

DOES THE EUROPEAN CONVENTION ON HUMAN RIGHTS PROTECT REFUGEES FROM "SAFE" COUNTRIES?

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*Thou shalt not oppress a stranger: for ye know the heart of a stranger, seeing ye were strangers in the land of Egypt.*¹

INTRODUCTION

There are approximately 6.5 million refugees in Europe.² Almost 3.3 million people applied for asylum in Western Europe between 1987 and 1994.³ As political upheaval and economic insecurity displaced people, high unemployment, overwhelmed welfare systems, and racial tensions between citizens and immigrants led a number of European states to change their refugee admission policies in the 1990s, severely limiting asylum seekers' rights.

The European Convention on Human Rights (ECHR),⁴ created by the Council of Europe⁵ to protect the basic civil rights of all people within the jurisdiction of the signatory states, impacts refugee rights. Although the

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¹ *Exodus* 23:9 (King James).

² Christiane Berthiaume, *Asylum Under Threat*, <<http://www.unhcr.ch/issues/asylum/rm10101.htm>>.

³ *Id.*

⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. Signed at Rome on November 4, 1950 and entered into force on September 3, 1953 after ratification by eight States: Denmark, the Federal Republic of Germany, Iceland, Ireland, Luxembourg, Norway, Sweden, and the United Kingdom [hereinafter ECHR].

⁵ Currently Albania, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey and the United Kingdom. Others have signed, but not ratified: Andorra, Croatia, Latvia, Lithuania, Macedonia, Moldova, Russian Federation, and Ukraine.

ECHR does not explicitly provide protection for refugees, Article 3⁶ prohibits Contracting States from subjecting "everyone within their jurisdiction"⁷ to "torture or . . . inhuman or degrading treatment or punishment."⁸ The European Court has determined that Article 3 applies to deportation of refugees to countries where they would be persecuted.⁹

In addition, some Contracting States to the ECHR base refugee status within their borders on whether the refugee applicant has come from a country that adheres to the ECHR. If the applicant has come from or traveled through a country that is a signator to the ECHR, he or she is not entitled to refugee status, because it is presumed that another Contracting State to the ECHR is a "safe" country. By designating countries as "safe," ECHR Contracting States make the determination the refugee applicant will not be subjected to persecution without examining the applicant's claim. States that have accepted the notion of "safe" country have instituted a number of procedures for excluding asylum seekers, including the following: accelerating status-determination procedures so that an investigation cannot be undertaken of an applicant's allegations of persecution; deporting with non-suspensive effect so that the asylee is deported before an appeal can be heard; instituting sanctions against airlines for not policing entry documents; making a geographical reservation to the United Nations Refugee Convention, thereby only accepting refugee applicants from areas that generally do not produce refugees; restricting interpretation of the Refugee Convention to include acts of state actors only, which nullifies refugees' claims of persecution by paramilitary forces and rebel armies; and reaching agreements with other countries to return applicants in exchange for the status of "safe" country.

Does the ECHR protect potential refugees when a Contracting State devises mechanisms to turn them back at its borders or deports those already in the country based on the concept of "safe" country? The European Court

⁶ Although European Court cases address possible violations of Article 5 ("Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the . . . lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.") and Article 8 ("Everyone has the right to respect for his private and family life, his home and his correspondence." *Gul v. Switzerland*, 22 Eur. H.R. Rep. 93 (1996)), this paper addresses the rights protected under Article 3 only.

⁷ ECHR, *supra* note 4, art. I.

⁸ ECHR, *supra* note 4, art. III.

⁹ See *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439 (1989), paras. 82, 88, and 91.

has not specifically addressed a case of expulsion from a Contracting State to a "safe" country, but has defined the parameters of protection for refugees. An analysis of the Court's decisions may provide a preview of how the Court would answer this question.

Part I of this paper reviews the history of the creation and implementation of international protection for refugees, including the prohibition of returning a refugee to a state where he or she would be subject to persecution. Part II defines protection of refugees under Article 3 of the ECHR as interpreted by the European Court, while Part III defines "safe" country and categorizes methods Contracting States have instituted to expel refugee applicants.

Part IV returns to the question of whether the ECHR protects refugees from "safe" countries by analyzing European Court decisions that have determined what acts constitute torture, inhuman or degrading treatment and when deportation constitutes prohibited treatment. This section reviews a 1996 case involving an order for deportation of an asylum seeker. The Court held that deportation would have constituted torture. The state to which the asylee was scheduled to be deported is one that some ECHR Contracting States have designated as "safe." Although the Court did not address the "safe" country issue, it did analyze the asylee's risk of persecution based on the country's political conditions. The Court's holding leads to the conclusion that the European Court's interpretation of the ECHR prevents Contracting States from expelling refugees to "safe" countries if the refugees would be subject to conduct prohibited by Article 3.

I. INTERNATIONAL PROTECTION OF REFUGEES

Prior to the early 1900s, states encouraged immigration and discouraged or forbade emigration.¹⁰ In the twentieth century, the rise of nationalism led states to develop immigration controls¹¹ to allow states to choose residents who could contribute wealth or technical skills,¹² while rejecting asylees from politically and economically unstable regions.

¹⁰ "Whether to be taxed, to contribute to the growth of manufactures and commerce, to offer specialized knowledge, or to join the military, talented or affluent foreigners were frequently deemed useful to society and welcomed with open arms by European monarchs or municipalities." MICHAEL R. MARRUS, *THE UNWANTED: EUROPEAN REFUGEES IN THE TWENTIETH CENTURY* 6-7 (1985).

¹¹ GUY GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES* 96 (1978).

¹² JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 1 (1991).

Forced migration—involuntary migration motivated by political upheavals—became an issue beginning in 1917 when millions of Russians fled the revolution and in 1922 upon the collapse of the Ottoman empire. As a consequence, states adopted refugee policies as a compromise between their inability to stop the exodus and their desires for restrictive immigration.¹³

The League of Nations established the first High Commissioner for Refugees in 1921 to deal with issues of refugees' legal status and repatriation.¹⁴ From 1922 to 1933, the League of Nations dealt with refugees from Russia, Armenia, and a number of other countries.¹⁵ In 1933, confronted with the Nazis' expulsion of Germans, the League recognized the need for a permanent system to protect refugees.¹⁶

The United Nations later created the International Refugee Organization (IRO), which functioned from 1946 to 1950. The Constitution of the IRO defined refugees as persons who could not be repatriated or who "in complete freedom and after receiving full knowledge of the facts . . . expressed valid objections to returning to [their country of origin]"¹⁷ based on "valid reasons," including "[p]ersecution, or fear, based on reasonable grounds of persecution."¹⁸

The U.N. General Assembly created the office of the United Nations High Commissioner for Refugees (UNHCR) in 1950 to replace the IRO. In 1951, the U.N. Conference adopted the Convention Relating to the Status of Refugees¹⁹ (Refugee Convention), which was entered into force on April 22, 1954.

The Preamble to the Refugee Convention declares:

[] the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms . . . [and] all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this

¹³ Marrus, *supra* note 10, at 51-81 n.1.

¹⁴ James C. Hathaway, *The Evolution of Refugee Status in International Law 1920-1950*, 33 INT'L & COMP. L.Q. 348, 351 (1984).

¹⁵ *Id.* at 350-57.

¹⁶ *Id.* at 362-70.

¹⁷ Hathaway, *supra* note 12, at 5 n.23, citing 1(2) UNGAOR (67th Plen. Mtg.) at 1454.

¹⁸ *Id.* at 66, citing 18 U.N.T.S. 3 (Dec. 15, 1946) § C(1)(a)(i).

¹⁹ G.A. Res. 428, U.N. GAOR, 5th Sess., Supp. No. 20, at 46, U.N.Doc. A/1775 (1950).

problem from becoming a cause of tension between States

. . .²⁰

Article I(A)(2) of the Convention, as modified by and incorporated into the 1967 Protocol, defines "refugee" in the following manner:

[A refugee is any person who,] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country . . .²¹

Article 3 requires the Contracting States to "apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."²² The U.N. Handbook on Procedures and Criteria for Determining Refugee Status states that "the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself."²³

Article 32(1) of the 1951 Refugee Convention prohibits Contracting States from expelling "a refugee lawfully in their territory save on grounds of national security or public order."²⁴ Further, paragraph 2 requires that the "expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law."²⁵ Paragraph 3 requires Contracting

²⁰ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter *Refugee Convention*].

²¹ *Refugee Convention*, *supra* note 20, art. 1(A)(2), 19 U.S.T. 6223, T.I.A.S. No. 2545.

²² *Refugee Convention*, *supra* note 20, art. 3.

²³ Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status 1* (Geneva, 1979), U.N. Doc. HCR/PRO/4.

²⁴ *Refugee Convention*, *supra* note 20, art. 32(1).

²⁵ *Id.*, art 32(2). The 1933 Convention Relating to the International Status of Refugees prohibited contracting states from refusing "entry to refugees at the frontiers of their countries of origin." GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 70-71 (1983), *citing* Convention Relating to the International Status of Refugees, Oct. 28, 1933, art. 3, 159 L.N.T.S. 3663. In 1936, a German agreement provided that "refugees shall not be sent back across the frontier of the Reich unless they have been warned and have refused to make the necessary arrangements to proceed to another country or to take advantage of the arrangements made for them with that object." Robert L. Newmark, Note, *Non-refoulement*

States to "allow such a refugee a reasonable period within which to seek legal admission into another country."²⁶

Article 33 of the Refugee Convention prohibits Contracting States from expelling or returning (*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."²⁷ While Article 33 prohibits expulsion or return, it does not identify the location of the refugees, other than they must be "outside their country of nationality."²⁸ Article 33 is mandatory upon the signatories.²⁹

In addition, *refoulement* is a concept recognized in customary international law. The Final Act of the Conference which adopted the Convention of the Status of Stateless Persons unanimously adopted the following statement:

The Conference being of the opinion that Article 33 of the Convention Relating to the Status of Refugees of 1951 is an expression of the generally accepted principle that no state should expel or return a person in any manner whatsoever . . . Has not found it necessary to include in the Convention relating to the Status of Stateless Persons an article equivalent to Article 33 . . .³⁰

Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs, 71 WASH. U. L.Q. 833 n.23 (Fall 1993), citing Provisional Arrangement Concerning the Status of Refugees Coming From Germany, July 4, 1936, art. 4(3), 171 L.N.T.S. 75, 79. Few states signed either agreement. (Eight states signed the 1933 Convention, and seven states signed the 1936 Arrangement.) *Id.*

²⁶ Refugee Convention, *supra* note 20, art. 32(3).

²⁷ *Id.*, art 33(1).

²⁸ Discussions held at the Conference adopting the Convention were divided on the issue of *refoulement*. Some states expressed concern with overwhelming numbers of refugees coming across their borders and stated it was their belief that the obligation was only created when a refugee was within the territory of the Contracting State. The Conference summaries do not provide a contrary position, but state "the general consensus of opinion was in favour of [this] interpretation." Conference, Summary of the 35th Meeting, U.N. Doc. A/CONF.2/SR.35, at 21-22 (July 25, 1951).

²⁹ 1967 Protocol Relating to the Status of Refugees, art. 7, para. 1, 19 U.S.T. 6223, T.I.A.S. No. 6577.

³⁰ Convention of the Status of Stateless Persons, September 28, 1954, No. 5158, 118, 360 U.N.T.S. 122, cited in Abigail D. King, Note: *Interdiction: The United States' Continuing Violation of International Law*, 68 B.U. L. REV. 773, 790 n.138 (1988).

Current practice forbids states from sending refugees to any country from which the refugees risk being expelled to *another* state where they would be persecuted.³¹ Asylum seekers can be returned to a "safe" country if: (1) they have found protection in that country; (2) they can enter and remain safely; (3) they are not subject to *refoulement* and are treated in accordance with basic human standards; (4) they will not be subject to persecution or threats to safety or liberty; and (5) they have access to a durable solution.³² In 1993, the UNHCR established criteria for states' return of asylum seekers to "safe" countries *only* after the states have established that the "safe" country will admit the asylum seeker to its territory, will observe the principle of *non-refoulement*, will consider the applicant's claim, and, if appropriate, will allow the applicant to remain as a refugee.³³

II. EUROPEAN CONVENTION ON HUMAN RIGHTS PROTECTION OF REFUGEES

The ECHR does not explicitly provide protection for refugees,³⁴ although the original draft of the Convention did provide for freedom from arbitrary arrest, detention and exile.³⁵ Article 14 of the ECHR provides that rights

Guy Goodwin-Gill, legal advisor in the Office of the United Nations High Commissioner for Refugees, argues,

It may be affirmed that the prohibition on the return of refugees to countries of persecution has established itself as a general principle of international law, binding on States automatically and independently of any specific assent. Earlier State practice supports the contention that . . . Article 33 . . . reflected or crystallized a rule of customary international law at the time of [its] formulation, and practice since that date reaffirms this conclusion.

GUY S. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PEOPLE BETWEEN STATES* 141 (1975).

³¹ Alberto Achermann and Mario Gattiker, *Safe Third Countries: European Developments*, 7 INT'L J. REFUGEE L. 19, 26 (1995).

³² Executive Committee of the High Commissioner's Programme, Conclusion No. 58 (XL) (1989), "Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner From a Country in Which They Had Already Found Protection."

³³ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (LONDON), THE "SAFE THIRD COUNTRY" POLICY IN THE LIGHT OF THE INTERNATIONAL OBLIGATIONS OF COUNTRIES VIS-A-VIS REFUGEES AND ASYLUM SEEKERS, 28-29 (1993).

³⁴ *Vilvarajah and Others v. United Kingdom*, 14 Eur. H.R. Rep. (ser. A) at 286 (1992).

³⁵ Council of Europe, 1 COLLECTED EDITION OF THE TRAVAUX PREPARATOIRES xxiii (1975), Article I(b) [hereinafter TRAVAUX PREPARATOIRES].

and freedoms "shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."³⁶ The enumerated categories are similar to the categories provided for in the Refugee Convention.

Responsibility under the ECHR is based on its own provisions in light of relevant principles of international law.³⁷ The ECHR was modeled on the Universal Declaration of Human Rights (UDHR).³⁸ Under Article 14 of the UDHR, everyone has the right to seek and to enjoy in other countries asylum from persecution.³⁹

The Council of Europe asked Member States "[to] apply liberally the definition of 'refugee' in the convention" and "not to expel de facto refugees unless they will be admitted by another country where they do not run the risk of persecution."⁴⁰ The Council expressed concern regarding "de facto refugees," persons who either have not been formally recognized as Convention refugees or who are "unable or unwilling for . . . other valid reasons to return to their countries of origin."⁴¹ The Committee of Ministers has stipulated that Convention refugees not formally recognized as such should be protected from return.⁴²

The Committee on Population and Refugees of the Council of Europe stated:

[T]he concept of persecution should be interpreted and applied liberally and also adapted to the changed circumstances which may differ considerably from those existing when the Convention was originally adopted . . . [A]ccount should be taken of the relation between refugee status and the denial of human rights as laid down in different international instruments.⁴³

³⁶ ECHR, *supra* note 4, art. 14.

³⁷ *Golder v. United Kingdom*, 1 EUR. CT. H.R. (Ser. A) at 534 (1975).

³⁸ TRAVAUX PREPARATOIRES, *supra* note 35, at 218.

³⁹ *Universal Declaration of Human Rights*, G.A. Res. 217A (III), art. 14, U.N. Doc. A/810 (1948).

⁴⁰ Council of Europe, Parliamentary Assembly Recommendation 773 (1976), *as cited in* Hathaway, *supra* note 12 THE LAW OF REFUGEE STATUS 21 (1991).

⁴¹ *Id.* at 21.

⁴² Council of Europe, Committee of Ministers Recommendation R(84)1 (1984), *as cited in* HATHAWAY, *supra* note 40.

⁴³ HATHAWAY, *supra* note 40, at 104 text and n.39, *citing* J. Thomas in A. Woods, ed., *Refugees: A New Dimension in International Human Rights*, 70 A.S.I.L.P. 58, 69 (1976).

The European Court of Human Rights has relied on Article 3 of the ECHR, which prohibits states from subjecting people to torture or inhuman or degrading treatment or punishment, to recognize and protect refugees' rights. "[T]he Convention provides for a real and effective protection of human rights for all persons present in the member States; their governments cannot be permitted to expose such persons to serious violations of human rights in other countries. This should be beyond doubt in cases where torture or violations of other basic rights are to be feared."⁴⁴ The ECHR prohibits torture in absolute terms, regardless "of the person in question."⁴⁵ A person cannot lose the benefit of protection as a result of his or her own conduct.⁴⁶ Article 3 makes no provision for exceptions, and, under Article 15(2), there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.⁴⁷

Furthermore, "jurisdiction" is not restricted to the national territory of the Contracting States.⁴⁸ A Contracting State may bear responsibility beyond its borders for acts of its authorities, whether performed within or outside national boundaries, which produce effects outside of its own territory.⁴⁹ The exercise of effective control as a result of military action abroad amounts to "jurisdiction." This control can be exercised "directly or through a subordinate local administration."⁵⁰

Although Contracting States have the right to retain the option to expel foreigners, the states have agreed to limit the free exercise of their rights under general international law.⁵¹ This restriction includes the right to control the entry and exit of foreigners, to the extent and within the limits of the obligations they have accepted under the Convention.⁵² The

⁴⁴ Cruz Varas v. Sweden 14 Eur. H.R. Rep. (ser. A) at 44 (1991) (dissenting opinion by Judge Cremora, *et al.*).

⁴⁵ Case 70/1995, Chahal v. United Kingdom, Nov. 15, 1996. *Court Did Not Pronounce on Lawfulness of Detention*, THE TIMES (London), Nov. 28, 1996, available in LEXIS.

⁴⁶ Nasri v. France, 21 Eur. H.R. Rep. (ser. A) at 467 (1996).

⁴⁷ Ireland v. United Kingdom, 2 Eur. H.R. Rep. (ser. A) at 79 (1978).

⁴⁸ Loizidou v. Turkey, 20 Eur. H.R. Rep. (ser. A) at 130 (1995).

⁴⁹ *Id.* at 130, citing Drozd and Janousek v. France and Spain, 14 Eur. H.R. Rep. at 745, para. 91 (1992). The Court has not attempted to establish "the responsibility of the receiving country, whether under general international law, under the Convention or otherwise." Soering.

⁵⁰ Loizidou, *supra* note 48, at 130.

⁵¹ Art 5(1); Vilvarajah, *supra* note 34, at 286.

⁵² East African Asians v. United Kingdom 3 EUR. H.R. REP. 76, para. 186 (1981).

extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3 and engage the responsibility of that state under the Convention.⁵³ Contracting States, therefore, have an obligation not to send people to countries where there are substantial grounds for believing that they would be in danger of being subjected to treatment proscribed by Article 3.⁵⁴ Where a Contracting State removes an alien from its territory, it is liable under the Convention to the extent to which it directly exposes that person to a risk of treatment contrary to Article 3.⁵⁵

In determining whether an asylee would be subjected to persecution upon return to his or her home country, the Court assesses the risk with reference to facts which were known or ought to have been known to the Contracting State at the time of expulsion and may consider information which comes to light subsequent to the expulsion.⁵⁶ There is no violation if the Contracting State could not have foreseen ill treatment. The Court considers whether the state carefully evaluated the claim and also takes into account the knowledge and experience of state authorities.⁵⁷ The Court will make a "rigorous" examination of the existence of a risk of ill treatment "in view of the absolute character [of Article 3] and the fact that it enshrined one of the fundamental values of . . . the Council of Europe."⁵⁸

Ill treatment must attain a minimum level of severity to fall within the scope of Article 3;⁵⁹ the mere possibility of ill treatment does not constitute a breach of Article 3.⁶⁰ However, even if certain forms of treatment do not constitute acts of torture, they may amount to inhuman and degrading treatment.⁶¹ The question is whether the applicant had substantial grounds for showing that he or she was or would be exposed to a real risk of being subjected to inhuman or degrading treatment,⁶² recognizing that people who

⁵³ *Soering*, *supra* note 9, at para. 91.

⁵⁴ *Id.* at paras. 86-91.

⁵⁵ *Nasri*, *supra* note 46, at 467.

⁵⁶ *Vilvarajah*, *supra* note 34, at 288.

⁵⁷ *Id.*

⁵⁸ *Id.* at 288-89.

⁵⁹ *Id.* at 288. It depends on all of the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects, and, in some instances, the sex, age and state of health of the victim. *Soering*, *supra* note 9, para. at 100.

⁶⁰ *Vilvarajah*, *supra* note 34, at 289-90; *Chahal*, *supra* note 45.

⁶¹ *Ireland*, *supra* note 47, at 80.

⁶² *Vilvarajah*, *supra* note 34, at para. 115.

have been tortured may feel apprehensive toward authorities and may be afraid to provide information about their cases.⁶³

Inhuman treatment does not have to be actual bodily injury, if the victim suffered at least intense physical and mental suffering.⁶⁴ Degrading treatment arouses in the person feelings of fear, anguish and inferiority capable of humiliating and debasing this person and possibly breaking his or her physical or moral resistance.⁶⁵ Degrading treatment may include the mental anguish of anticipating the violence to be inflicted upon him.⁶⁶ An action which lowers a person in rank, position, reputation or character is degrading where it reaches a certain level of severity.⁶⁷ The question is whether state practices of returning asylees to "safe" countries rise to the level of treatment proscribed by Article 3.

III. ECHR CONTRACTING STATES' REJECTION OF REFUGEES

A number of states have relied on the ECHR to develop the concept of "safe country" to exclude or expel applicants for asylum. The "safe country" is the asylee's home country ("safe" country of origin) or the first country the asylee travels to after fleeing his or her home country in which he or she would be deemed to be free from persecution ("safe" third country).⁶⁸

States utilize the notion of "safe" country in a number of ways, including the following: defining "safe" countries as those that are signatories to the Refugee Convention and/or ECHR; implementing accelerated status-determination procedures for asylees arriving from "safe" states; entering into agreements with other states to return applicants in exchange for "safe" country designation; instituting sanctions against airlines for delivering asylees from "safe" countries; signing the Refugee Convention with geographic reservations; and interpreting the Refugee Convention restrictively.

⁶³ Cruz Varas, *supra* note 44, at para. 71.

⁶⁴ Klaas v. Germany, 18 EUR. H.R. REP. 305, para. 83 (1994).

⁶⁵ *Id.*

⁶⁶ Soering, *supra* note 9, at para. 100.

⁶⁷ East African Asians, *supra* note 52, at para. 189.

⁶⁸ Rosemary Byrne and Andrew Shacknove, *The Safe Country Notion in European Asylum Law*, 9 HARV. HUM. RTS. J. 185, 193 (1996); Judith Kumin, *Protection of, or Protection From, Refugees?* (visited Aug. 14, 1997) <<http://www.unhcr.ch/issues/asylum/rm10102.htm>>.

A. Defining "Safe" Country As One Which Adheres To ECHR

Germany is an example of a Contracting State that has adopted use of the "safe" country concept to create a *cordon sanitaire* around its borders. Germany historically accepted more refugees than the next four countries combined.⁶⁹ Before passage of a new asylum law, Germany provided the most generous public support for asylum seekers in all of Europe. Germany's Basic Law⁷⁰ sought to create a safe haven for those suffering from totalitarian oppression. The refugee policy permitted "an unrestricted flow of asylum seekers."⁷¹

Article 16(2) of the Basic Law which addressed refugees predated the U.N. Refugee Convention. It provided that "persons persecuted on political grounds shall enjoy the right of asylum."⁷² Asylum seekers had a right to remain in Germany until their status was determined. Article 19 extended to asylum seekers a constitutional right to a decision on their cases and a hearing in court if denied asylum in the first round.

However, under the Law on Asylum Procedure of 1982, border police were allowed to reject asylum applicants if the applicants had been "safe from persecution in another country"⁷³ or if they had been in any European Union⁷⁴ country, Austria, Switzerland, Sweden,⁷⁵ or Norway for more than

⁶⁹ Germany has had the highest number of asylum applicants of 20 industrialized nations nine years out of ten from 1983 to 1992. During those years, Germany had 1,397,700 asylum applicants. U.S. COMMITTEE FOR REFUGEES, REFUGEE REPORTS 16 (Nov. 30, 1993). Applicants were entitled to housing, initial clothing, food, medical care, a generous social allowance, and schooling for their children. U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 1994, 136.

⁷⁰ i.e., its Constitution.

⁷¹ Center for Immigration Studies, *German Bundestag Votes to Restrict the Right to Asylum: Bonn in a State of Siege*, WEEK IN GERMANY, May 28, 1993, at 1.

⁷² Basic Law for the Federal Republic of Germany, promulgated by the Parliamentary Council on 23 May 1949, as amended by the Unification Treaty of 31 August 1990 and Federal Statute of 23 September 1990, available on Internet.

⁷³ Section 9(1)(1), Gesetz uber das Asylverfahren of July 16, 1982, 1982 BGBI. I 946, as amended, cited in Sam Blay and Andreas Zimmermann, Current Development, *Recent Changes in German Refugee Law: A Critical Assessment*, 88 A.J.I.L. 361 (April 1994).

⁷⁴ At that time, European Economic Community.

⁷⁵ Where one in eight (8.8 million population) is an immigrant or has an immigrant parent. Paul de Bendern, *Sweden Gets Tough on Immigration*, REUTER TEXTLINE, Aug. 6, 1996.

three months before coming to Germany.⁷⁶ Applicants were allowed entry into Germany and could apply for asylum if they could establish a credible fear of expulsion to a state where there was a risk of political persecution or if they possessed a valid Convention Travel Document issued by another country.⁷⁷ Under the Aliens Law of 1990, an alien was not to be deported "if (1) he would thereby be exposed to inhuman treatment or torture, or (2) his deportation would run counter to the European Convention on Human Rights."⁷⁸

Germany's resources became overwhelmed when the number of asylum seekers rose from a few thousand in the early 1970s⁷⁹ to 438,191 in 1992.⁸⁰ There were 6.49 million foreign residents (asylum seekers, refugees, and workers) living in Germany in the early 1990s, which was 8.0 percent of the population.⁸¹ Two million of the foreigners were refugees. Germany suffered from a shortage of permanent housing, and refugees wound up in economically depressed areas where there was high unemployment. In the late 1980s refugees to West Germany from East Germany were sleeping in schools, gymnasiums, metal shipping containers and underground bomb shelters.⁸² Some refugees awaiting decisions on their claims were forced to live in camps that were crime ridden.⁸³ Refugees were targets of attacks, beatings, murders, and arson.⁸⁴ Although fewer than 10 percent of

⁷⁶ Blay, *supra* note 73.

⁷⁷ *Id.* at Section 9(2).

⁷⁸ Art. 53, Aliens Law of 1990, 1990 BGB1.I 1354, *cited in* Blay, *supra* note 73, at n.17.

⁷⁹ The German guest worker program brought several million foreigners to Germany beginning in the 1960s. The program ended in 1973. Aleinikoff, 197, *citing* Hoenekopp & Ullman, *The Status of Immigrant Workers in the Federal Republic of Germany*, IMMIGRANT WORKERS IN EUROPE: THEIR LEGAL STATUS (1982).

⁸⁰ For years 1973-1983, Aleinikoff, 196; for years 1984-1994, German Information Center 1.

⁸¹ German Information Center, *Foreigners in Germany and the New German Asylum Law*, June 1994, at 1.

⁸² Joseph A. Reaves, *Bill is Coming Due for Bonn: Aid to Refugees*, CHI. TRIB. Nov. 13, 1989.

⁸³ Yuri Shpakov, *Germany: War Against Refugees*, MOSCOW NEWS, June 2, 1993, *available in* LEXIS.

⁸⁴ *Id.* In 1992, there were over 4,600 criminal offenses against foreigners. In September 1991, over 250 Vietnamese and Mozambican nationals were removed from a compound housing refugees in Hoyerswerda after an anti-foreign demonstration. Brigitte T. Nuss, *German Immigration Policy: Holding at Bay a Sea of Would-be Immigrants*, 11 WIS. INT'L L.J. 185, 192 (Fall 1992).

applicants obtained refugee status, others were allowed to remain in Germany because deportation would have violated Article 3 of the ECHR.⁸⁵

As a result of these problems, the major political parties compromised on a comprehensive asylum law which significantly restricted the previously unqualified right to apply for asylum. On the one hand there were those who wanted to stop the influx of asylum seekers by abolishing the constitutional right to asylum. On the other hand, were those who wanted to admit and protect applicants with genuine asylum claims.⁸⁶ The Amendment to the Basic Law⁸⁷ provides for the right of asylum for anyone persecuted on political grounds, but effectively excludes the overwhelming majority of would-be asylum applicants. Paragraph 2 provides, in part:

Paragraph 1 may not be invoked by persons who enter from a member state of the European Communities or from a third country where the application of the Convention Relating to the Status of Refugees and the European Convention for the Protection of Human Rights and Fundamental Freedoms is guaranteed.⁸⁸

Therefore, aliens from—or who travel through—designated states do not have the right to asylum. It is presumed that these states ensure against political persecution or inhuman or degrading treatment or punishment. An asylum seeker must offer evidence which would rebut the general presumption towards refusal.⁸⁹

The amended asylum law's two categories of "safe" countries, "safe" states of origin and "safe" third states, include states that continue to violate human rights. In the new Law of Asylum Procedure, the government

⁸⁵ Blay, *supra* note 73, at n.10.

⁸⁶ On the eve of the vote on the asylum amendment, Inter Press Service reported that Germany spent \$22.5 million on asylum seekers, the amount Germans spent annually on feeding their dogs. Carlos Bendana, *Germany: Growing Opposition to Changes in Asylum Law*, INTER PRESS SERVICE, May 21, 1993. Within a few days of the amendment's passing, neo-Nazis killed five Turks in Soligen and attacked a shelter for asylum seekers in Berlin and a center for Rumanian refugees in Wolfsburg. "Ultra-rightist" groups stormed a refugee shelter in Munich after attacking an African refugee family. Carlos Bendana, *Germany: Amendments to Asylum Law Cause More Violence*, INTER PRESS SERVICE, June 2, 1993.

⁸⁷ This amendment replaces Article 16(2) with Article 16a.

⁸⁸ 1993 BGB1.I 1102, cited in Blay, *supra* note 73, at 363 n.12.

⁸⁹ *Id.*

designated "safe" states of origin to encompass all countries with a land border with Germany,⁹⁰ including Poland and the Czech Republic, which have limited experience in the asylum process.⁹¹ In addition, the list of safe countries of origin includes Bulgaria, which continues a practice of torturing detainees,⁹² and Ghana, which still has the death penalty.⁹³

A safe third state is theoretically one in which the application of the Refugee Convention and the European Convention on Human Rights is guaranteed.⁹⁴ However, the UNHCR has reservations about a number of these states,⁹⁵ and Amnesty International has said that political torture and murder are officially tolerated in 10 countries on the safe list.⁹⁶ Liberia has been described in Amnesty's report as being in a state of "terror and anarchy," and it, along with Bulgaria, produces its own refugees.⁹⁷ Other "safe" countries, Turkey and Pakistan,⁹⁸ are described as states with "hundreds of documented cases of torture," and Romania and Bulgaria have

⁹⁰ The Netherlands, Belgium, Luxembourg, France, Switzerland, Austria, Czech Republic, Poland, and Denmark.

⁹¹ U.S. Committee for Refugees, *World Refugee Survey 1995*, at 30.

⁹² Amnesty International reports continuing human rights violations, including torture and beatings of detainees. *Bulgaria: Shootings, Deaths in Custody, Torture and Ill-treatment*, AMNESTY INT'L, EUR 15/07/96, June 1996.

⁹³ Blay, *supra* note 73, at 373 n.62.

⁹⁴ German Information Center, *supra* note 81, at 6. In addition, the Draft Bill included the following criteria for "secure": recognition rates for asylum applicants in previous years; general political situation (i.e., democratic structure of the state); observance of human rights (i.e., compliance with the International Convention on Civil and Political Rights); readiness of the state of origin to allow independent international human rights organizations access to its territory; and stability of the country. Kay Hailbrunner, *Asylum Law Reform in the German Constitution*, at 4 n.7 (unpublished article, available from the GERMAN INFORMATION CENTER), citing Bundestagsdrucksache 12/4450 (March 2, 1993).

⁹⁵ Berthiaume, *supra* note 2.

⁹⁶ These countries include Turkey, Liberia, Zaire, Nigeria, Ghana, Togo, India, Pakistan, Romania, and Bulgaria. See Stephen Kinzer, *Rights Groups Attack German Plan on Refugees*, N.Y. TIMES, Feb. 7, 1993, at 11.

⁹⁷ Sharon Russell, *International Migration: Global Trends and National Responses*, 20-FALL FLETCHER F. WORLD AFF. 1, 4 (1996). As of December 1994, Liberia produced an estimated 784,000 and Bulgaria (between 1989-1993), 96,000. See *World Refugee Survey 1995*, *supra* note 91, at 44.

⁹⁸ Pakistan continues to impose the death penalty, including against children. Pakistan: The Death Penalty, AMNESTY INT'L COUNTRY REP., ASIA 33/10/96 (Sept. 1996).

committed "pogrom-style assaults" on Gypsies.⁹⁹ India and Pakistan are not signatories to the Refugee Convention,¹⁰⁰ and they, along with Romania and Turkey, made forced returns and expulsions of asylum seekers, which may have resulted in *refoulement* of genuine refugees.¹⁰¹

Other Contracting States have made questionable "safe" country choices. In the United Kingdom the Home Secretary has the power to designate a list of "safe countries." The Home Secretary has adopted three criteria: (1) there is no serious risk of persecution; (2) the country must be one which generates a large number of asylum applications; and (3) a high proportion of the asylum applications which are generated from that state must be unfounded.¹⁰² The United Kingdom has identified all of the countries of the former Soviet Union to be "first safe countries,"¹⁰³ although a number of them experienced armed conflicts that led to civilian deaths and refugee flows.¹⁰⁴

A number of countries designated by ECHR Contracting States¹⁰⁵ as "safe" have been criticized by national courts and international organizations for failure to meet human rights standards.¹⁰⁶ "Safe" country Greece, which was criticized by the European Parliament of the European Union for human rights abuses in 1994,¹⁰⁷ admits only asylum seekers who enter

⁹⁹ Kinzer, *supra* note 96, at 11. Amnesty International reports beatings and other ill-treatment by police officers of Romas. *Bulgaria: Shootings, Deaths in Custody, Torture and Ill-treatment*, *supra* note 92.

¹⁰⁰ *World Refugee Survey 1995*, *supra* note 91, at 47.

¹⁰¹ *Id.* at 45.

¹⁰² Colin Harvey, *The United Kingdom's New Asylum and Immigration Bill*, 8 INT'L J. OF REFUGEE LAW at 184 (1996) (citing Mr. Howard, Secretary of State for the Home Department, Hansard, H. C. Deb. 268, col. 702, Dec. 11, 1995).

¹⁰³ British Immigration Plan, MIGRATION NEWS 2, no. 12 (December 1995), Arthur C. Helton, *Forced Migration in Europe*, 20-FALL FLETCHER F. WORLD AFF. 89, 97 n.35 (1996) (citing "British Immigration Plan," MIGRATION NEWS 2, no. 12, Dec. 1995).

¹⁰⁴ DEP'T ST. BULL., AMERICA'S COMMITMENT TO HUMAN RIGHTS, Feb. 1994, at 12 (Georgia and Azerbaijan are two countries experiencing armed conflict); *see also* World Refugee Survey 1995, *supra* note 91, at 44. (Numbers of refugees for 1995 vary, but are reported, as follows: Azerbaijan, 374,000; Tajikistan, 165,000; Georgia, 106,800; Uzbekistan, 50,000.).

¹⁰⁵ Austria, Czech Republic, France, Germany, Italy, and Greece.

¹⁰⁶ Gillian Handyside, *EU Countries Slammed for Human Rights Abuse*, REUTER EUR. COMMUNITY REP., Sept. 17, 1996; Kumin, *supra* note 68.

¹⁰⁷ Abuses included poor treatment of detainees and prisoners and prosecution of conscientious objectors, religious and ethnic minorities, and asylum seekers. Handyside, *supra* note 106.

directly from their countries of origin. Others are sent back to whatever country they traveled through.¹⁰⁸ Greece considers all of its Central and East European border neighbors to be safe.¹⁰⁹

The Office of the U.N. High Commissioner for Refugees has declared that Austria should not be considered a "safe" country for refugees because its asylum policy is likely to result in refugee applicants being sent back to third countries that are not safe.¹¹⁰ Austrian legislation permits deportation of asylees without regard to whether the asylum seekers could in fact seek safe asylum in a transit country through which they briefly had traveled.¹¹¹ The rejected asylee must leave Austria or be expelled by the Aliens Police. "Even states where mass scale human rights violations are the order of the day are categorized by Austrian authorities as safe third countries."¹¹²

B. Accelerating Status-Determination Procedures and Deporting With Non-Suspensive Effect

Applicants arriving from "safe states" are screened out of the regular asylum process and into an accelerated determination process to be completed within a limited period of time. A number of new asylum laws¹¹³ include accelerated asylum procedures to deal with manifestly unfounded asylum applications, those in which the asylum seeker is a national or a permanent resident of a State in which an asylum seeker can be assumed to be safe, according to general knowledge, legal order and actual practice, from persecution for one of the reasons mentioned in the Geneva Convention.¹¹⁴

In Germany, the asylum seeker has 48 hours to apply. Rejected asylum seekers in such cases are given three days to file an appeal with an administrative court, but the courts are instructed to grant a stay of

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See generally Senthin Ratnasabapathy, *Refugees in Austria: UNHCR Report Criticizes Vienna Asylum Laws*, INTER PRESS SERV., Mar. 10, 1995, available in LEXIS.

¹¹¹ *ELDR President Address on Asylum, Refugee Policy*, REUTER EUR. COMMUNITY REP., Oct. 18, 1996, available in LEXIS.

¹¹² Ratnasabapathy, *supra* note 110 (citing 1995 UNHCR Report).

¹¹³ Federal Asylum Act, BGB1. No. 8/1992; Federal Acts on the Assistance and Support of Asylum-Seekers, BGB1. No. 405/1991; Permanent Residence, BGB1. No. 466/1992; Passports, BGB1. No. 839/1992; Aliens, BGTB1. No. 838/1992.

¹¹⁴ Art. 17(3) of the Austrian Asylum Law.

deportation only in cases where there is serious doubt as to the legality of the measure. Following a negative decision, the applicants are to be swiftly deported back to the "safe states."¹¹⁵

In the United Kingdom, asylees from "safe" countries are returned within 24 hours.¹¹⁶ In the Czech Republic asylum seekers are required to make application within 48 hours of entering the country. Aliens waive the opportunity to apply after that time.¹¹⁷ Belgium's accelerated procedures reject 90 percent of asylum requests at border.

Generally, rejected asylum seekers cannot remain in the countries to which they fled pending appeal, and they are, therefore, effectively denied the right to appeal.¹¹⁸ Belgium and Germany contract with private security firms to deport unwanted aliens, but have not implemented procedures to verify that the asylees arrived in their home countries safely.¹¹⁹

C. Entering Into Readmission Agreements With Other Countries to Return Applicants

Bilateral and multilateral readmission agreements establish expulsion criteria of citizens of third states and readmission of a state's own citizens. Germany signed a Cooperation with Regard to The Effects of Migration Movements with Poland in May of 1993.¹²⁰ Under this agreement, Germany is to donate 120 million DM (\$74 million) to Poland to build refugee camps in exchange for designating Poland a "safe" country for refugees.¹²¹ Since the agreement went into effect, the Polish authorities have agreed to take back only those foreigners whom the German border

¹¹⁵ World Refugee Survey 1994, *supra* note 69, at 135.

¹¹⁶ Helton, *supra* note 103, at 98-99.

¹¹⁷ Blay, *supra* note 73, at 373.

¹¹⁸ Austria, France, Sweden, United Kingdom and Germany.

¹¹⁹ Alain Guillaume and Jean-Claude Vantroyen, "Dirty washing" is Sent Privately, *GUARDIAN*, Jan. 24, 1996, available in LEXIS, EURONEWS.

¹²⁰ Blay, *supra* note 73, at n.57 (citing Abkommen uber die Zusammenarbeit hinsichtlich der Auswirkungen von Wanderungsbewegungen, May 7, 1993); see also *Germany: Agreement with Poland to Slow Down Immigration*, REUTER TEXTLINE AGENCY EUR., May 11, 1993, available in LEXIS.

¹²¹ Angela G. Moore, *International Developments: Is the Boat Too Full for a Few More? Refugees' Dreams Deferred as Germany Reforms an Exploited Asylum Opportunity*, 7 *GEORGETOWN IMMIGRATION L.J.* 633, 638 (1993); *Conditions for Signature of Readmission Agreement in Germany*, CTK NATIONAL NEWswire, Oct. 27, 1994, available in LEXIS.

police could definitively prove had traveled through Poland to get to Germany.¹²²

By the end of 1993, Germany and Poland had also signed readmission agreements with other countries. Germany signed agreements with Switzerland, Bulgaria, Romania, and the Czech Republic. Under the latter agreement, the Czech Republic resolved to take back refugees—Czech citizens and aliens from third countries that use the Czech Republic as a transit country—that Germany rejects *within 72 hours* of their entrance into Germany.¹²³ Poland concluded readmission agreements with Bulgaria, the Czech Republic, Hungary, Moldova, Romania, Slovakia, and the Ukraine.¹²⁴

These countries may not be prepared to handle the large numbers of refugees that historically have passed through on their way to Germany or have instituted restrictive procedures that preclude most refugees from applying for asylum. Persons returned from Germany to the Czech Republic are often immediately issued an order to leave and are prohibited from returning to the Czech Republic for ten years. Some are deported to Slovakia.¹²⁵ Few of the asylum seekers who returned to Poland or the Czech Republic applied for asylum in those countries; rather, they went to their home countries or disappeared.¹²⁶ A result of the German-Polish and German-Czech agreements was that the number of asylum seekers increased considerably in Germany's neighboring countries, notably in Switzerland and the Netherlands.

European Union Ministers of Justice and Home Affairs adopted a "Standard Bilateral Readmission Agreement" which allows for the transfer of asylum seekers from the country in which they had attempted to seek asylum to a "safe third country."¹²⁷ The Agreement does not ensure that

¹²² *World Refugee Survey 1994*, *supra* note 69, at 136.

¹²³ *Czechs to Accept Refugees Germans Spurn*, CHI. TRIB., Nov. 4, 1994, available in LEXIS; *Government Approves Draft Readmission Agreement with Germany*, CTK NATIONAL NEWS WIRE, Oct. 26, 1994, available in LEXIS. A separate agreement between the countries gives the Czech Republic 60 million DM for asylum infrastructure and equipment for border police. *Kanther Assesses Readmission Agreement as Great Success*, CTK NATIONAL NEWS WIRE, Nov. 3, 1994, available in LEXIS.

¹²⁴ *World Refugee Survey 1995*, *supra* note 91, at 32.

¹²⁵ *Id.* at 31.

¹²⁶ See Hailbronner, *supra* note 94, at 7 (Polish authorities reported that only 20 persons re-admitted from May to October 1993 applied for asylum in Poland.).

¹²⁷ Kumin, *supra* note 68 (adopted Dec. 1, 1994).

the third country will examine an asylum claim on its merits.¹²⁸ There is no guarantee the person will have access to an asylum procedure. The re-admitting state may not be informed that the individual is an asylum seeker.¹²⁹

A 1994 report identified 30 bilateral readmission agreements among Western and Central European states, none of which provides for protection of asylum seekers.¹³⁰ The Council of Europe on Refugees and Exiles noted in a 1994 paper that "unless additional safeguards are established to ensure respect for human rights standards and international principles of refugee protection, these readmission agreements and the concept of 'host third country' pose a serious risk to the institution of asylum and to the fundamental principle of nonrefoulement."¹³¹ The ECRE concluded that an absence of adequate guarantees of admission to an asylum procedure carries a risk of *refoulement*.¹³² The ECRE's 1995 report was unequivocal: the return of asylum seekers to "safe" countries "has resulted in cases of actual, attempted or anticipated *refoulement* to the refugees' respective countries of origin."¹³³

D. Instituting Visa Requirements and Sanctions Against Airlines

Persons arriving by air on a direct flight from a "safe" country or persons arriving without a valid passport are not entitled to asylum. States have implemented visa requirements from particular states and fine air carriers for delivering aliens with forged passports or no documentation.¹³⁴

Forcing carriers to verify visas and other travel documentation shifts the burden of determining refugee status. Carriers, with personnel untrained in the refugee process, are making asylum determinations on behalf of states.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* (report written by Secretariat of the Inter-governmental Consultation on Asylum, Refugees and Migration Policies in Europe, North America, and Australia).

¹³¹ *World Refugee Survey 1995*, *supra* note 91, at 33.

¹³² *Id.*

¹³³ Kumin, *supra* note 68 (citing European Council on Refugees and Exiles, *Safe Third Countries: Myths and Realities* (1995)).

¹³⁴ James C. Hathaway, *Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 26 CORNELL INT'L L.J. 719, 725 (1993). It should also be noted that the Schengen II and Dublin Conventions contain similar rules on visa and carrier penalties.

Visa requirements and carrier sanctions which do not distinguish asylum seekers from other aliens result in *refoulement* of refugees.¹³⁵

E. Making Geographical Reservation to Refugee Convention

When Hungary and Turkey ratified the Refugee Convention, they accepted the option of accepting the Convention's obligations only with respect to refugees from Europe.¹³⁶ Therefore, only refugees from Europe can claim asylum. As a result, Hungary and Turkey do not recognize non-European asylum seekers as refugees, who are required to register with authorities within five days of entering the country. The governments screen these applicants, determine those they consider bona fide, and then refer them to the U.N. High Commissioner for Refugees (UNHCR) for resettlement outside their borders.

F. Restricting Interpretation of Refugee Convention

A number of states give refugee status only to people who can prove persecution by a state actor, not a non-state actor.¹³⁷ Victims of persecution by other kinds of groups—paramilitary forces, rebel armies, extremist organizations, warlords—are not given asylum, although the Refugee Convention and the *travaux préparatoires* do not contain such a limitation.¹³⁸ Under this restriction, Bosnians, Algerians, Peruvians, and Liberians who have fled civil wars are denied refugee status.¹³⁹

IV. DOES THE ECHR PROTECT REFUGEES FROM STATE PRACTICES?

The European Council on Refugees and Exiles states that "by introducing various and varying categories of 'second' and 'third' 'responsible' host

¹³⁵ "While such measures are targeted at foreigners in general, in the case of asylum seekers they tended to increase the risk of *refoulement*." United Nations High Commissioner for Refugees, U.N. Doc. E/1992/65 (1992), at 30.

¹³⁶ *World Refugee Survey 1995*, *supra* note 91, at 147.

¹³⁷ Arthur C. Helton and Pamela Birchenough, *Forced Migration in Europe*, 20-FALL FLETCHER F. WORLD AFFAIRS 89, 92 (1996). These states include France, Austria, Sweden, and Switzerland. In Switzerland, some of these victims are permitted to remain temporarily on humanitarian grounds. Human Rights Watch has criticized Sweden's treatment of asylum seekers, based on its restricted interpretation of the Refugee Convention. See *ELDR President Address on Asylum, Refugee Policy*, *supra* note 111.

¹³⁸ See Ed. note 7 IJRL 522 (1995).

¹³⁹ Berthiaume, *supra* note 2.

countries, states have actively increased, rather than reduced, the incidence of 'refugees in orbit.'"¹⁴⁰ The European Court has not specifically reviewed a "safe" country case in which there was a reasonable fear the applicant would be subjected to persecution.

To assess whether the European Court would hold that the state practice of rejecting asylum seekers based on the notion that they should return to a "safe" country violates Article 3, this section examines cases where the Court has reviewed state-sanctioned conduct—events similar to those refugees' experience, such as arrests, detentions, interrogations, and beatings—and found that conduct to constitute torture or inhuman or degrading treatment. The second step is a review of cases in which the Court considered the issue of whether deportation or exclusion constitutes treatment prohibited by Article 3 as it relates to several classes: citizens, protected nationals, aliens and asylum seekers. Lastly, this section considers a 1996 case involving deportation of an asylum seeker to a country that some Contracting States have designated as "safe."

A. *Prohibited Conduct*

The Court found violations of Article 3 in cases of police detention and alleged beatings, where there was evidence of intense suffering and/or lengthy detentions that occurred under the control of the government authorities. In *Ireland v. United Kingdom*,¹⁴¹ UK soldiers detained and interrogated suspected IRA terrorists. The interrogations were accompanied by "five techniques" of physical and mental treatment to wear down the detainees' reluctance to provide information.¹⁴² The Court held that although the techniques used during interrogation did not lead to suffering "of the particular intensity and cruelty implied by the word torture as so understood," the five techniques amounted to inhuman and degrading treatment, which was in breach of Article 3.¹⁴³ The Court found that while they did not necessarily cause bodily injury, the techniques caused intense physical and mental suffering.¹⁴⁴

¹⁴⁰ Kumin, *supra* note 68 (citing European Council on Refugees and Exiles (ECRE), *Safe Third Countries: Myths and Realities* (1995)).

¹⁴¹ *Ireland*, *supra* note 47.

¹⁴² *Id.* These techniques included wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink.

¹⁴³ ECHR, art. 3, paras. 167-168.

¹⁴⁴ ECHR, art. 3, para. 167.

The Court also found a violation of Article 3 where a French national, arrested and charged with murder and the possession of firearms, was kept in detention for five years during investigation and trial.¹⁴⁵ He alleged that he had been beaten and badly treated while in police custody: he was left naked in front of an open window for three hours, was threatened with a gun, was threatened that he and his family would be killed, had a tooth broken and was only given one sandwich to eat over a 48-hour period.¹⁴⁶

Recently, the Court found a violation of Article 3 where Austrian police officers held a suspected drug dealer in police custody for approximately 45 hours and harassed and beat him to obtain a confession, which resulted in bruises.¹⁴⁷ Witnesses had confirmed that the applicant had sustained physical injuries and was suffering from considerable psychological trauma.¹⁴⁸ There was no dispute that the applicant sustained the injuries during his detention in police custody, while he was under the control of police officers. The Court held that when a person is deprived of his liberty, physical force which has not been made strictly necessary by the applicant's own conduct diminishes his human dignity and is in principle an infringement of Article 3.¹⁴⁹

However, the Court¹⁵⁰ found no violations of Article 3 in other cases of alleged police detention and beatings where the Court could not establish "beyond all reasonable doubt" that the marks in question were caused while the suspects were in police custody and that they were the result of treatment prohibited by Article 3 of the Convention.¹⁵¹ Also, the European Commission found no violation in a case of a 10-hour police detention without evidence of any physical or mental abuse.¹⁵² Therefore, the Court is willing to define certain conduct as prohibited under Article 3 to the extent

¹⁴⁵ *Tomasi v. France*, 15 Eur. H.R. Rep. (ser. A) (1992).

¹⁴⁶ *Id.* at para. 106.

¹⁴⁷ *Ribitsch v. Austria*, 21 Eur. H.R. Rep. (ser. A) 573, paras. 39-40 (1996).

¹⁴⁸ *Id.* at para. 35.

¹⁴⁹ *Id.* at para. 38.

¹⁵⁰ The Commission evaluated the case in a friendly settlement in *Diaz Ruano v. Spain*, 19 Eur. H.R. Rep. (ser. A) 542 (1995).

¹⁵¹ *Id.* at paras. 63-64. The applicant's son was fatally shot during a police interrogation. The applicant alleged that his son's body contained bruises, cuts, and scrapes inconsistent with the shooting. He contended that the police tortured his son before the shooting. In *Klaas*, *supra* note 64, police stopped a woman for a traffic violation, and the woman subsequently failed an alcohol test and was bruised during an arrest-related scuffle.

¹⁵² *Loizidou*, *supra* note 48.

that there is evidence the acts the victim suffered occurred under the control of the government authorities, and the victim experienced more than a relatively brief detention.

B. Protected Classes

The Court has also relied on Article 3 in a case involving deportation of an alien who was not seeking political asylum. The Court found that deportation of a deaf and dumb alien would violate Article 3.¹⁵³ The applicant alleged that on account of his handicap, deportation would expose him to treatment prohibited by Article 3 because he would experience complete sensory isolation. The Court agreed that deportation would cause him to experience feelings of fear and anguish that would humiliate and degrade him and would, therefore, violate Article 3.¹⁵⁴

The Commission held that British citizens, but not British protected persons, from a British colony refused admission to the UK were discriminated against based on their color or race, which amounted to degrading treatment.¹⁵⁵ A UK Immigration Control Act affected UK nationals of Asian and East African origins. The government maintained that Article 3 does not provide a right to enter one's own country. The Commission agreed, but referred to case law concerning the right of asylum and the right of an alien not to be expelled. The Commission stated that publicity to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity. The Commission also stated that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment.

The Commission concluded that as to the British citizens, the legislation discriminated on ground of color or race, which could amount to degrading treatment if there was interference with human dignity.¹⁵⁶ However, as to the British protected persons, although they were not aliens, they also were not British subjects, and were, therefore, properly subject to the Commonwealth Immigrants Act of 1962. The Commission therefore held that Article

¹⁵³ *Nasri*, *supra* note 46, at para. 95.

¹⁵⁴ *Id.* at para. 61.

¹⁵⁵ *East African Asians*, *supra* note 67.

¹⁵⁶ *Id.* at para. 208.

3 had not been violated in those cases.¹⁵⁷

Until 1996, in the very cases that established law protecting refugees' rights, the Court rejected all refugees' claims that deportation would subject them to persecution and, therefore, violated Article 3. Protection existed in the Court's rules, but not in the Court's decisions. In *Djeroud v. France*,¹⁵⁸ the Commission summarily rejected an asylum seeker's claim of a violation of Article 3. Djeroud, an Algerian national who lived in France from the age of one year, was convicted on several occasions for theft. The Minister of the Interior ordered his deportation on the ground that he represented a danger to public order.¹⁵⁹ He left France voluntarily, returned, committed other offenses, was deported on two other occasions, but again returned to France. He was later subjected to a compulsory residence order in France which confined him to a particular municipality until he complied with the deportation order. He filed a political asylum claim, alleging that he was arrested and beaten by police upon his arrivals on two occasions in Algeria following deportation.

Although the Commission cautioned that only in exceptional circumstances may the deportation of an alien in cases where he has no family or other social links in the country to which he is sent be regarded as proportionate to the aim pursued, the Commission, without explanation, found no violation of Article 3.¹⁶⁰ In a friendly settlement, the Commission stated that regulation of the entry and exit of foreigners must be proportionate to the legitimate aim pursued.¹⁶¹ The Commission provided no rationale as to why the alleged incidents did not rise to the level of persecution, even though in another case involving alleged torture during detention in a mental hospital, the Commission stated that "whether the treatment of the applicant amounted to a breach of Article 3 of the Convention depends upon a detailed assessment of the circumstances of the case."¹⁶²

The Court has denied claims where the situation in the applicant's home

¹⁵⁷ *Id.* at para. 215.

¹⁵⁸ *Djeroud v. France*, 14 Eur. H.R. Rep. 68 (1992).

¹⁵⁹ Section 23 of the Order of November 2, 1945 on the conditions for the entry and residence of foreign nationals.

¹⁶⁰ *Djeroud*, *supra* note 158, at para. 65.

¹⁶¹ *Id.* at para. 62, *citing* *Berrehab v. Netherlands*, 22 Eur. H.R. Rep. (ser. A) 322, para. 28 (1989). The applicant and the Government reached a friendly settlement under which the deportation order was revoked, a ten years' residence permit issued and compensation of 150,000 FF paid.

¹⁶² *B v. U.K.*, 6 Eur. H.R. Rep. (ser. A) 204, para. 173 (1984).

country had arguably stabilized. In *Cruz Varas v. Sweden*, Chilean nationals fled to Sweden and requested political asylum.¹⁶³ The husband was a member of the Radical Party's Youth Federation, Socialist Party, and the Revolutionary Workers Front, which opposed the government of General Pinochet. The applicant was arrested and served two days in a military camp. He later took part in many demonstrations and two general strikes. He reported arrests for minor offenses. The Swedish National Immigration Board denied refugee status.

On appeal, the applicant said he would be persecuted if he was returned to Chile because of activities he participated in while in Sweden. While in Sweden,¹⁶⁴ after initially applying for and before being denied asylum, he alleged he was involved with a radical organization that had tried to kill Pinochet. He then gave more detailed accounts of the incidents that occurred in Chile which consisted of kidnapping and beatings: being tied to a bed, interrogated while hanging upside down, and shocked with electrodes to his testicles and anus.

Although his medical evidence supported the view that the applicant had been subjected in the past to inhuman or degrading treatment, the Court questioned his silence for a period of 18 months after his first interrogation by the police authority regarding the activities he had participated in and the torture he suffered at the hands of the Chilean police. The Court also determined that he was not able to support his claims.¹⁶⁵ In addition, the political situation had improved in Chile, and some refugees had voluntarily returned. Lastly, the Swedish authorities had knowledge and experience in evaluating refugee claims.¹⁶⁶ The Court found that the applicant's expulsion did not exceed the threshold set by Article 3 since, in the Court's view, he had shown no substantial basis for his fears.¹⁶⁷

In *Vilvarajah*,¹⁶⁸ five Sri Lankan nationals of Tamil ethnic origin traveled illegally to the United Kingdom on counterfeit passports. They applied for political asylum, claiming they had been arrested, detained, and

¹⁶³ *Cruz Varas*, *supra* note 44.

¹⁶⁴ The applicant was alleging that, in addition to being persecuted because of activities in which he had participated while in Chile, he had become a *sur place* refugee, one who, because of activities undertaken in the country of refuge, would be persecuted in the home country for those activities.

¹⁶⁵ *Cruz Varas*, *supra* note 44, at para. 78.

¹⁶⁶ *Id.* at para. 81.

¹⁶⁷ *Id.* at para. 82.

¹⁶⁸ *Vilvarajah*, *supra* note 34.

ill treated by members of the Indian peacekeeping force.¹⁶⁹ They gave detailed accounts: the Sri Lankan army had attacked their districts, killing people and destroying property; their close relatives were killed by the army, and their homes and businesses were searched and damaged or destroyed.

In spite of their claims, they were deported from the United Kingdom and returned to Sri Lanka. They were subsequently questioned by the Sri Lankan police and experienced more acts of persecution: they were paraded in front of masked men who identified certain persons; they were filmed and later shown on television as surrendered LTTE¹⁷⁰ men; they were assaulted with rifle butts and sticks, beaten with belts, stripped and beaten with iron bars and sand-filled PVC pipes, tied upside down, and subjected to electric shock treatment. They were subsequently allowed to return to the UK and made further application for political asylum.¹⁷¹

The Court reviewed conflicting reports about the then-current political situation in Sri Lanka and found conditions of "general instability," but no risk personally to the applicants.¹⁷² Although the UNHCR had begun a voluntary repatriation program to Sri Lanka, it had urged the UK not to return Tamils because there had been bloody confrontations between Tamils and the Indian Peace Keeping Forces (IPKF) in northern Sri Lanka. Amnesty International's reports catalogued claims of arbitrary killings, torture, detention and disappearances in the Tamil communities in the beginning of 1988 as the IPKF took on security duties following the Indian/Sri Lankan Accord of July 1987. While many Tamils were going about their ordinary affairs in Sri Lanka, young Tamils were at risk of interrogation, arrest and detention.¹⁷³ The Court held that there was no

¹⁶⁹ Between 1983 and 1995, more than 200,000 refugees fled Sri Lanka due to fighting between Tamil separatists and the Sinhalese-dominated government. *India's Repatriation of Sri Lankan Refugees Will Resume*, AGENCE FR. PRESSE, Feb. 24, 1995.

¹⁷⁰ Liberation Tigers of Tamil Ealam.

¹⁷¹ In 1987, the Sri Lankan government asked the United Kingdom to identify Tamils who had sought asylum. *Sri Lanka Asks Britain to Help Expose Tamil Refugees*, REUTERS LTD., Apr. 7, 1987.

¹⁷² *Vilvarajah*, *supra* note 34, at para. 143.

¹⁷³ During this same period, the U.S. Department of State reported continuing torture and other mistreatment of detainees. There were army massacres of Tamil civilians in Kakkadicholai in 1991 and, in Mailanthani in 1992. One hundred civilians were killed by Sri Lankan navy and air force in Jaffna in 1993. Beginning in August 1993, suspected LTTE sympathizers were detained for months or tortured. Hostilities between government and LTTE continued through 1993. Dep't of St. Dispatch, *Sri Lanka Human Rights Practices 1993*, HUM. RTS. REP. 1993.

violation of Article 3, observing that the applicants' "personal position was [not] any worse than the generality of other members of the Tamil community" and a mere possibility of ill-treatment was not sufficient to give rise to a breach of Article 3.¹⁷⁴ The Court concluded that there were no substantial grounds for believing the applicants would be exposed to a real risk of being subjected to inhuman or degrading treatment if they were returned to Sri Lanka.¹⁷⁵

The Court also denied refugees' claims where there was no deportation order.¹⁷⁶ France had refused refugee status to Sri Lankan citizens of Tamil origin. They entered France without authority and were ordered to leave, but remained in France unlawfully. The applicants insisted that they would be exposed to a real risk of torture or inhuman or degrading treatment if returned to Sri Lanka, because they had been arrested several times for distributing leaflets defending Tamils and for participating in Tamil movements. One applicant's father was mistakenly killed by the Indian army, thinking it was the applicant, who was later arrested and imprisoned for one month. His brother was killed in fighting between LTTE and the Sri Lankan army. The government argued that the claim was premature because there was no deportation order. The applicants argued that once a deportation order was issued against them, they would have no avenue effectively to oppose their repatriation. The Court agreed with the government and did not reach the merits of the Article 3 claim because there was no deportation order.¹⁷⁷

Before 1996, therefore, both the Commission and the Court had a number of opportunities to stop the expulsion of an asylum seeker, to put into practice the case law developed over a 16-year period since *Soering*. By rejecting the claim in *Vijayanathan* because the French government had not instituted deportation proceedings, the Court effectively expelled the applicants. As the refugees had argued, they would not have been able to bring a second case before the Court, inasmuch as a deportation order would not have been suspended while they petitioned the Court. By reviewing and rejecting the claims in *Vilvarajah* as being "generalized instability," the

¹⁷⁴ *Vilvarajah*, *supra* note 34, at para. 143.

¹⁷⁵ *Id.*

¹⁷⁶ *Vijayanathan and Pusparajah v. France*, 15 Eur. H.R. Rep. (ser. A) 62 (1993).

¹⁷⁷ In November 1996, the LTTE continued a war, then in its 14th year, for a separate Tamil state. *Sri Lanka Frees Tamil Girl Deported from Denmark*, REUTERS WORLD SERV., Nov. 21, 1996.

Court weighed opposing arguments and rejected the reports of continuing persecution.¹⁷⁸ The conduct that the refugee applicants in *Vilvarajah* and *Vijayanathan* suffered in their home countries was similar to acts the Court previously determined to be inhuman and degrading, and, therefore, in violation of Article 3 in non-refugee cases. However, the Court was unable to find that the conduct amounted to persecution when the issue was whether a Contracting State had the responsibility to prevent that same conduct by another state. Up to this point in the Court's case law, refugees would not have been protected from a "safe" country.

However, in November 1996, the Court found that the United Kingdom "would violate" an Indian Sikh's rights under Article 3 if he were deported to India.¹⁷⁹ He had entered the United Kingdom illegally in 1971, but was granted indefinite leave to remain in the country. On a visit to India in 1984, he was arrested and tortured by Punjab Police when he participated in a movement in support of a Sikh homeland. He was arrested, detained for 21 days and tortured by the Punjab police. He returned to the United Kingdom, became prominently involved with British Sikhs, and was allegedly involved in Sikh-related disturbances; he was also charged on two occasions with assault. The Home Secretary decided to deport him on grounds of national security and terrorism. He was incarcerated for six years and applied for political asylum, claiming he would be tortured and persecuted if returned to India, but the Home Secretary rejected his claim.

The Court stated that although states are confronted with terrorism, they cannot protect their citizens by deporting suspected terrorists if to do so would subject the individual to torture or inhuman or degrading treatment or punishment. Therefore, whatever acts Mr. Chahal had allegedly committed were not relevant to the Article 3 issue.

The European Court relied on reports of Amnesty International, the United States Department of State, and the Indian National Human Rights Commission to determine whether Mr. Chahal would be persecuted if deported to India. The reports stated that until mid-1994 the Punjab Police violated

¹⁷⁸ In June 1995, 29 Sri Lankan Tamil asylees began a hunger strike in Sweden after their asylum requests were denied. 29 *Tamils Hunger Strikers Fear Deportation From Sweden*, AGENCE FR. PRESSE, June 16, 1995, available in LEXIS, International News Library.

¹⁷⁹ *Chahal*, supra note 45. *Court Did Not Pronounce on Lawfulness of Detention*, TIMES, Nov. 28, 1995, at 45, available in 1996 WL 14482297.

human rights of suspected Sikh militants.¹⁸⁰ In recent years there had been improvements in the human rights situation in Punjab. However, complaints continued to be made in connection with the Punjab police, and no concrete evidence had been produced of any fundamental reform or reorganization of the force. Less than two years before, the same police force was carrying out well-documented raids into other Indian states. Although the Indian government had assured the UK government that Mr. Chahal "would have no reason to expect to suffer mistreatment . . . by the Indian authorities," those assurances were inadequate to guarantee Mr. Chahal's safety. The Court also considered that the "serious, albeit untested, allegations made against [Mr. Chahal] by the British Government would be likely to make him a target of interest for hard-line elements in the security forces."¹⁸¹ Therefore, the deportation order for Mr. Chahal, if implemented, would give rise to a violation of Article 3.

This decision may provide a glimpse into the Court's future when presented with a "safe" country case. The Court found that acts of the Indian government against Chahal, the severity and duration of which it had considered and rejected in previous cases, were sufficient to make deportation a violation of Article 3. Chahal was arrested, tortured, and detained for 21 days for participating in anti-government demonstrations. The acts are similar to—and less severe than—conduct suffered by millions of asylum seekers. While the Court had ruled against asylum seekers in other cases because it concluded that the political conditions had stabilized (though they in fact had not) in this case it weighed conflicting reports and decided in favor of the asylee's arguments.

The Court did not specifically address the "safe" country issue, but the country to which Chahal was scheduled to be deported, India, has been designated a "safe" country by several Contracting States, including the United Kingdom.¹⁸² Therefore, inasmuch as the Court found that a deportation to India would have violated Chahal's rights under Article 3 because he would have been subjected to "interest" by Indian security forces,

¹⁸⁰ The United States Department of State reported in 1995 "persistent and significant human rights abuses" in India including "police brutality against those in custody, incommunicado detention without charges for prolonged periods under special security laws," and extrajudicial killings. Further, India has not allowed some international human rights organizations to enter the country. See DEP'T ST. BULL., HUMAN RIGHTS AND DEMOCRACY IN ASIA, April 3, 1995, at 273, available in WESTLAW, USDPTSTDIS.

¹⁸¹ *Chahal*, *supra* note 45.

¹⁸² Germany and Switzerland have also listed India as a "safe" country.

India is not a "safe" country.

The Court was able to back into the "safe" country issue by holding that Mr. Chahal, because of his prominent exposure, would be subject to persecution if deported to India. Although the facts were thin as to the persecution Mr. Chahal had suffered on the one occasion he returned to India, the Court was satisfied that his past persecution, together with anticipated ill treatment, would subject him to conduct prohibited by Article 3 if deported.

This decision provides the Court with a vehicle to address a "safe" country case intentionally. It can continue the evolutionary process it began with *Soering*, developing a rule based on *Chahal*: if a refugee applicant has suffered or would suffer persecution if expelled to a particular country, the applicant must be protected by the ECHR even if that country is "safe." The ECHR does not allow derogation from the requirements of Article 3. Even in the face of alleged terrorism, a Contracting State was not allowed to protect itself by deporting the suspected terrorist. Therefore, a state should not be allowed to protect itself from refugees standing at the gates simply because the refugees passed through "safe" countries.

States are increasingly reacting to refugee flows. The Shengen countries¹⁸³ required Italy to add police and troops to its border patrols to prevent immigration.¹⁸⁴ Swiss voters narrowly voted down a referendum that would have disqualified all illegal immigrants from receiving refugee status and would have limited asylum seekers' rights of appeal.¹⁸⁵ The German Federal Constitutional Court recently upheld the new asylum law, finding that provisions rejecting asylees from "safe" countries without a hearing were constitutional.¹⁸⁶ In France, the National Front party elected officials in the 1995 municipal elections; the party wants to send half of France's *legal* immigrants to their countries of origin.¹⁸⁷

¹⁸³ Belgium, the Netherlands, Luxembourg, France, Germany, Spain, and Portugal.

¹⁸⁴ Jean-Louis De la Vaissiere, *AGENCE FR. PRESSE*, April 11, 1995.

¹⁸⁵ *Switzerland Narrowly Rejects Anti-Immigrant Amendment*, DOW JONES INT'L NEWS SERVICE, Dec. 1, 1996.

¹⁸⁶ *See German Court Upholds Tough Asylum Law*, L.A. TIMES, May 15, 1996, at 4; *see also Constitutional Court Upholds Restrictive Asylum Law*, *AGENCE FR. PRESSE*, May 14, 1996.

¹⁸⁷ *See France: Rightists Accused of Racial Murder that Shocked Marseille*, INTER PRESS SERV., Feb. 24, 1995; *see also France's Next President Must Court*, CHRISTIAN SCI. MONITOR, Apr. 25, 1995, at 6.

In this anti-immigration environment, national courts have held that asylum seekers should not be expelled because, although they did not qualify as refugees, "aliens may not be returned to their country of origin if that would imply a violation of one or more of the rights laid down in the ECHR."¹⁸⁸ In addition, Contracting States are reviewing the practices of particular states to determine whether the applicant would be subjected to possible persecution prohibited under Article 3.¹⁸⁹ These decisions bode well for asylum seekers. A determination by the European Court that specifically addresses the "safe" country concept and shows a willingness to carefully evaluate the merits of a claim will provide Contracting States with additional authority upon which to protect refugees.

CONCLUSION

Current migration is caused by events sadly similar to those that led to the creation of an international refugee organization in 1946: political, religious, and nationality-based persecution. Large-scale turmoil in Eastern Europe, Asia, the Middle East and Africa, evidenced by mass killings, bombings, rape, kidnappings, and loss of economic stability, cause people to leave their homes. Military and rebel armies forcibly expel others.

Western Europe is protecting itself from these refugees by designating not only other Western European states, but also Central and Eastern Europe and African states, as "safe" countries. The European Court has created case law to protect refugees from expulsion under Article 3, leading one judge to warn: "[T]his development of case law must not transform the institutions of the Convention into bodies supervising application of the [Refugee] Convention, nor substitute Article 3 of the European Convention on Human Rights for that convention."¹⁹⁰

¹⁸⁸ Ten Case Abstracts, IJRL/0181, 6 I.J.R.L. 110, 113-14 (1994); Ten Case Abstracts, IJRL/0198, 0200, and 0204, 6 I.J.R.L. 472, 472-79 (1994). Ten Case Abstracts, IJRL/0226, 7 I.J.R.L. 129, 140-41 (1995).

¹⁸⁹ Ten Case Abstracts, IJRL/0158, 5 I.J.R.L. 466, 468-9 (1993); Ten Case Abstracts, IJRL/0232, 7 I.J.R.L. 513, 519-533 (1995). In addition, a UK asylum judge revoked a deportation order to Belgium of five asylum seekers from Togo, Iraq, and Turkey because the judge said he did not believe Belgium was "safe." Belgium had an eight-day limit for asylum claims, but there were conflicting opinions as to whether the time began to run from the date of first entry or date of return. Tendler, *Belgium Unsafe, Says Asylum Judge*, TIMES (London), Apr. 20, 1996, available in 1996 WL 6490101.

¹⁹⁰ Vijayanathan, *supra* note 176 (Separate Opinion of Mr. CL Rozakis).

The European Court, to be an effective mechanism for protecting human rights, must play a role in supervising states' practices related to refugees. The benignly-named, yet dangerously-implemented, "safe" country concept is one practice that the European Court must strictly supervise through decisions that reflect the original purpose of the ECHR, to secure enumerated rights and freedoms.

