “progressively acquiring the character of a peremptory rule of international law.”⁴² While the conclusions of the Executive Committee do not create binding obligations, they constitute a contribution to the *opinio juris* of States.⁴³ When coupled with consistent State practice, the *opinio juris* can be said to have given rise to *jus cogens*—a peremptory norm. This notion was reinforced when the Cartagena Declaration on Refugees was issued in 1984, declaring *non-refoulement* to be “a corner-stone of the international protection of refugees” that should be acknowledged and observed as a rule of *jus cogens*.⁴⁴ State practice has confirmed that “the duty of *nonrefoulement* extends beyond expulsion and return and applies to measures such as rejection at the frontier.”⁴⁵

Evidence of State practice which conforms with the principle of *non-refoulement* may be found in subsequent international agreements which specifically refer to it. One such agreement is the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴⁶ This Convention incorporates the principle of *non-refoulement* and applies it to persons who would face torture if returned to their country of origin. Specifically, Article 3, paragraph 1 of that Convention requires that “no State Party shall expel, return (*‘refouler’*) or extradite (in the case of an immigrant already present in the country) a person to another State where there

39. Fitzpatrick, *supra* note 28, at 252.

40. Executive Committee Conclusion No. 22 U.N. GAOR, 36th Session, Supp. No. 12A at 18, U.N. Doc. A/36/12/Add.1 (1981).

41. *Id.*

42. Report of the 33rd Session: U.N. doc. A/AC.96/614, para. 70 (1982) (cited in GOODWIN-GILL, *supra* note 24, at 127).

43. GOODWIN-GILL, *supra* note 24, at 128.

44. 1984 Cartagena Declaration on Refugees, Nov. 22, 1984, reprinted in Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1 (1984-85) (quoted in PIRKKO KOURULA, BROADENING THE EDGES: REFUGEE DEFINITION AND INTERNATIONAL PROTECTION REVISITED 276 (1997)).

45. Guy S. Goodwin-Gill, *Nonrefoulement and the New Asylum Seekers*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S THE NINTH SOKOL COLLOQUIUM ON INTERNATIONAL LAW, 103, 105 (David A. Martin, ed. 1986).

46. *Opened for signature* February 4, 1984, G.A. res. 39/46, 39 U.N. GAOR Supp. NO. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter “Convention Against Torture”].

are substantial grounds for believing that he would be in danger of being subjected to torture.”⁴⁷

The Convention Against Torture’s use of language paralleling that of the Refugee Convention while further recognizing the need for protection of persons already present in the country seeking to remove them lends further credence to the notion that *non-refoulement* has risen to the level of a customary norm of international law. At the same time, it creates an additional class of persons who may not be subjected to return or rejection at the border of a state where they seek refuge.

IV. CLARIFYING THE OBLIGATIONS OF *NON-REFOULEMENT*

A. *The Duty of States: Protection, Not Admission*

A significant part of the debate surrounding the principle of *non-refoulement* stems from the fact that States have attempted to blur the responsibilities that the principle creates for them. States have attempted to shift the focus away from the risks faced by refugees who may be forcibly returned to their country of origin, instead focusing on the prospect of a mass influx of immigrants. The concern surrounding a potential mass migration into a State is certainly not without basis. The fact remains, however, that States, especially those which are signatories to the 1951 Refugee Convention or the 1967 Protocol, are duty bound not to forcibly return (*refouler*) or otherwise reject persons arriving at its borders who have either a well-founded fear of persecution or who have grounds for believing that a danger of torture exists if returned to their home country.⁴⁸ Indeed, “[t]he application of the principle of *nonrefoulement* is independent of any formal determination of refugee status by a state or an international organization”⁴⁹ making it applicable “as soon as certain objective conditions occur.”⁵⁰ In this manner,

a state may be liable for a breach of the duty of *nonrefoulement* regardless of notions of fault, either directly for the acts and omissions of its officials, or indirectly where its legal and administrative systems fail to provide a remedy or guarantee which is required by an applicable international standard.⁵¹

47. *Id.* Art. 3, para. 1.

48. GOODWIN-GILL, *supra* note 24, at 139.

49. Goodwin-Gill, *Nonrefoulement and the New Asylum Seekers*, *supra* note 45, at 105 (citing the Report of the UNHCR, paras. 22-23, U.N. Doc. E/1985/62 (1985); Report of the Twenty-eighth session of the Executive Committee of the High Commissioner’s Programme, para. 53 (4)(c), U.N. Doc. A/AC.96/549 (1977)).

50. *Id.*

51. *Id.* at 105-06.

Based upon the enactment of IIRIRA and the manner in which it has been implemented, the United States may be said to have breached its duty under international law on both counts.

B. The Problem with U.S. Policy: Splitting Hairs to Avoid Its Obligation

Acknowledging the concern of States with the prospect of mass migration, it is important to clarify the duty owed to arriving refugees. In fact, the principle of *non-refoulement* does not require a State to admit or grant asylum to a refugee. It does, however, “enjoin any action on the part of a state which returns or has the effect of returning refugees to territories where their lives or freedom may be threatened.”⁵² While the ultimate effect of *non-refoulement* may require temporary refuge, “[i]t is a mistake to make the leap from *non-refoulement* to asylum.”⁵³ It is in this respect that the United States failed during the Haitian refugee crisis, as it blurred the line between admitting refugees and not returning them to their country of origin. In a carefully worded statement to the United Nations, the United States defended itself as follows: “[the U.S.] did not consider that the *non-refoulement* obligation under Article 33 of the Convention included an obligation to admit an asylum seeker.”⁵⁴ Even if this assertion is true, it does not serve to excuse the U.S. from the obligation of *non-refoulement*. By appealing to the lack of an obligation to provide asylum, the U.S. “failed to notice that *non-refoulement* is not so much about admission to a State, as about not returning refugees to where their lives or freedom may be endangered.”⁵⁵ Expedited removal may well have been conceived as a means of circumventing this very dilemma. The distinction between *non-refoulement* and admission may become somewhat blurred in cases where no third country will accept a genuine refugee arriving at a U.S. port of entry. Such a dilemma does not, however, undermine the U.S. obligation of *non-refoulement*.

States undermine the most fundamental basis of *non-refoulement* by placing short-term national interests above a potential threat to the life or freedom of refugees. Any fear that refugees may remain in a State does not mitigate that State’s duty not to return them to their country of origin in those situations:

the variety of procedural limitations governing applications for refugee status and asylum, as well as the tendency of States to interpret their own and other States’ duties in the light of sovereign self-interest, all contribute to a negative

52. *Id.*

53. *Id.* at 112.

54. GOODWIN-GILL, *supra* note 24, at 132.

55. *Id.*

situation potentially capable of leading to breach of the fundamental principle of *non-refoulement*.⁵⁶

The tendency of U.S. courts and lawmakers alike to find a lack of standing or of substantive rights for arriving immigrants demonstrates all the more the need for compliance with international norms of *non-refoulement*. The duty of the United States under international law not to return or to reject refugees exists independent of the rights of any individual.⁵⁷ The United States has effectively shirked its responsibility to refugees by confusing the lack of individual rights with a lack of a duty towards the refugees themselves. The expedited removal provisions of IIRIRA are an unfortunate product of this confusion, and their continued enforcement carries with it a significant risk that individuals arriving in the United States will be forcibly returned to the risk having their basic human rights violated.

V. U.S. IMMIGRATION LAW IN LIGHT OF INTERNATIONAL OBLIGATIONS

A. *Reconciling U.S. Law with Treaty Obligations: The Refugee Act of 1980*

While the United States was not a party to the original Convention of 1951, it ultimately signed the subsequent Protocol Relating to the Status of Refugees in 1967.⁵⁸ Prior to that time, nothing in U.S. law provided absolute protection from *refoulement* (forcible return).⁵⁹ The Protocol became effective for the United States on November 1, 1968,⁶⁰ but adherence to the principle of *non-refoulement* remained discretionary until Congress passed the Refugee Act of 1980⁶¹ making the U.S. compliant with the requirements imposed upon it as a signatory State.⁶² By attending to such fundamental details as introducing a definition of a refugee into U.S. law,⁶³ the Refugee Act began to provide a

56. Guy S. Goodwin-Gill, *The Protection of Refugees and the Safe Third Country Rule in International Law*, in *ASYLUM LAW* 89, 91 (Judicial Conference on Asylum Law ed., 1995).

57. GOODWIN-GILL, *supra* note 24, at 171.

58. United Nations Protocol Relating to the Status of Refugees, *supra* note 1. The Protocol incorporated by reference all but the first Article of the Convention (limiting its application to persons who were made refugees by events occurring prior to January 1, 1951) and provided for a prospective application thereof. *Id.* Art. I, §§ 1 and 2.

59. GIL LOESCHER, *BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS* 58, n. 5 (1993).

60. United Nations Protocol Relating to the Status of Refugees, *supra* note 1.

61. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of Title 8 U.S.C.).

62. Maureen O'Connor-Hurley, *The Asylum Process: Past, Present and Future*, 26 *NEW ENG. L. REV.* 995, 1006 (1992) (quoted in Mary McGee Light, Note: *The Well-Founded Fear Standard in Refugee Asylum: Will it Still Provide Hope for the Oppressed?* 45 *DRAKE L. REV.* 789, 792 n. 36 (1997)).

63. 8 U.S.C. § 1101 (a)(42)(A) defines a refugee as “any person who is outside of any country of such person’s nationality or, in the case of a person having no nationality, is outside

legal mechanism through which refugees could seek protection in the United States.⁶⁴ New provisions allowed for grants of asylum on a discretionary basis for persons who met the refugee definition.⁶⁵

One of the more notable inclusions in the Refugee Act was the mandatory prohibition of the return of an alien to his or her country of origin if his or her life or freedom would be endangered.⁶⁶ The “withholding of deportation” provision was duplicative of a type of relief already available through asylum provisions. Its inclusion in U.S. law represented an important advance in that it codified the requirement of *non-refoulement* into the domestic law of the U.S. In this manner, the U.S. fulfilled the obligation imposed upon it by virtue of it being a signatory to the 1967 Protocol Relating to the Status of Refugees.⁶⁷

B. U.S. Obligations Under the Convention Against Torture

The United States became a signatory to the Convention Against Torture in October, 1988 and it entered into force in November, 1994.⁶⁸ On October 21, 1998, Congress enacted legislation requiring “heads of appropriate agencies [to] prescribe regulations to implement the obligations of the United States Under Article 3 of the [Convention Against Torture].”⁶⁹ Pursuant to this directive, the I.N.S. promulgated regulations establishing procedures for raising a claim for protection from torture.⁷⁰ In the context of expedited removal, a person making an Article 3 claim undergoes the same “credible fear” screening as an asylum-seeker, with the exception that once he is before an immigration judge, he may assert a claim to withholding of removal or

any country in which such person last habitually resided, and who is unable or unwilling to return to, and who is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

64. McGee Light, *supra* note 62 at 793.

65. *Id.*

66. Originally codified at 8 U.S.C. § 1253 (h) (“Withholding of Deportation”) and now found at 8 U.S.C. § 1251(b)(3) (“Restriction on Removal”). Withholding of deportation was previously discretionary, but under the Refugee Act of 1980 was made mandatory, in addition to including provisions designed to prevent persecutors and criminals from benefiting from its protection.

67. The provision for the “withholding of deportation” of certain aliens based upon endangerment in his country of origin “is based directly upon the language of the Protocol and it is intended that it be construed consistent with the Protocol.” H.R. CONF. REP. 96-781 (1980), *reprinted in* U.S.C.A.A.N. 160, 161 (1980).

68. Convention Against Torture, *supra* note 46.

69. Section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998 Pub. L. No. 105-277, 112 Stat. 2681 (1998).

70. 64 Fed. Reg. 8478 (1999).

deferral of removal in addition to the possibility of seeking asylum.⁷¹ Nevertheless, in order for Article 3 claims under the Convention Against Torture to be heard, the applicants must overcome the obstacle of secondary inspection. As a result, the risk of *refoulement* remains.

C. *Treatment of Asylum-Seekers Under IIRIRA*

Within the context of the inspection process, IIRIRA includes measures directed at immigrants who may be eligible for political asylum in the U.S.⁷² Under these provisions, if an immigrant who is otherwise subject to expedited removal expresses either a desire to apply for asylum or expresses a fear of persecution, the I.N.S. inspector is required by law to refer them to an asylum officer⁷³ for an interview.⁷⁴ Any such referral would take place during the secondary stage of inspection. If the I.N.S. official fails, for whatever reason, to ascertain that the “applicant for admission” has a credible fear of returning to his country of origin, the immigrant is subject to expedited removal and left without any recourse for review of the decision.

Advocates of expedited removal view cite to the high percentage of immigrants found to have a “credible fear” in the course of their interview with an asylum officer⁷⁵ as evidence of an effective, comprehensive screening process. Quite obviously, these numbers do not account for the individuals who were not referred from secondary inspection for an interview with an asylum officer due to an adverse determination by the I.N.S. officer conducting the inspection. The shortcomings of the expedited removal process are best illustrated then, by a closer examination of the secondary inspection process as it relates to asylum-seekers.

VI. IIRIRA AND *NON-REFOULEMENT*: A TEST OF COMPATIBILITY

A. *Secondary Inspection: The Moment of Truth*

For immigrants subject to expedited removal, secondary inspection represents the crucial moment in which any fear of returning to their country must emerge if they are to avoid summary repatriation. An immigrant ordered

71. *Id.* at 8484.

72. 8 U.S.C. §§ 1225 (b)(1)(A)(ii) and (b)(1)(B) et seq. (1996) provide procedures for the inspection of persons asserting an asylum claim.

73. An asylum officer is defined as “an immigration officer who has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of [asylum] applications...and has had substantial experience adjudicating asylum applications.” 8 U.S.C. § 1225 (b)(1)(E).

74. 8 U.S.C. § 1225 (b)(1)(A)(ii).

75. Bo Cooper, *Procedures for Expedited Removal and Asylum Screening Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*. 29 CONN. L. REV. 1501, 1523 (1997).

removed after secondary inspection is preempted from an interview with an asylum officer.⁷⁶ It is for this reason that the same guarantees afforded to those who undergo a “credible fear” interview must be afforded to individuals in secondary inspection. The failure to provide information regarding the secondary inspection process and the availability of protections for refugees in a manner that is meaningful to the immigrant (in his or her own language) could result in his or her removal. It is not surprising, then, that the concerns that have been raised regarding the conduct of secondary inspections include: I.N.S. failure to provide adequate information about the process, abusive conduct of I.N.S. officials during secondary inspection, a lack of confidentiality of the interview, and inadequate translation services.⁷⁷

I.N.S. officials involved in the secondary phase of inspection are required to observe certain procedures aimed at apprising immigrants of the nature of the proceedings in which they find themselves.⁷⁸ On the form used by the I.N.S. in its interviews, however, no specific mention is made of the availability of asylum.⁷⁹ The applicable statute falls short of ensuring that aliens eligible for asylum will be apprised of the availability of same: “[t]he Attorney General shall provide information concerning the asylum interview. . .to aliens who may be eligible.”⁸⁰ The safeguards provided within the context of expedited removal depend largely upon their being provided by the I.N.S. inspector.

The inspector is required to inform the alien of the possibility of speaking to another officer about any concern he may have regarding being returned to his country of origin.⁸¹ The difference in the availability of review of the asylum officer’s decision is not mentioned.⁸² There is, however, a series of three questions to be asked of the alien to ascertain whether he or she has a fear of returning to his or her country.⁸³ According to a study conducted by the General Accounting Office (GAO), inspectors failed to document asking at least one of the three required questions between an estimated 1 and 18 percent

76. SLAMMING “THE GOLDEN DOOR”, *supra* note 16, at 9.

77. *Id.* at 9-13.

78. *Id.* at 9.

79. Department of Justice, U.S. Immigration and Naturalization Service, Form I-867A/B, “Record of Sworn Statement in Proceedings under Section 235 (b)(1) of the Act.”

80. 8 U.S.C. § 1225 (b)(1)(B)(iv).

81. Form I-867A, *supra* note 79.

82. *Id.*

83. The questions are: “[1.] Why did you leave your home country or country of last residence? [2.] Do you have any fear or concern about being returned to your home country or being removed from the United States? [3.] Would you be harmed if you returned to your home country or country of last residence?” Department of Justice, Form I-867B, “Jurat for Record of Sworn Statement in Proceedings under Section 235 (b)(1) of the Act.”

of the time.⁸⁴ Such practice represents a failure on the part of the I.N.S. to adhere to its own stated procedure, under which “[n]o alien can be expeditiously removed from the United States until they are read, and acknowledge they understand, a sworn statement and asked three specific questions concerning whether they have a concern or fear of being returned to their home country.”⁸⁵

Once an intent to apply for asylum or a fear of return has been indicated by the alien, the regulations used by the I.N.S. require that officials “record sufficient information . . . to establish . . . that the alien had indicated such intention, fear, or concern.”⁸⁶ This regulation seems to go beyond the statutory indications for referral of aliens for an interview by an asylum officer.⁸⁷ An internal I.N.S. memorandum only exacerbates this by instructing the inspector to “ask enough follow-up questions to ascertain the general nature of the fear or concern.”⁸⁸ Such instruction clearly exceeds the bounds of the role set forth for inspectors, as “[t]he legislative scheme anticipates that false claims will be identified by trained Asylum Officers at credible fear interviews—not by low-level inspectors at the airport.”⁸⁹

In the context of expedited removal, any hope for a guarantee of protection for refugees depends directly upon the integrity of the procedures established and the adherence of immigration officials to the same. Since the I.N.S. procedures have already been found to be lacking in specific respects, the faithful adherence of officials to the few requirements that exist is all the more crucial, as “[p]rocedural safeguards are of vital importance from the very first moment that the examination of an asylum claim begins.”⁹⁰

B. *Secondary Inspection and Minimum Guarantees of Non-refoulement*

Defenders of the expedited removal procedures currently in place have attempted to find support within international instruments for the abbreviated

84. United States General Accounting Office, *Illegal Aliens: Changes in the Process of Denying Aliens Entry Into the United States*. GAO/GGD-98-81, 43 (March, 1998) [hereinafter GAO Report].

85. U.S. Immigration and Naturalization Service, Office of Public Affairs, *FY 1998 Update on Expedited Removals*, (June 21, 1999) *supra* note 19.

86. 8 C.F.R. § 235.3 (b)(4).

87. “If an immigration officer determines that an alien . . . who is arriving in the United States . . . [is subject to expedited removal]. . . and the alien indicates either an intention to apply for asylum . . . or a fear of persecution, the officer *shall* refer the alien for an interview with an asylum officer. . . .” 8 U.S.C. § 1225 (b)(1)(A)(ii). (emphasis added).

88. I.N.S. Memorandum re: Implementation of Expedited Removal, at para. 7 (Mar. 31, 1997) (quoted in SLAMMING “THE GOLDEN DOOR”, *supra* note 16, at 13).

89. SLAMMING “THE GOLDEN DOOR”, *supra* note 16, at 11.

90. Naula Mole, *Background Note on Seeking Asylum and Administrative Procedures*, in ASYLUM LAW 143,147 (The Judicial Conference on Asylum Law ed., 1995).

nature of the process.⁹¹ It should be noted that the United Nations document most often cited in support of this position, the 1983 ExComm Conclusion No. 30, may well prove the contrary position. In fact, ExComm Conclusion No. 30 is premised upon the notion that applications for refugee status that would be subject to an abbreviated procedure are those which are either “clearly abusive” or “manifestly unfounded.”⁹² The actual determination as to whether an application could be so categorized was considered to be one of “substantive character.”⁹³

Even within the context of an expeditious process, certain “procedural guarantees” are still required.⁹⁴ Because of the binding nature of the principle of *non-refoulement* upon the U.S., “the integrity of the system of protection [must] be assured; this entails the absence of arbitrariness, reasoned determinations by trained and informed decision-makers, adequate opportunities to present one’s case, including the assistance of appropriately qualified interpreters, due process of law, coherence, and consistency.”⁹⁵

The arguments that the expedited removal procedures provide these guarantees are based upon a comparison with the interview by an asylum officer rather than an interview conducted by the I.N.S. in a secondary inspection.⁹⁶ The secondary inspection interview falls far short of ensuring the

91. Cooper, *supra* note 75, at 1520-21. Cooper cites to the UNHCR, Executive Committee Conclusion No. 30, The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, U.N. GAOR, 38th Session, Supp. No. 12A, at 23, U.N. Doc. A/38/12/ Add.1 (1983), Available at: <<http://www.unhcr.ch/refworld/unhcr/excom/exconc/excom30.htm>> [“ExComm Conclusion No. 30”]. While not directly binding on the U.S., the conclusions of the Executive Committee represent recommendations of the consensus of its members, the U.S. ranking among them.

92. *Id.* part (d).

93. *Id.* part (e).

94. In light of the “grave consequences of an erroneous determination [of refugee status]” the recommended guarantees for an applicant for refugee status include:

- (i) . . . a complete personal interview by a fully qualified official and whenever possible, by an official of the authority competent to determine refugee status.
- (ii) [T]he manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status;
- (iii) [A]n unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory. . . This review possibility can be more simplified than that available in the case of rejected applications which are not considered manifestly unfounded or abusive.

Ex Comm Conclusion No. 30, part (e), *supra* note 66.

95. Guy S. Goodwin-Gill, *The Principles of International Refugee Law*, in ASYLUM 11, 23 (Council of Europe, Parliamentary Assembly, ed. 1995).

96. “[T]he procedures in place for expedited removal—including instructions to inspectors, notice of the process for asylum seekers, identification of adjudicators, contact with UNHCR, and review with suspensive effect—appear to meet the requirements [of ExComm Conclusions Nos. 8 and 30].” Cooper, *supra* note 75 at 1521, n. 74.

guarantees required for determining refugee status. Specifically, the secondary inspector is allowed to determine that an application for refugee status is “manifestly unfounded.”⁹⁷ In such a case, the person making the application may be subjected to an abbreviated review process.⁹⁸ This procedure fails to provide the second guarantee suggested by ExComm Conclusion No. 30, that “[t]he manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status.”⁹⁹ Within the context of expedited removal, it may be argued that the secondary inspector is, *de facto*, the person who makes determinations of refugee status. The preemptive effect of a decision not to refer applicants for an interview with an asylum officer further demonstrates the pivotal nature of the secondary inspection process and further evidences the need for increased review of the secondary inspection process. The simple fact that secondary inspectors have been empowered with additional discretion by IIRIRA cannot be considered an adequate substitute for the competency required to make such determinations. The I.N.S.’s assertion that “those people subject to the expedited removal proceeding, *experienced* INS inspectors review their cases”¹⁰⁰ is of little consolation when one considers that even the credible fear determinations made by experienced asylum officers are sometimes reversed.¹⁰¹

International human rights standards oblige States to ensure that those who claim asylum have access to asylum determination procedures.¹⁰² In light of the determinative nature of the secondary inspection process, it is of particular importance that “airport immigration officials and even the lowest-ranking border guards”¹⁰³ understand the potential ramifications of their actions, both for the refugee and the State that employs them.

ExComm Conclusion No. 30 also suggests a guarantee of review of an adverse decision, even if in abbreviated form.¹⁰⁴ While I.N.S. inspectors are required to receive the approval of a supervisor prior to effectuating any order

97. ExComm Conclusion No. 30, part (d), *supra* note 91.

98. *Id.* at part (e)(iii) and (f).

99. *Id.* at part (e)(ii).

100. U.S. Immigration and Naturalization Service, Office of Public Affairs, *FY 1998 Update on Expedited Removals*, (June 21, 1999) *supra* note 19.

101. Of 131 adverse credible fear decisions made by asylum officers, 12.4% were reversed by an immigration judge. KAREN MUSALO, EXPEDITED REMOVAL STUDY, CENTER FOR HUMAN RIGHTS AND INTERNATIONAL JUSTICE, REPORT ON THE SECOND YEAR OF IMPLEMENTATION OF EXPEDITED REMOVAL, Table 50. *Immigration Judge Review Outcomes, EOIR Database* (1999). <<http://www.uchastings.edu/ers/reports/1999/tables.pdf>>

102. Mole, *supra* note 90, at 146.

103. *Id.*

104. ExComm Conclusion No. 30, *supra* note 91, part (e)(iii).

of removal within the expedited removal context,¹⁰⁵ an internal I.N.S. audit found that 6 of 27 cases where an alien was ordered removed by the inspector were not reviewed or approved by supervisors.¹⁰⁶ Additionally, a review of case files of similar orders revealed that documentation of supervisory review was missing.¹⁰⁷ Here again, the guarantees needed to protect refugees from *non-refoulement* can only be effective if properly implemented, and even the limited inquiry of the Government Accounting Office (GAO) reveals that the I.N.S. has fallen short of doing so.¹⁰⁸ When operating under an inspection regime that provides abbreviated, if any, review of decisions, “[t]he underlying practical issue is one of monitoring and compliance, but experience unfortunately confirms that errors of *refoulement* are more likely when procedural shortcuts are taken in zones of restricted guarantees and limited access.”¹⁰⁹

By virtue of the manner in which the inspection process is administered to all arriving immigrants, including potential asylum seekers, the ports of entry of the United States have become such a zone of restricted access. In fiscal year 1998 alone, the I.N.S. reported that expedited removal accounted for 76,113 of the 115,143 non-criminal removals at ports of entry.¹¹⁰ The total number of removals reflected an 82% increase over the previous fiscal year.¹¹¹ During the fiscal year 1999, 89,035 aliensited removal, an increase of approximately 16 percent over 1998 levels.¹¹² As this number continues to grow, so will the risk of *refoulement* of refugees.

105. “Any removal order entered by an examining immigration officer pursuant to [8 U.S.C. § 1225 (b)(1)] must be reviewed and approved by the appropriate supervisor before the order is considered final.” 8 C.F.R. § 235.3 (b)(7).

106. GAO Report, *supra* note 84, at 44. (Citing the I.N.S. Office of Internal Audit, *Final Report Newark District* (97-02, Jan. 5, 1998)).

107. *Id.*

108. The GAO failed to “undertake to evaluate the accuracy of decision-making in the expedited removal process” in spite of the intent of Congress for it to do so. EXPEDITED REMOVAL STUDY, *supra* note 101, III, A, ¶ 1. <<http://www.uchastings.edu/ers/reports/1999/99ers3.htm>> (citing IIRAIRA, Appendix B (Requirement for Study and Report on Implementation of Removal Procedures)).

109. GOODWIN-GILL, *supra* note 24, at 147.

110. U.S. Immigration and Naturalization Service, Office of Public Affairs, *INS Breaks Previous Removals Record; Fiscal Year 1998 Removals Reach 171,154*, (Jan. 8, 1999) <<http://www.ins.usdoj.gov/graphics/publicaffairs/newsrels/remove98.htm>>.

111. *Id.*

112. U.S. Immigration and Naturalization Service, Office of Public Affairs, *INS Sets New Removals Record; Fiscal Year 1999 Removals Reach 176,990*, (Nov. 12, 1999), <<http://www.ins.usdoj.gov/graphics/publicaffairs/newsrels/removal99.pdf>>.

C. “Credible Fear” Determinations

ExComm Conclusion No. 30 concludes that the standards of “manifestly unfounded” and “abusive” are to be used in determining the viability of applications for refugee status.¹¹³ Conspicuously absent is any reference to the standard of “credible fear” utilized by asylum officers to determine if an individual should undergo further screening for asylum in the U.S.¹¹⁴ No standard of “credible fear” exists in the international context.¹¹⁵ While a lack of a concrete definition in the international realm is not fatal, the prospect for the development of one is dim. The marked difference between the “credible fear” standard and that of “well-founded fear,” (which is used in determining one’s eligibility for refugee status) is that there has been an opportunity for judicial development of the latter standard.¹¹⁶ Such development is simply not possible with the former standard, since, due to the procedural apparatus within which it operates, there is no opportunity for the establishment of precedential, binding decisions.¹¹⁷ This contrast is troubling for it leaves what have been conceded to be “hair breadth judgments” in the hands of officers whose only guidance comes from materials provided by the I.N.S.¹¹⁸ The concern, of course, is that the “credible fear” standard will not be properly applied as a lower screening standard than that used to determine one’s ultimate eligibility for asylum that of a “well-founded fear of persecution.”

While the substance of the materials provided to asylum officers¹¹⁹ seems to be properly aligned with the threshold for which it is instructing officers to test, the concern again lies with how faithful the asylum officers will be to the regulations provided. Without the review of their decisions on a level that will develop precedent, the possibility of repetitive errors cannot be eliminated.

This problem has already been noted by at least one court. In *AILA et. al. v. Reno*, the Court expressed concern over the limitation placed upon judicial review, saying it was:

113. ExComm Conclusion No. 30, *supra* note 91.

114. “If the officer determines that the alien has a credible fear of persecution. . .the alien shall be detained for further consideration of the application for asylum.” 8 U.S.C. 1225 § (b)(1)(B)(ii). “The term ‘credible fear of persecution’ means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.” 8 U.S.C. 1225 § (b)(1)(B)(v).

115. Standard of “manifestly unfounded” requires a far lesser showing than that of “credible fear of persecution.” Blum, *supra* note 5, at 48.

116. Cooper, *supra* note 91, at 1522.

117. “No prospect exists, therefore, for a body of jurisprudence on the credible fear standard.” *Id.* at 1523.

118. *Id.* at 1503 and at 1523.

119. Here, reference is made to the I.N.S. “Credible Fear” Training Module as cited in Cooper, *supra* note 91, at 1523.

troubled by the effects of Congress's decision to immunize the unwritten actions of an agency from judicial review, particularly where...so much discretion is placed in the hands of individual INS agents who face only a supervisor's review of their decisions.¹²⁰

The Court went on to admonish the I.N.S. "in the strongest language possible" to follow its own regulations in the treatment of aliens arriving in the United States.¹²¹ While the recognition of the problem presented by the court-stripping measures of IIRIRA is welcome, the words of Judge Sullivan have a somewhat hollow ring because IIRIRA renders them non-binding upon the very agency to which they are directed. This frustration is endemic of similar judicial challenges to IIRIRA.

One example of the magnitude of the risk for error in expedited removal proceedings is set forth in the facts of *Diaz v. Reno*.¹²² Mr. Diaz, a U.S. Citizen, entered the U.S. at O'Hare International Airport in Chicago on February 18, 1998.¹²³ In spite of his claim to citizenship and provision of documents proving his status, Mr. Diaz was placed in expedited removal proceedings and deported to Mexico without further hearing as required by 8 C.F.R. § 235.3. Stripped of his identity documents by the I.N.S., he was not able to return to the U.S. until nearly three weeks later. In its decision, the District Court found that Mr. Diaz's substantive claim against the I.N.S. for deportation in contravention of established procedure for processing U.S. Citizens at a port of entry was moot.¹²⁴ This left the I.N.S. without any reprimand beyond that of a mandamus order to return Mr. Diaz's identity documents. While the indignity suffered by Mr. Diaz was certainly substantial, some solace may be taken in the fact that he was ultimately able to return to the U.S. The same cannot be said of refugees who fall victim to similar errors on the part of I.N.S. inspectors. Whether a refugee is wrongly sent away due to an inspector's failure to follow established procedures, or worse yet, failure to recognize the factors that trigger the possibility of a "credible fear" interview, the principle of *refoulement* is equally violated.

VII. THE TREND OF IIRIRA: CAN IT BE STOPPED?

A. *Expedited Removal as a Policy of Non-Entrée*

Unfortunately, the exclusionary features of IIRIRA in the United States follow a pattern set by Western European nations relying upon such measures

120. 18 F. Supp. 2d 38, 58 (D.D.C. August 20, 1998) (Emmet G. Sullivan, U.S. District Judge), *aff'd by* 199 F.3d 1352 (2000).

121. *Id.* at 64-65.

122. 40 F. Supp.2d 984 (N.D. Ill. 1999).

123. *Id.* at 985.

124. *Id.* at 987.

as “safe country” lists and similar mechanisms to deny people access to an asylum determination on the merits.¹²⁵ An increasing proclivity on the part of States to adopt policies of “*non-entrée*” indicates their intention to subvert obligations towards refugees, including that of *non-refoulement*. Such policies come in the form of increased visa requirements for nationals of countries which produce a large number of refugees, sanctions on commercial carriers for failure to detect fraudulent documents or for allowing the passage of undocumented passengers, and even the forcible interdiction of entry of refugees at frontiers.¹²⁶ Whatever the mechanism, “[t]he simple purpose of *non-entrée* strategies is to keep refugees away.”¹²⁷ The purported objective of doing so is to lessen the pressures placed upon States to accept such immigrants, to avoid providing temporary refuge to the displaced,¹²⁸ and to avoid the costs of adjudication of claims and detention of refugees during the pendency of same. The motivation to avoid such burdens has caused “[d]eterrence [to] become official policy for a number of states.”¹²⁹

While policies of *non-entrée* may not always prove to be directly violative of the obligation of *non-refoulement*, the result for would-be refugees is, of course, the same. It is for this reason that the actions of the United States during the Haitian refugee crisis of the early 1990s have been the subject of intense criticism. The interdiction and repatriation of Haitians following the coup against the Aristide government was ordered by President Bush¹³⁰ and continued by the Clinton administration. The Supreme Court upheld the action in *Sale, Acting Commissioner, INS v. Haitian Centers Council*, ruling that “neither domestic law nor Article 33 of the 1951 Convention limited the power of the President to order the Coast Guard to repatriate undocumented aliens, including refugees, on the high seas.”¹³¹ The decision of the Court limited, in effect, the obligations of *non-refoulement* to aliens who have arrived at a port in the U.S.. Such treatment of international law by a domestic court is not entirely uncommon, and presents an additional challenge.

125. For a discussion of the movement towards policies offensive to the 1951 Convention, see Maryellen Fullerton, *Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights*. 29 VA.J.INT'L L. 33 (1988).

126. RECONCEIVING INTERNATIONAL REFUGEE LAW xx (James C. Hathaway, ed. 1997).

127. *Id.*

128. *Id.*

129. LOESCHER, *supra* note 59, at 144.

130. See Executive Order No. 12,807: 57 Fed. Reg. 23,133 (1992).

131. 509 U.S. 155, *supra* note 33.

B. The Problem of Bringing International Law to Bear in U.S. Courts

In light of the seemingly obvious violations of customary norms of international refugee law by the U.S., the need for redress is apparent. While the Refugee Convention does not include a means to enforce its requirements upon party States, the status of *non-refoulement* as a customary norm, let alone its binding nature upon states through treaties, would appear to provide ample fodder for a domestic court to take up the role of enforcing the same.¹³² Unfortunately, several cases dealing with *non-refoulement* have borne out an inclination on the part of the courts not to acknowledge this norm as a binding one. Using often circuitous reasoning, U.S. courts have successfully refrained from finding an obligation of the Executive branch to act in accordance with these norms.

The insistence of domestic courts that the principle of *non-refoulement* as contained in the Protocol is not self-executing, provides further evidence of their disregard of this principle. One author formulated that “[t]he tendency to find Article 33’s clear, mandatory command to be domestically unenforceable in the absence of identically worded implementing legislation is yet another symptom of the courts’ general disregard of international law, especially where individuals seek its protection against law-breaking conduct of U.S. officials.”¹³³ As a norm or otherwise, courts balk at recognizing an obligation of *non-refoulement*.

The problem often encountered in the course of trying to prove customary international law to a court has been referred to as the “blank stare phenomenon.”¹³⁴ Such a label is not meant to be condescending, but is more likely “owing to judges’ typical unfamiliarity with and resistance to international standards.”¹³⁵ Indeed, as practice has proven, “judicial skepticism is one of the largest obstacles for a lawyer trying to use customary law in domestic litigation.”¹³⁶ While a certain degree of judicial hesitancy is understandable, especially in cases involving such a political “hot potato” as immigration.¹³⁷ However, when addressing situations such as the admissibility

132. “When international law protects individual rights against governments, then enforcement of international law falls squarely within the traditional notion of judicial responsibility.” Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2308 (1991).

133. Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT’L L. 1, 10 (1997).

134. Paul L. Hoffman, *Problems of Proving International Human Rights Law in U.S. Courts: The “Blank Stare Phenomenon”*: Proving Customary International Law in U.S. Courts, 25 GA. J. INT’L & COMP. L. 181 (1996).

135. Fitzpatrick, *supra* note 133, at 24.

136. Hoffman, *supra* note 134, at 181.

137. “U.S. courts will almost always be reluctant to impose onerous duties on the other branches of government in [refugee and immigration issues], especially if it entails granting

of refugees, whose lives often hang in the balance, “[t]he mandate of U.S. courts to protect the human rights of aliens and refugees would seem to be clear.”¹³⁸ In light of the fact that courts have repeatedly failed to do so, however, “the pursuit of political strategies may be a more effective way of encouraging compliance with international refugee norms than expending the bulk of one’s energies in court.”¹³⁹

The administration of even straightforward regulations has presented problems for the I.N.S. It is perhaps too much to expect then, that any test developed by a court could be applied by officials of the same agency with any more success. The lack of judicial review provided for in IIRIRA, coupled with the dim prospect of the development of standards that would be helpful in bringing U.S. law into line with international norms, leads this author to conclude that statutory reform may well be the only hope for the preservation of refugee protection in the U.S.

VIII. CONCLUSION

In light of the totality of the restrictions placed upon admission to the U.S. by IIRIRA, there is no room to allow for any limitation upon the fundamental principle of *non-refoulement*. The expedited removal procedures instituted by IIRIRA are a threat to asylum seekers, as they limit access to the very mechanism that is designed to offer protection to asylum seekers. What is now lacking is similar protection of the principle of *non-refoulement*. The attempts of the I.N.S. to implement regulations in an effort to compensate for IIRIRA’s failure to guarantee such protections have proven to be inadequate. It is, of course, the untold consequences of this action that belie its severity as to:

refugees and other aliens, the destruction of the ordinary checks of publicity and review provides dangerous opportunities for arbitrary behavior. The absence of any evidence that this innovation was needed makes its imposition all the more regrettable.¹⁴⁰

The conclusion that the procedures created by IIRIRA “appear susceptible of fair application meeting the international standards”¹⁴¹ may not be entirely untrue. However, until such time as there is no longer a possibility of these procedures being applied in a manner that contravenes the requirements of

admission to or permanent status in the United States.” Scott Busby, *The Politics of Protection: Limits and Possibilities in the Implementation of International Refugee Norms in the United States*, 15 BERK. J. INT’L LAW 27, 35 (1997).

138. Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 YALE L.J. 2335, 2345 (1991).

139. Busby, *supra* note 136, at 37.

140. Gerald L. Newman, *Admissions and Denials: A Dialogic Introduction to the Immigration Law Symposium*, 29 CONN. L. REV. 1395, 1401 (1997).

141. Cooper, *supra* note 91, at 1524.

international refugee law, the U.S. continues to breach the duty it owes to refugees. The manner in which the I.N.S. has implemented the process of expedited removal shows little promise for a consistent and compliant application of IIRIRA. The continued denial by the I.N.S. of access and data regarding the expedited removal process “continues to insulate [it] from careful scrutiny and evaluation.”¹⁴² This denial of access has deprived human rights advocates of the information necessary to ensure appropriate reform of the expedited removal process. Absent a statutory mandate that would introduce safeguards for refugees into the expedited removal process, the U.S. will continue to “[imperil] bona fide refugees.”¹⁴³ As long as expedited removal continues to place refugees at risk, it is not easy to foresee how the U.S. could be found to be in compliance with international norms of refugee protection against *refoulement*.

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142. EXPEDITED REMOVAL STUDY, *supra* note 101, at Executive Summary, Conclusion, <http://www.uchastig.edu/ers/reports/1999/99ers_exec.htm> .

143. HUMAN RIGHTS WATCH, WORLD REPORT 2000, EVENTS OF 1999, 398 (1999).

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