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LEGAL ASPECTS OF THE REFUSAL OF ASYLUM BY U.S. COAST GUARD ON 23 NOVEMBER 1970

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The confusion surrounding Simas Kudirka's attempt to obtain asylum aboard the U.S. Coast Guard cutter *Vigilant* on 23 November 1970 has led to outrage, accusations, recriminations, excuses, and lame exculpations of some of the parties involved and the disgrace of others. It has not led to any constructive change in the public promulgations of the relevant law and procedures. Much of what has passed provides a sad reminder of Dr. Johnson's famous remark, "Depend upon it, Sir. When a man knows he is about to be hanged in a fortnight, it concentrates his mind wonderfully." It is a pity that more concentration or clarity of mind was not shown by the participants in the tragic little drama. Clearly, most of them were without thought of what might happen to them in 2 weeks. Clarity of mind should have been aided by the fact that both *Vigilant* and the Russian mother ship, the *Sovetskaya Litva*, from which Kudirka, a Lithuanian national, sought to separate himself permanently were both well within U.S. territorial waters (about 1 mile off Gay's Head, Martha's Vineyard[1]) during the whole of the pathetic drama.

First of all it is necessary to separate the issue of asylum, *per se*, from that of the territorial integrity of the United States and of a U.S. warship and of the American flag. Hence we should go over

some old cases bearing on the former point before dealing with the problem of asylum.

Territorial Integrity of the Receiving State. The first is the famous *Savarkar* case.[2] This was decided by the Permanent Court of International Arbitration in 1911. Savarkar was an Indian revolutionary (in a letter to the Marseilles police authorities, the French Surete, transmitting a Scotland Yard request for cooperation, called him "un revolutionnaire hindou"). He was being shipped back from England to India aboard the P. & O. liner *Morea* to face charges of abetment of murder. On reaching Marseilles, he escaped while the *Morea* was in port. He swam to the wharf and was running down it when he was arrested by a brigadier (the equivalent rank of sergeant) of the French port police. The French brigadier handed Savarkar back to the Indian Army Military Police guard who had been escorting Savarkar back to India and who had given chase. Thanks to the intervention of the French police officer, Savarkar was taken back aboard ship. On learning the facts, the French Government protested to the British. The latter considered that their conduct was within the police arrangement of collaboration and the brigadier's delivery, being voluntary, closed the case. The French Government was not satisfied with this response. It argued that the brigadier of the port gendarmerie was mistaken as to his duties and protested that Savarkar could only be recovered by the British if they took appropriate legal proceedings for his rendition. This dispute came before the Permanent Court of International Arbitration in 1910, and it gave its decision in 1911. The Court held, firstly, that since there was a pattern of collaboration between the two countries regarding the possibility of Savarkar's escape in Marseilles and since there was neither force nor fraud in inducing the French authorities to return Savarkar to them, the British authorities did not have to hand him back to the French in order for the latter to hold rendition proceedings. On the other hand, the tribunal also observed that there had been an "irregularity" in Savarkar's arrest and delivery over to the Indian Army Military Police guard.

My second case involves Berthold Jacobs, a German refugee journalist in Switzerland. In 1936 he was kidnapped by the Nazi authorities. They apparently disliked the kind of writing he was doing in the country of his adoption. The Swiss Government protested very strongly to the Nazi German Government who, first of all, denied that they were answerable to Switzerland because Berthold Jacobs was a German national. But on Swiss insistence they returned him to Switzerland.[3]

Article 2, paragraph 4 of the United Nations Charter now reinforces the territorial integrity and political independence of states as does the post-World War II decision of the International Court of Justice in the *Corfu Channel* case.[4] Albanian waters had been mined; a British destroyer and a British cruiser had suffered damage. Crewmembers had been killed and injured. The Royal Navy then swept the channel free of mines, and the British Government claimed reparation for the killed and injured seamen and for the damaged ships. The Court held that Albania had been wrong in mining the channel and in failing to give the necessary warnings. Accordingly, she owed an indemnity to the British Government for the damage to the ships and for the injuries and deaths of the seamen. On the other hand, the Court found that the British Government had been wrong in sweeping the channel. The Corfu Channel was in Albanian territorial waters, hence sweeping it amounted to a denial of Albania's territorial integrity under article 2,

paragraph 4 of the charter. While this case is not about defectors or asylum, it does underscore the importance of the territorial integrity of states in international law and points up the prohibition against the exercise of coercive power by one country within the territory of another. The *Corfu Channel* case emphasizes this point because in it the exercise of power was for general international community values, namely clearing an international waterway of mines and making it safe for all shipping, irrespective of nationality.

Klimowicz was an East European doctor who was in London and wished to find asylum in England. This was in July 1954. The Russian authorities were determined to make his defection as hard as possible, so they had him spirited aboard a Polish freighter which was then departing for the Soviet Union. The British port police stopped the freighter while she was in the Pool of London, went aboard with a writ of habeas corpus, and took Klimowicz off. The Russian exercise of force against Klimowicz was viewed as an unlawful act of coercion by the Soviets within British territory and was resisted on that ground. On the other hand, the Russian representatives were entitled to participate in the habeas corpus proceedings which followed. Finally, Klimowicz was granted asylum in England.[5]

Now we come to a startling series of events which may be collectively called the *Erich Teayn* case after the main actor, a very enterprising and determined Estonian seeker of asylum in Great Britain.[6] This was in June 1958. While aboard the Russian mother ship *Ukraina* engaged in fishing in the North Sea off Northern Scotland, Erich Teayn managed to gain the shore of Mainland, the principal island of the Shetland Islands, a group of very sparsely inhabited Scottish islands to the northeast of Great Britain. He was chased by no less than 30 Russian crewmembers who were so determined to get him back that their chase did not stop at the 3-mile limit or even the water's edge. They came ashore after their quarry. He took refuge with a crofter who apparently called the police. The local constabulary then intervened and took Erich Teayn to the police station at Lerwick and forbade the representatives of the Russians from seeing him. He was temporarily held under the Aliens Order and finally was given asylum in England. It is interesting to note that the only debate about this bizarre event in the House of Commons was a question to the Foreign Secretary whether the British Government would protest to the Russian Government for the "invasion" of the territorial integrity of the Shetlands by 30 Russians. The British note pointed out that had Mr. Teayn been apprehended by force "a flagrant violation" of international law would have occurred.[7]

There are, of course, many other areas of asylum. For example, there was the case of the Russian schoolteacher in New York. She jumped out of a high-rise hotel building about 16 years ago and was badly injured while seeking to escape from the Russian police who were trying to exercise Soviet sovereignty on American soil by forcibly taking her back to Russia. When she had been taken to the hospital and told her story, she was granted asylum.

If we clear our minds, hopefully without the imminence of a hanging, we can see that in the cases I have just outlined the authorities of one country have sought to exercise power on the soil of another. Thus, in considering the recent debacle, one should remember that since they had no extraterritorial rights here, the Russians were denigrating the territorial sovereignty and integrity of the United States. Without the consent of *Vigilant*'s Commanding Officer to their action, the Russians who arrested Simas Kudirka could be characterized as common criminals, kidnappers for example. Even with his

consent, any excessive use of force that might have been brought to bear could not be made lawful merely by virtue of the commanding officer's invitation or nonintervention. It merely was an illegality aided and abetted by an officer of the U.S. Coast Guard. Let me repeat, Russian policemen have no extraterritorial status or privileges here in the United States except insofar as they may be granted them by the appropriate U.S. authorities. And this consent cannot condone what the Constitution and laws of the United States themselves prohibit. Be that as it may, without a valid grant, the exercise of police power by one country on the soil of another is a threat or use of force against the territorial integrity of the host state. The freedom from the threat or use of force which this assures to states is guaranteed not only in traditional international law, but by article 2, paragraph 4, of the Charter of the United Nations. For, let me stress, the primary issue in all the instances I have cited is the territorial integrity of the receiving state and the abuse of that territorial integrity by the authorities of the state claiming to exercise power over the individual. That was exactly the situation in the *Kudirka* case, for, let us remember, the events in that case occurred upon a U.S. Coast Guard ship which was itself within the territorial waters of the United States.

Asylum. Paragraph F of article 1 of the United Nations Convention Relating to the Status of Refugees* (signed at Geneva on 28 July 1951[8]—the United States became a party to the Protocol consisting of Articles 2-34 on December 1968[9])—by this clause the Convention does not apply to persons regarding whom there are strong reasons to believe had committed a nonpolitical crime—a war crime or a crime against humanity as defined in international instruments. Note that the provisions of this Convention apply to the receiving state's "serious reasons for considering" that such crimes have been committed by the defector. I wish to draw your attention to the phrase "serious reasons for considering." Unsubstantiated allegations by the officials of the claiming state that the defector has committed a serious crime of a nonpolitical nature are not, in international usage, accepted as valid reasons under this clause and other clauses like it for obligating the receiving state to refuse asylum and return the would-be asylee. There has to be something further. For example, it is standard practice of the Soviet Union to allege some kind of crime against most people who are seeking asylum abroad; it is a sort of standard appeal to the reveiving state. For example, when a fairly senior NKVD official called Petrov defected to Australia back in 1956, the allegation was made that he had stolen funds from a football club. (I suspect that the Russians congratulated themselves with the thought that their allegation involving the funds of a sporting club was a very clever maneuver and should have a special appeal to the Australian mind!) No one believed it because the Soviet authorities produced no substantiation that would stand up in a democratic country's court of law as "serious reasons for considering" that the applicant has committed the type of offense listed in paragraph F. Thus, when the master of a ship says, "This

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*F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious nonpolitical crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

man is a thief who stole three thousand rubles (about $3 thousand at inflated official rate) from my safe," his unsubstantiated or uncorroborated allegation does not, in the general acceptation of the clause, stand up as a "serious reason for considering" that the defector has committed one of the classes of crimes listed under the above article.

Standardly an individual seeking asylum should first be given temporary asylum. That gives the receiving state's official the opportunity of examining him. Furthermore, if the country from whence he fled has a desire to have him returned, it should be heard on that point, and a decision can then be made either granting the defector the asylum he seeks or rendering him back. This is the claim the French made in the *Savarkar* case, and this has been international practice long before the United Nations Convention on the Status of Refugees was written.

Article 33 of the Convention* provides at least the starting point of an international law obligation binding on a receiving state. It requires that whatever else the receiving state does with him, if it is satisfied as to the status of the refugee, it will not expel or return him to any 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." One may argue, perhaps, that the individual here may have a positive claim in international law itself not to be returned—especially if the purpose is to try him for high treason—the standard Soviet punishment for defection whether accomplished or merely attempted. This appraisal of the article's meaning was, probably, the underlying assumption of the position taken by Prince Sadruddin Aga Khan, the United Nations High Commissioner of Refugees when he sent his telegram to the U.S. Secretary of State.[10] But it is not, perhaps, necessary to find that article 33 creates an international law right enuring in individuals, while agreeing that, in a very real way, it obligates the state to respect the claim of a *bona fide* refugee.

Nothing regarding the claims of the refugee can cut across the right of a state fully to examine an individual to determine whether in its opinion this individual is likely to abuse its hospitality. Anything less would be a wonderful way of putting a spy into the receiving state's midst. Also a way, perhaps, for criminals to start with a clean sheet. The purpose of holding the individual on the basis of a temporary asylum only, and of examining him, is not only to determine whether there is an obligation to return him but also whether it is in the best interests of the receiving state to grant him the privileges of asylum.

A Legal Fiction. Unfortunately I cannot leave the *Kudirka* case here. There is a further point I am, in all conscience, bound to discuss. The officer of the Department of State who was contacted by the Coast Guard advised on two points for consideration and possible action. First, he said "do not encourage the potential defector." This would not seem to be practical advice in the case where the alien had already made up his mind. The other

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*Article 33, "Prohibition of Expulsion or Return ('Refoulement')"

1. 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.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

was to confirm, that if Kudirka were to follow up his announced intention and jump from the Soviet ship into the sea, he could be rescued as a "mariner in distress."[11] Is the imputation of this that he is not to be granted asylum, only hospitalization? What if the Russians sent a boat to "play chicken" or if their authorities demanded his immediate return after we had rescued him? Should his standing as a distressed mariner place the Coast Guard in a more privileged position regarding the rescue over and above the ship on which the man served? Should the Russians play Alphonse and say, "Après vous"? Even if the Russians did stand back and allow the Coast Guard to conduct the rescue, would the United States, merely on the basis of Kudirka's status as a "distressed mariner," be capable of withstanding the Russian demand for his return after the rescue? How can Kudirka's standing as a distressed mariner be an improvement on that of being a political refugee? Surely the Soviet authorities would have a better case for his return if he were a half-drowned but loyal Russian. They could claim that their mother ship, being so much larger than the Coast Guard cutter, had far better medical equipment and facilities, and, moreover, it carried sick bay attendants who could converse easily with the victim. This illustrates a sad point. Lawyers have, down the ages, been accused of manufacturing legal fictions in order to befuddle laymen and thus the more easily to earn large fees. Now, just as the legal profession is turning its collective back on those spurious and sometimes self-defeating forms of argument, it would appear that laymen are going into the business of manufacturing those decoys of the mind in order to deceive themselves.

An Issue of Legality. Although the United States has been, since 1968, a party to the 1951 United Nations Convention on the Status of Refugees, the current *Naval Regulation* (Regulation 0621) still opens with a preamble more redolent of the days of Professors Moore and Hyde than of the present. It states:

> The right of asylum for political or other refugees has no foundation in international law. In countries, however, where frequent insurrections occur, and constant instability of government exists, usage sanctions the granting of asylum; but even in waters of such countries, officers should refuse all applications for asylum except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob. Officers shall neither directly nor indirectly invite refugees to accept asylum.

This directive reflects a harmony with this country's time-honored sentiment of remaining neutral in the civil commotions of the South and Central American republics. The stated exception, in terms of "humanity," should be viewed, in the context of the regulation as a whole, with a degree of skepticism and, indeed, disenchantment. Its operation turns on an undefined criterion to be applied or disregarded by the naval officer at his discretion—and risk. Be that as it may, today Naval Regulation 0621 is no longer congruent with the laws of the United States as they are now in force. For, while the Naval Regulations may be the naval officer's bible, they are subordinate regulations which are void if contrary to the "supreme law of the land," namely the Constitution, treaties, and statutes of the United States. Clearly, since Naval Regulation 0621 is contrary to the United Nations Treaty on Refugees to which the United States has been a party since December 1968, it is now invalid as it stands.

I would like to suggest that a new subordinate legislative act, a regulation, be promulgated. This should be public, plain on the face of it as to its purpose and meaning and consonant with the laws and treaties now in force in this country. The drafters of such a law might profitably study and adopt possible procedures whereby an official within the United States, its territories and territorial seas and on the high seas, be he a policeman or a naval officer, can routinely grant *ex parte* temporary and provisional asylum, to be followed up by a hearing before executive officials in whom would be vested the power of determining finally whether the defector or refugee may remain permanently under the protection of the United States or not. On the other hand, the case of an American officer in a U.S. installation abroad or aboard a U.S. warship in a foreign port or in the roadsteads, or internal or territorial waters of a foreign country, would not necessarily appear to fall within the Convention; so he should not be brought within the procedures just outlined. In such cases, perhaps, the older principles and rules might be sufficient. After all, they were sufficient to warrant the extension of American asylum to Svetlana Alcyevna at a point of time when she was either in India or Switzerland or in transit between the two.

Conclusion. The blueprint suggested in the preceding paragraphs would give each his due. The defector would be provided with the procedural opportunities of satisfying a tribunal of the executive branch as to his good faith, his credentials and his claim to asylum, if he did indeed have these factors in his favor. The security services of the United States could have the opportunity of attacking his claim on the ground of his previous criminal record (if such were to exist) or of his past hostility to the United States and to the political and moral principles for which it stands, or of the strong possibility that the defector may be a plant by a foreign secret service to embarrass the United States or to give misleading information or to engage in espionage or sabotage activities under the cover of his status as an asylee. The commanding officer of a unit to which a defector appeals is protected and so, through him, is the important principle of the integrity of command.[12] Finally, the interests of the United States are protected in two ways. First, the means of protecting its security interests have already been indicated. Second, if a foreign country knows that the grant of asylum by an officer in the first instance is merely provisional, any attempt by its representatives to recover the person of the asylee or put pressure on the officer granting temporary protection for the defector's return would be an unwarranted and insulting intervention in the domestic operation of the receiving country's domestic procedures and could be justifiably resisted on that ground. On the other hand, the foreign country's claim to have the asylee returned could be heard by the executive tribunal and taken into account when the final decision is rendered. In conclusion, I am compelled to point out that to give the foreign country standing to be heard and the assurance of full respect and consideration of its claim would amount, in the light of article 33 of the Convention as well as paragraph F of article 2, to be more than the Convention itself requires.

FOOTNOTES

1. The facts of this case were reported in Terence Smith, "Nixon Is Irked by Return of Defector to Soviet Ship," *The New York Times,* 1 December 1970, p. 1:2; James M. Naughton, "Nixon to Issue 'New, Clear Policy' on Accepting Political Refugees," *The New York Times,* 3 December 1970, p. 2:3; Terence Smith, "Coast Guard Officers Relieved of Duties in Defector Incident," *The New York Times,* 5 December 1970, p. 1:2, 6:3; "Defector: Why Nixon Was So Angry over Refusal of Asylum," *The New York Times,* 6 December 1970, sec. 4, p. 3:1.

2. The Hague, Permanent Court of Arbitration, *Hague Court Reports,* 1911, v. I, p. 275.

3. Discussed in Joseph G. Starke, *An Introduction to International Law,* 4th ed. (London: Butterworths, 1958), p. 84.

4. The Hague, International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders* (Leyden: Sijthoff, 1949), p. 4.

5. "Klimowicz Gets Asylum," *The New York Times,* 7 August 1954, p. 5:2.

6. This was reported in "Soviet Crew Lands in Shetland to Hunt Deserter from Trawler," *The New York Times,* 27 June 1958, p. 1:4. "Two Soviet Aides Fly to Defection Scene," *The New York Times,* 28 June 1958, p. 3:4; "Britain Warns Soviet on Shetland Landing," *The New York Times,* 29 June 1958, p. 4:4; see also "Russians Hunt Seaman in Shetland," *The Times* (London), 27 June 1958, p. 10:1; "Estonian Refugee on Way to Leith," *The Times* (London), 28 June 1958, p. 6:12.

7. "Britain Warns Soviet on Shetland Landing," p. 4:4.

8. United Nations, Secretariat, "Convention Relating to the Status of Refugees Signed at Geneva on 28 July 1951," *Treaty Series* (New York: 1954), v. CIXC, p. 150.

9. U.S. Treaties, etc., *United States Treaties and Other International Agreements* TIAS 6577 (Washington: U.S. Govt. Print. Off., 1968), v. 5, p. 6225.

10. "U.N. High Commissioner of Refugees Prince Sadruddin Aga Khan Expresses Dismay over Incident, Wire to Rogers; Discusses Incident with U.S., U.N., Amb. Yost," *The New York Times,* 1 December 1970, p. 1:2.

11. Here we have indulgence in logomachy ("word play") which, in the context, amounts to a resort to a legal fiction. What we term a legal fiction is the pretense or contrivance of an untrue characterization of the facts (namely here that the defector is a "mariner in distress") so that a possibly desirable legal prescription could be induced as governing the situation (i.e., that the Coast Guard may "rescue" the distressed mariner-defector). Logically this logomachy which was introjected into Kudirka's proposal has a similar configuration to the postmedieval common law courts' characterization of John Doe and Richard Roe as sureties for a defendant's appearance in civil suits begun by a Bill of Middlesex, see Sir William S. Holdsworth, *History of English Law,* 3d ed. (London: Sweet and Maxwell, 1922), v. I, p. 220-221, or Court of King's Bench characterization of "William Stiles" as the "casual ejector" in the action of ejectment (*ejectione firmae*) over the centuries during which that form of action was greatly in demand, see Frederick Maitland, *The Forms of Action at Common Law* (Cambridge, Eng.: The University Press, 1936), p. 58-59. In all these situations the Court which approved the fiction was in control of the litigation. Accordingly, the pretended facts, not the true ones, drew the desired legal conclusion; for one essential factor in successful legal fictions (which was missing in the Simas Kudirka incident) was the prohibition of the defendant's traversing the facts upon which the fiction depended. Clearly the master of the Soviet mother ship would not be placed under binding inhibitions similar to those which a domestic court can impose on litigants before it. The humanitarian duty to rescue would not impel him to bow to the Coast Guard's assumption of control after his subordinate had jumped into the sea nor would his duty to maintain discipline aboard his ship and among his personnel.

12. For an eloquent assertion of the integrity of command, see Henry E. Eccles, *Military Concepts and Philosophy* (New Brunswick, N.J.: Rutgers University Press, 1965), p. 68-70, 117, 118-164, 165, 257-267, 269-289.

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