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# **ASYLUM AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

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## Introduction

A key attribute of national sovereignty is the right of states to admit or exclude aliens from their territory.<sup>1</sup> Only if exclusion would involve a breach of some other provision of international law are states bound to admit aliens. The concept of asylum is the most important example of the latter principle. Although Article 14 of the Universal Declaration of Human Rights expressly protected the right to “seek and enjoy asylum from persecution”, this right is not found in the texts of other general instruments of international human rights law such as the ICCPR or the European Convention on Human Rights. When those instruments were drafted the Geneva Convention on the Status of Refugees was thought to constitute a *lex specialis* which fully covered the need.

The Geneva Convention treats those who are recognised as falling within the scope of its protection as a privileged group and provides them with a comprehensive bundle of rights. In the early years of the Convention recognition as a refugee in Europe was not a problem. Everyone knew who refugees were and UNHCR saw no need to produce a handbook to guide asylum determination procedures until 1979. In the new millennium the Geneva Convention’s provisions are being used in an increasingly legalistic way and invoked to exclude those at risk from the protection from expulsion the Convention was designed, in part, to provide. That role is now more effectively performed by general human rights instruments and in particular by the European Convention on Human Rights. The Geneva Convention remains effective – and essential – as an instrument which provides additional benefits to an increasingly shrinking group of people who are still considered as deserving by governments. Its protection is not accorded to many of those who are at risk of expulsion to situations where they would face torture or inhuman and degrading treatment. Even if not expelled, those who are refused recognition as refugees are often left drifting in a state of undocumented uncertainty.

Both the Convention for the Protection of Human Rights and Fundamental Freedoms, which was opened for signature in November 1950, and the Geneva Convention on the Status of Refugees, opened for signature the following year, were drafted as the polarisation in international relations which marked the Cold War set in. Both conventions reflect the concerns and thinking of the period. Over the next fifty years, when the conflict between the two opposing ideologies dominated international relations, the definition of a refugee set out in Article 1.a (2)<sup>2</sup> and the principle of *non-refoulement* established in Article 33 (1)<sup>3</sup> of the Geneva Convention became well recognised in international law. Drafted in the wake of the forced migration of the mid-twentieth century, the Geneva Convention was designed to provide a legal status for those persons who found themselves outside the country of their nationality or habitual residence and in fear of persecution as a consequence of “events occurring in Europe before 1st January 1951”. The European Convention on Human Rights on the other hand set out to provide an express regional recognition of most of the rights set out in the Universal Declaration of Human Rights (UDHR) and to provide international mechanisms to police their implementation. It did not however contain any provision to reflect Article 14 of the UDHR which guaranteed the right to seek and enjoy asylum from persecution.

## **Background considerations: movement of refugees in Europe from the Cold War to the present**

While the Geneva Convention was primarily an instrument devised to meet a humanitarian need by providing a proper legal framework for asylum, it was also an instrument which was intended to serve the aims of Cold War politics. The emphasis was on providing protection for those who fled from those countries behind the Iron Curtain where the furtherance of collective Communist ideals took precedence over the observance of the civil and political rights of the individual. The declared sympathies of such refugees were with Western political values.

In 1967 the New York Protocol to the Geneva Convention removed the reference to 1 January 1951,<sup>4</sup> and almost all the countries<sup>5</sup> which were then members of the Council of Europe subsequently removed the geographical limitation so that those who arrived from any part of the world were protected. This was recognition that the refugee question was not simply

an isolated European phenomenon. During the years of rapid economic expansion the 1960s, the Cold War meant that very few refugees or asylum-seekers were able to reach western countries and arrivals were, in any case, welcomed to feed the expanding economies' demand for increased labour.

The first oil crisis in 1973 and the resulting recession brought growing unemployment and opposition to new immigration. Less than thirty years after the fall of the Nazi regime in Germany the ugly spectre of racism was also beginning to be an issue in Europe again.

At the same time events such as Idi Amin's seizure of power in Uganda in 1971 and General Pinochet's coup in Chile in 1973 prompted thousands to flee the repression which followed in those countries. Although the vast majority of refugees from any conflict or oppression tend to flee only as far as neighbouring countries – only 5% of the world's refugees are in Europe – the increasing availability of air travel meant that some were able to reach the developed world. The numbers involved were, however, small compared with the potential flood of both refugees and migrants facilitated by the fall of the Iron Curtain in November 1989 and the crumbling of the eastern bloc, where movement had previously been tightly controlled.

States have found their commitment to their obligations under international law strained as a result of this greater freedom of movement, while concerns have also arisen that economic migrants may be misusing asylum legislation to secure entry to countries which have closed normal immigration routes.<sup>6</sup> There has been a significant increase in the numbers of asylum-seekers and refugees. They have come from within the Council of Europe itself (for example, Turkish Kurds or Roma from the former communist states). The events in the former Yugoslavia of the last decade of the old millennium, and particularly of the Spring of 1999, created refugee movements in Europe on a scale unseen since the second world war. Others have fled from repression and civil war in countries further afield such as Sri Lanka, Somalia, Zaire, Rwanda, and Algeria. This influx has prompted western European states to introduce increasingly restrictive legislation and practices on asylum. In particular, the fifteen member states of the European Union (EU) have sought to enhance their co-operation through intergovernmental measures and through agreements such as the Schengen Agreement on the suppression of controls at common frontiers and the Dublin Convention Determining the State Responsible for Examin-

ing Applications for Asylum Lodged in one of the Member States of the European Community.<sup>7</sup>

A full list of the agreements relating to refugees adopted under the so-called “third pillar” of the Treaty of Maastricht is attached as an appendix to this study. The Treaty of Amsterdam have moved many of these areas into the “first pillar” so that they will now be a part of EU law and not merely parallel agreements between member states. What is important to note is that all the “third pillar” measures refer **exclusively** to those who fall within the definition contained in Article 1 of the Geneva Convention or who claim its protection. The increasingly important role played by the obligations of states under the European Convention on Human Rights in this field is excluded from application under the third pillar measures.

In some cases refugees failing to gain entry to western European countries have been pushed back to the states of central and eastern Europe and the former Soviet Union, who often lack the mechanisms, legislation or experience to handle cases. More and more of these states are joining the Council of Europe, and membership of that body has expanded rapidly.

The provisions of the European Convention on Human Rights and the case-law which has built up under that Convention now bind 41 countries (as at 1 May 2000). The experience of the Council of Europe in brokering agreements, conventions, recommendations, resolutions and declarations complementary to refugee instruments, the forum for discussion which it offers and the body of case-law built up by the European Commission and Court of Human Rights is proving invaluable in assisting these states – indeed all Council of Europe member states – to ensure that their humanitarian obligations under international law are upheld and the rights of refugees protected.<sup>8</sup>



## **Part One: The role of the European Convention on Human Rights in protection from expulsion**

The Geneva Convention has no international supervision procedure. There is no right of individual petition to a judicial body comparable to that which exists under Articles 34<sup>9</sup> and 35<sup>10</sup> of the European Convention on Human Rights. However, a large body of specialised case-law has developed on its interpretation and application by national courts. But there is no uniformity of approach and the result has been a patchwork of disparate decisions. Since there is no express provision relating to asylum contained in its articles, the European Convention on Human Rights might therefore seem to be of only marginal relevance to those seeking asylum in Europe.<sup>11</sup> This is far from the case. The substantial body of jurisprudence that has emerged between 1989 and 2000 now sets the standards for the rights of asylum-seekers across Europe.

### **The applicability of the Convention to asylum cases**

The first issue considered by the convention organs and eventually ruled on by the Court was whether the European Convention on Human Rights applied at all to asylum situations. The Court has repeatedly stated that there is no right to asylum as such contained in the Convention.<sup>12</sup>

Article 1 of the European Convention on Human Rights states:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1.

A territorial limit is thus set on the reach of the Convention.

Article 3 of the European Convention on Human Rights provides:

No one shall be subjected to torture or inhuman or degrading treatment or punishment.

This prohibition is absolute. It permits of no justification or limitation and is non-derogable under Article 15 of the European Convention on Human Rights even in times of war or other public emergency threatening the life of the nation.

At first sight, and this was strongly argued by the United Kingdom Government in the cases discussed below, these two articles taken together might seem to absolve governments from any responsibility under the European Convention on Human Rights for events which occur *outside* their jurisdiction. The Convention clearly cannot govern the actions of states which are not parties to it. But the prohibition on torture and inhuman and degrading treatment, and other non-derogable rights, loses much of its force if states can expose people to such treatment at the hands of others by expelling them to countries where they are at risk.

From the 1960s the Commission and Court have regularly considered the question of whether extradition, expulsion, or deportation to a country where an individual is likely to be subjected to such treatment is contrary to Article 3.<sup>13</sup>

The question of applicability was first considered in detail by the European Court of Human Rights in the case of *Soering v. the United Kingdom*, a case concerning not political asylum but extradition.<sup>14</sup> The American State of Virginia wished to extradite Mr Soering from Britain to stand trial on capital charges. At the time prisoners in Virginia often remained on death row awaiting execution for between six and eight years. It was alleged that this constituted inhuman and degrading treatment contrary to Article 3.

The Court noted the existence of other international instruments, such as the Geneva Convention and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which expressly and specifically address the question of sending individuals to a country where they will be exposed to the risk of prohibited treatment. It nevertheless found that the application of the European Convention on Human Rights was not excluded by the existence of the other instruments. Their existence could not "absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction".<sup>15</sup>

The Court observed:

The fact that a specialised treaty should spell out in detail a specific obligation attaching to a prohibition on torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3.<sup>16</sup>

The Court noted that the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.<sup>17</sup> It found that the inherent obligation under Article 3 also extends to cases in which the fugitive would be faced in the receiving state by a real risk of exposure to inhuman or degrading treatment proscribed by that article. The Court noted that:

It is a liability incurred by the Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to such treatment.<sup>18</sup>

Shortly after the judgment in *Soering*, the case of *Cruz Varas v. Sweden* came before the Court. It was the first case which concerned a refused asylum-seeker. The Court held that the principle enunciated in *Soering* applied to decisions to expel as well as to extradite.<sup>19</sup> This view was reaffirmed in the judgment in *Vilvarajah v. the United Kingdom*.<sup>20</sup>

The question of the applicability of Article 3 to expulsion cases is now generally considered to be established beyond doubt. As late as 1995, the United Kingdom Government nevertheless still tried to put forward the contrary argument in the case of *Chahal*.<sup>21</sup> This was firmly rejected by the Commission which reaffirmed the principle laid down in *Vilvarajah*:

expulsion by the Contracting State of an asylum-seeker may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned. [...]<sup>22</sup>

The Government eventually accepted the applicability of the Convention in their pleadings before the Court.<sup>23</sup>

The huge refugee outflows from the former Republic of Yugoslavia into neighbouring Macedonia and Albania which occurred in the Spring of 1999 were triggered by the actions of the NATO countries who could therefore in theory have been held accountable in Strasbourg for their failure to make adequate preparation to provide for them. In the event the

refugees were reluctant to take any action which might prejudice their eligibility for aid or resettlement in the West.

Article 3 is not, however, the only provision which is relevant to asylum questions. As we shall see expulsion of refused asylum-seekers may also raise issues under Article 2 (right to life), Article 5 (right to liberty and security of the person), Article 6 (right to a fair trial), Article 7 (prohibition on retroactive criminal punishment), Article 3 of Protocol No. 7 (exclusion of own nationals), Article 4 of Protocol No. 7 (prohibition on double jeopardy), Article 8 (right to respect for family and private life), Article 4 of Protocol No. 4 (collective expulsion of aliens) and Article 13 (right to an effective remedy). Issues also arise under Article 8 (family life) and Article 8 (private life in relation to status) and Article 16 (political rights of aliens) for those who are not at immediate risk of expulsion.

There are many situations which fall outside the scope of the Geneva Convention but are protected by the European Convention on Human Rights.

### ***1. Alienage***

To attract the protection of the Geneva Convention a person must, under Article 1 of that instrument, be outside the country of his or her nationality or habitual residence.

However, the European Convention on Human Rights has a wider application.

The Commission considered in the case of *Fadele v. the United Kingdom*<sup>24</sup> that Article 3 could apply to cases where British citizen children were being constructively exiled from the United Kingdom by the deportation of their custodial parent and where the conditions which they would face on return could amount to inhuman and degrading treatment.

The same reasoning as was applied in *Fadele* would apply to situations where a refused asylum-seeker's close family members include, as they sometimes do, nationals of the expelling state. The constructive deportation of such nationals would infringe Article 3 (taken together with Article 8) if it could be shown they would be exposed to the risk of ill-treatment should they accompany the refused asylum-seeker. The same principle would also apply to the extradition of a state's own nationals. For those

states which are parties to it these cases would also raise issues under Article 3 of Protocol No. 4 to the Convention, which states that:

1. No one shall be expelled, by means either of an individual or of a collective measure from the territory of the state of which he is a national.
2. No one shall be deprived of the right to enter the territory of a state of which he is a national<sup>25</sup>

The Court has recently communicated to the Latvian government the case of *Slineko*<sup>26</sup> concerning the expulsion from Latvia of “ex-USSR citizens” and their family members.

## **2. Persecution for a “Convention reason”**

To attract the protection of the Refugee Convention a person must fear persecution for one of the reasons set out in Article 1 of that instrument: “race, religion, nationality, membership of a particular social group or political opinion”.

No similar qualification applies to Article 3 of the European Convention on Human Rights. It applies equally to the process of extradition as well as to the removal of refused asylum-seekers or of those who have been granted humanitarian status, but are not recognised convention refugees, or to those who have been recognised as refugees but have lost the protection of the Geneva Convention. If there is a real risk of exposure to ill-treatment the reasons for it are immaterial. The Commission found a violation in the case of *Nasri v. France* in a case where a deaf-mute was being expelled. The Court did not consider it necessary to rule on the Article 3 point as it found a violation of Article 8. The case of *H.L.R. v. France* concerned a convicted drug dealer who had provided evidence at his trial which had led to the conviction of several other members of a Colombian drugs ring and had significantly impeded its operation. On his release from prison he was to be returned to Colombia where he would have been at risk from revenge by the members of the cartel. The Court held that the reasons for his anticipated ill-treatment were not material to the protection guaranteed under Article 3. *D. v. the United Kingdom* concerned the proposed expulsion of a person dying of AIDS to his home country where he had no family or material resources, where there was no social welfare provision available to him and no treatment for AIDS. He was in no sense being persecuted for

a Convention reason. The Court found that his expulsion would constitute a violation of Article 3.

### ***3. State responsibility***

State responsibility for the feared persecution is an inherent part of the definition contained in Article 1 of the Geneva Convention which was drafted to protect those who had for one reason or another lost the protection of their own state. Under the Geneva Convention it is generally considered that a refugee must fear persecution resulting from a failure of state protection. In contrast, the Court held in *Soering* that in looking at the responsibility of the expelling state under Article 3 of the European Convention on Human Rights:

There is no question of adjudicating on or establishing the responsibility of the receiving country.<sup>27</sup>

A number of European States do not grant asylum to those whose claims relate to persecution by “non-state agents” such as terrorist groups, guerrilla armies, or where there is a civil war. It has been argued before the Court<sup>28</sup> that the United Nations Convention against Torture expressly provides that ill-treatment must involve the responsibility of state authorities and that the European Convention on Human Rights should be applied in the same way. In *T.I.*<sup>29</sup> the Court noted that the German courts not only exclude persecution by non-state agents as a ground for refusing asylum, but, despite the jurisprudence of the European Court, in applying the provision of their law which expressly refers to Article 3 of the European Convention on Human Rights do not recognise threats from non-state agents as qualifying an individual for protection. In *Tatete v. Switzerland*<sup>30</sup> the Swiss government had also argued that the Convention did not apply because the risk did not emanate from agents of the state.

The Court has now expressly rejected this argument in several cases. In *Ahmed v. Austria*,<sup>31</sup> the applicant was threatened with return to Somalia, a country in the grip of various warlords and with no government as such, and consequently no state to exercise responsibility. The Convention organs considered that the absence of state authority was immaterial to the risk to which the applicant would be exposed. The Court re-iterated this view in *H.L.R. v. France*.<sup>32</sup> The French Government sought to argue before the Commission and the Court<sup>33</sup> that as other international instruments

such as the United Nations Convention against Torture and Other Inhuman and Degrading Treatment or Punishment expressly provide that the ill-treatment must involve the responsibility of state authorities, the Convention should be interpreted in this way too. In *D. v. the United Kingdom*<sup>34</sup> it was accepted by all parties that the Government of St Kitts could not be held responsible for the poverty of the island that led to the absence of the socio-medical support on which the applicant relied in the United Kingdom. The same principle has recently been applied in *B.B. v. France*.<sup>35</sup>

#### **4. Exclusion clauses**

Article 1 (f) of the Geneva Convention states that:

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, or a 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 non-political 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.

This curious exception crept into the Geneva Convention during the *travaux préparatoires*. As a leading commentator has observed:

It is difficult to see why a person who, before becoming a refugee has been convicted of a serious crime and has served his sentence, should forever be debarred from refugee status. Such a rule would seem to run counter to the generally accepted principle of penal law that a person who has been punished for an offence should suffer no further prejudice on account of the offence committed.<sup>36</sup>

In the case of *Paez v. Sweden*<sup>37</sup> the applicant had been refused asylum in Sweden on the basis of Article 1 (f) of the Geneva Convention. When his brother won his case before the UN CAT (28 April 1997) the Swedish Government felt constrained to grant both brothers protection from expulsion.

As was noted at the outset, international human rights law provides protection to all human beings and that protection is absolute where Article 3 is engaged. The Geneva Convention provides protection for only a privileged group of people and that protection is easily lost.

Article 33 (2) of the Geneva Convention further provides:

A refugee may lose the protection of the Geneva Convention if there are reasonable grounds for regarding him as a danger to the security of the country in which he is or if he is convicted of a particularly serious crime and constitutes a danger to the community.

The protection accorded by Article 3 of the European Convention on Human Rights is not limited in this way.

This was stated by the Court in *Soering*, a case concerning extradition to face charges of a brutal murder allegedly committed before admission to the territory of the respondent state. The Court held:

“It would hardly be compatible with the underlying values of the Convention [...] were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, **however heinous the crime allegedly committed.**”<sup>38</sup> [Emphasis added.]

However, the Court went on to observe that “inherent in the whole Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”.<sup>39</sup> It noted further that the danger for a state obliged to harbour a fugitive was “a consideration which must be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases”.<sup>40</sup>

Unfortunately, the judgment does not fully explain what was meant by this comment. It is difficult to see how the notion of inhuman and degrading treatment anticipated in the state of destination can be interpreted by reference to the perceived danger to the expelling state of keeping the individual concerned on its territory.

The Court was perhaps merely signifying that it did not seek to undermine the foundations of extradition and that it did not wish its judgment in *Soering* to be taken as a message to governments that they were obliged to harbour dangerous fugitives from justice unless both the risk of exposure and the threshold of severity tests were clearly met. But this is quite different from taking the danger to the expelling state into account in assessing the dangers in the state of proposed destination.



The Court has now considered these comments again. In *Chahal*, the United Kingdom Government relied on Grotius, *De Iure Belli ac Pacis* to support the proposition that asylum is to be enjoyed by people “who suffer from undeserved enmity, not those who have done something that is injurious to human society or to other men.”<sup>41</sup>

The Court rejected this argument, as the Commission had. It re-affirmed the absolute character, permitting no exception, of this provision which had been noted by the Court in *Vilvarajah*.<sup>42</sup> It found itself “unable to accept the Government’s submission that Article 3 of the Convention may have implied limitations entitling the State to expel a person because of the requirements of national security”.<sup>43</sup> It stated:

The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion ... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.

The Court thus endorsed the Commission’s view that:

While it is accepted that this may result in undesirable individuals finding a safe haven in a Contracting State, the Commission observes that the State is not without means of dealing with any threats posed thereby, the individual being subject to the ordinary criminal laws of the country concerned.

The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.

In *Chahal*, the Court also considered the dicta in *Soering* quoted above. It held, in a somewhat Delphic comment, that:

[I]t should not be inferred from the Court’s remarks concerning the risks of undermining the foundations of extradition ... that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a state’s responsibility under Article 3 is engaged.<sup>44</sup>

It did not, however, offer any suggestion as to what was to be inferred from the remarks.

The judgment in *Ahmed v. Austria* was delivered some three weeks after that in *Chahal*. Mr Ahmed, a recognised refugee in Austria, was deprived

of his Geneva Convention status because of criminal convictions and a residence ban was imposed on him. The Court found that the conditions in Somalia which had led to him being granted refugee status still prevailed and that his criminal convictions were therefore irrelevant. The point now seems beyond dispute.<sup>45</sup>

### **5. Meeting the “real risk” test**

In the *Cruz Varas* judgment of 20 March 1991 the Court noted the following principles as being relevant to the assessment of the risk of ill-treatment:

In determining whether substantial grounds have been shown for believing the existence of a real risk of treatment contrary to Article 3 the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained ex proprio motu.

Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party of the well-foundedness or otherwise of an applicant's fears.<sup>46</sup>

Where the applicant has not yet been deported, because the government has complied with a Rule 36 indication (now Rule 39; see below at page 39) as in *Chahal* and *Ahmed*, “the material point in time must be that of the Court's consideration of the case”. The Court in both cases went on to state:

although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive.<sup>47</sup>

In *Ahmed* the Court re-affirmed the position it had adopted in *Chahal*.

This approach may not be entirely consistent with the obligation contained in Article 1 to “secure” the Convention rights<sup>48</sup> in domestic law and practice since it is clear that the individuals would have been expelled (and therefore presumably also ill-treated) but for the intervention of the Convention organs. It is difficult to sustain the argument that the state has discharged its obligations to secure the domestic protection of an absolute

right for a vulnerable individual if expulsion is only prevented by recourse to Rule 39. However the approach of the Court to these cases is that a violation of the Convention only occurs when there is an act of expulsion rather than the decision to expel. In *B.B. v. France*,<sup>49</sup> the applicant contested the proposal to strike out his case because the residence order, which had been made in his favour, could be rescinded at any time and did not constitute a residence permit. The Court stated “the complaint concerns the effects of enforcement of the exclusion order and does not raise any independent issue requiring separate examination”.

The third principle reiterated in *Cruz Varas* was:

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case.<sup>50</sup>

Citing these dicta with approval in *Vilvarajah v. the United Kingdom* the Court went on to add:

The Court’s examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe.

The Court will consider all relevant evidence. In *X v. the Federal Republic of Germany*,<sup>51</sup> for example, it found that the behaviour of the applicant provided a good indication of whether he truly considered himself to be in real danger.

At first sight this approach might seem to be a liberal charter for the protection of refugees’ rights as against the concerns of the states which were articulated as follows by the United Kingdom Government in *Vilvarajah*:

The consequences of finding a breach of Article 3 in the present case would be that all other persons in similar situations, facing random risks on account of civil turmoil in the State where they lived would be entitled not to be removed, thereby permitting the entry of a potentially very large class of people with the attendant serious social and economic consequences.<sup>52</sup>

In practice, and perhaps to alleviate those concerns, the approach of the Commission and Court has been highly cautious. The Court is silently conscious of the fact that the Strasbourg system of supervision needs to

retain the fullest possible support and compliance of the Contracting Parties if it is to be at all effective.

The trend in European Convention on Human Rights jurisprudence until recently had been for the Convention organs to repeat that the governments who examine many thousands of asylum applications from a given country in any year, and who have access to information through their overseas diplomatic posts, are in principle best placed to assess the situation which prevails in the country of destination.<sup>53</sup>

The Court (and the Commission before it) is understandably reluctant to find that applicants have discharged the burden of proof which rests on them, in the face of findings of insufficient risk, or lack of credibility, by experienced and well-informed governments. The principles which it clearly reiterates in the jurisprudence will rarely result in a finding of a violation on the facts.

In *Vilvarajah* the Court agreed with the United Kingdom Government that the evidence did not show that the applicants' position was any worse than the generality of other members of the Tamil community returning to their country. "A mere possibility of ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to a breach of Article 3."<sup>54</sup> It found no breach of Article 3 despite the fact that the applicants, who had been returned to Sri Lanka before the case was examined by the Commission and Court, had in fact been subjected to treatment contrary to Article 3 on their return. The reason given by the Court in exculpating the United Kingdom Government was that "there existed no special distinguishing features in their cases that could or should have enabled the Secretary of State to foresee that they would be treated in this way". The United Kingdom's own independent tribunal which was only able to consider the appeal against the refusal of asylum on the merits after the applicants had been returned had had no difficulty deciding that asylum had been wrongly refused. The Strasbourg Court was not persuaded by its findings that the Government had erred. (The Commission, when considering the same case, had been evenly divided as to whether there was a breach or not – the President's casting vote being required to find no breach).

It is difficult to reconcile the absolute nature of the protection offered by Article 3 with the Convention organs view that an individual must show

that he or she is relatively more at risk of prohibited treatment than others in similar vulnerable circumstances.

Many cases are rejected at the admissibility level because the Court is inclined to attach more weight to the governments' assessment of the situation than the applicant's fears and thus does not avail itself of the opportunity to examine the merits of the case. More than a hundred cases were declared inadmissible between May 1997 and April 2000, mostly on the ground that they were "manifestly ill-founded".

In some cases the absence of procedural safeguards in the expelling country will play an important role. *Hassanpour-Omrani v. Sweden*<sup>55</sup> and *Jabari v. Turkey*<sup>56</sup> both concerned women who feared stoning on return to Iran because of adultery. The Swedish case was declared inadmissible by the Commission. In contrast the Turkish case, where there were also no procedural safeguards, was declared admissible by the Court

In some cases where the Commission has found the test was not met, the applicants have been expelled. In some cases they have, like the applicants in *Vilvarajah*, been ill-treated on return.<sup>57</sup> In other cases the role of other treaty bodies can be important. In *Paez v. Sweden*, two brothers had applied for asylum in Sweden. Both were refused on similar grounds (Article 1 (f) Geneva Convention). One brother then made an application to the European Commission of Human Rights, the other to the United Nations Committee Against Torture. The Commission found in December 1996 that the applicant would not be at risk if returned to Peru.<sup>58</sup> The United Nations Committee Against Torture found in April 1997<sup>59</sup> that the return of the applicant's brother would expose him to prohibited treatment and underlined the absolute nature of the protection. The Swedish Government then granted the applicant to the Strasbourg institutions a residence permit. The Court held that the case could be struck off without deciding whether or not the proposed expulsion would have been a violation of the Convention.

*B.B. v. France*<sup>60</sup> concerned the proposed expulsion to Zaire of an AIDS sufferer whose four brothers had all been granted asylum in France and Belgium. The applicant was made subject to a compulsory residence order, but not granted a residence permit, after the Commission's Report found that his expulsion would violate Article 3. The application was therefore struck off by the Court.

A significant number of cases are struck off in this way each year because, following the making of a complaint to the European Court, the Government decides to withdraw the threat of expulsion. In *Abdurahim Incedur-sun v. the Netherlands*,<sup>61</sup> the Commission in its Report had found no violation of Article 2, Protocol No. 6 or Article 3. However, the applicants had brought their complaint before the Court under Protocol No. 9 of the Convention. Once the Filtering Committee had passed the application for onward reference to the Court, the Netherlands Government granted a residence permit. This mirrors the conduct of the same government in the case of *Nsona*.<sup>62</sup>

The Report of the Commission in *Chahal* marked a departure from the Commission's earlier approach to the Government's assessment of the situation in the country of destination. The Commission was impressed by the evidence submitted by the applicants as to the situation in India.

On the basis of the material before it the Court also found that the applicants would be at risk. They were unable to find in the material provided by the respondent government "any solid evidence that the police are now under democratic control or that the judiciary has been able fully to reassert its own independent authority in the Punjab". In particular they noted the views of the United Nations Special Rapporteur on Torture and dismissed the assurances given by the Indian Government to the United Kingdom Government as not providing an adequate guarantee of safety.<sup>63</sup> In *Bahaddar*<sup>64</sup> the Commission had expressed the view that expulsion to Bangladesh would be a violation of Article 3, although the Court did not rule on the point since the claim was rejected for failure to exhaust domestic remedies. In *T.I.*<sup>65</sup> the Court expressed its concerns that the applicant would be at risk if returned to Sri Lanka although the German courts had rejected his claims as (*inter alia*) lacking credibility.

In *Hatami v. Sweden*<sup>66</sup> the Commission also substituted its own evaluation of the evidence for that of the Swedish authorities, finding that the applicant's claim to have been tortured was credible, that the Swedish authorities had placed reliance on a ten minute interview conducted without effective interpretation, and that they had reached their decision on an incorrect interpretation of the available facts. In *Hatami* the Commission for the first time echoed (without express reference) the case-law of the United Nations Torture Committee to the effect that "complete accuracy is seldom to be expected from victims of torture".<sup>67</sup>

## ***6. The significance of the jurisprudence of the UN CAT Committee***

Important principles are now being established by the committee set up under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but not all Council of Europe countries have accepted the right of individual petition under that instrument.<sup>68</sup> In *Mutombo v. Switzerland* the committee considered whether the proposed expulsion of a refused asylum-seeker to Zaire would constitute a breach of Article 3 of the Convention. The committee addressed itself particularly to the provision of Article 3 (2) of the Torture Convention, which states that a consistent pattern of gross and massive violations of human rights are circumstances which a State Party should take into account when deciding on expulsion. As well as commenting on the general human rights abuses in Zaire, it was specifically concerned that, as Zaire was not at the time party to the Convention, the applicant would lose the protection of the Convention altogether if returned to Zaire and he would no longer have the legal possibility of applying to the Committee for protection. Other decisions have given important guidance as to the weight to be attached to the piecemeal emergence of a torture victim's story and the assessment of the internal flight alternative.<sup>69</sup> In the case of *Kisoki v. Sweden*<sup>70</sup> the CAT Committee expressly recognised that it was normal for people who have been tortured to disclose the detailed story of their experiences piecemeal and that this should not damage an asylum claimant's credibility. In *Alan v. Switzerland*<sup>71</sup> the Committee considered the feasibility of an internal flight alternative and concluded that such an alternative was not available in Turkey.

### *The relationship between the case-law of the UN CAT and the European Convention on Human Rights*

The UN Torture Convention's jurisprudence in this field is not just informative but has a legal role in the interpretation of the European Convention on Human Rights. Article 53<sup>72</sup> of the European Convention on Human Rights provides that a provision of the Convention may not be applied in a way that is inconsistent with the other international obligations of the state in question.<sup>73</sup>

## **7. The extraterritorial application of other articles**

### *Article 2 – The right to life*<sup>74</sup>

The Court found in *Soering*<sup>75</sup> that it could not be considered a breach of Article 2 read together with Article 3 to expel a person to face the death penalty since Article 2 did not outlaw capital punishment. However, for those states which are parties to Protocol No. 6 to the Convention, the Commission has since held that it can be a breach of that protocol to extradite or expel a person to another state where there is a real risk that the death penalty will be imposed.<sup>76</sup> The asylum-seeker or refugee who would face capital charges or execution on return will thus be protected from expulsion in a state which has ratified Protocol No. 6. The Article 2 issue has not generally been raised in expulsion cases. Although the applicant in *H.L.R. v. France*<sup>77</sup> alleged that his life would be at risk if returned to Colombia, the matter was considered under Article 3. The Commission declared *D. v. the United Kingdom*<sup>78</sup> admissible under Article 2 but the Court preferred to examine it under Article 3 as did the Commission in *Bahaddar*.<sup>79</sup> In *M.A.R. v. the United Kingdom*<sup>80</sup> the Commission also declared admissible under Article 2 a case where the applicant alleged he could face the death penalty on return to Iran.<sup>81</sup>

### *Article 6 – The right to a fair trial*

The Court held in *Soering*<sup>82</sup> that:

the right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of fair trial in the requesting country. however the facts of the present case do not disclose such a risk.

In *Drozd and Janousek v. France and Spain*<sup>83</sup> the Court noted that “the Convention does not require the Contracting Parties to impose its standards on third states or territories”, and referred to the importance of strengthening international co-operation in the administration of justice. It went on to state that “the Contracting states are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice”.



This obligation must apply *a fortiori* in cases of threatened expulsion to face trial in a country which flagrantly abuses the most fundamental principles of fair trial and the Commission and Court have recognised this in declaring two complaints admissible.<sup>84</sup>

As will be discussed below, Article 6 does not apply to the asylum determination process in the receiving country.

#### *Article 7 – Freedom from retroactive criminal offences and punishment*<sup>85</sup>

It would seem logical to apply the reasoning previously adduced in relation to Article 6 of the Convention to Article 7. The argument in favour of this approach is strengthened by the fact that – like Articles 2, 3, and 4 (1), but unlike Article 6 – it cannot be derogated from even in time of war or national emergency.<sup>86</sup>

#### *Article 4 of Protocol No. 7 – Prohibition on double jeopardy*

The Commission held that the prohibition on double jeopardy only applies to trial and conviction for the same offence in the same jurisdiction and does not protect an individual from double jeopardy where the prosecutions take place in different jurisdictions.<sup>87</sup> There could be situations, however, where such double jeopardy might constitute inhumane or degrading treatment or a breach of Article 6 of the kind declared admissible in *M.A.R.* above.

#### *Article 8 – Right to respect for family and private life*

This article may be engaged in two ways in the context of asylum and expulsion or exclusion.

#### *The right to moral and physical integrity*

Where an examination of the real risk test is conducted and it is adjudged that the “threshold of severity” test laid down under Article 3 has not been met, the individual may nevertheless be at a real risk of being subjected to treatment which violates his right to respect for his “moral and physical integrity”. The Convention organs have been keenly aware of the absolute nature of Article 3. It is illimitable – that is, no limitation can be put on its application. It is unjustifiable – that is, no argument can be advanced to exculpate the offending state. It is non-derogable – that is, it is binding

even in time of war or national emergency. Not unsurprisingly, it is a stringent test and, if it is to retain its absolute character, must remain so. Nevertheless the Convention organs have not felt comfortable that the “threshold of severity” test will not be met in many cases where the actual or threatened treatment is nevertheless unacceptable in a democratic society. There has consequently evolved through the jurisprudence of the Commission and the Court the notion of the right to “moral and physical integrity” as an aspect of the right to respect for private life protected under Article 8.

In the case of *Costello-Roberts v. the United Kingdom*<sup>88</sup> the Court considered that physical and psychological ill-treatment which fell below the threshold of Article 3 might nevertheless be in breach of Article 8. In expulsion cases the point has yet to be considered by the Court, though it has recently declared admissible the case of *Bensaid v. the United Kingdom*<sup>89</sup> on this ground as well as Article 3. In *D.* the Court declined to consider the complaints under Article 8 as it found that the expulsion would amount to a violation of Article 3.

The crucial difference between the protection offered by Article 8 and Article 3 lies not just in the application of the threshold of severity test. An interference with Article 8 rights, unlike those protected under Article 3, can be justified under the second paragraph of that article. Whether or not such an interference constitutes a violation of Convention rights will depend on whether it is lawful, pursued a legitimate aim and is proportionate to the aim pursued. The concept of proportionality runs through the whole Convention. The Court's consideration of the case of *Conka v. Belgium*,<sup>90</sup> which concerns the expulsion of Slovak Roma asylum-seekers, is awaited in this context. Under EU legislation, Slovak nationals have a guaranteed right<sup>91</sup> to move as economic migrants to any part of the European Union in order to establish themselves in self employment or business similar to the rights enjoyed by EU nationals themselves.<sup>92</sup>

#### *Article 4 of Protocol No. 4 – Prohibition on the collective expulsion of aliens*<sup>93</sup>

The Commission found in *Becker v. Denmark*<sup>94</sup> that the phrase *collective expulsion* refers to “any measure of the competent authority compelling aliens as a group to leave the country, except where such measure is taken after and on the basis of a reasonable and objective examination of the

particular cases of each individual alien in the group. In *A v. the Netherlands*<sup>95</sup> the Commission found that the fact that a number of aliens from the same country had all been refused asylum in similar terms did not mean that they had been collectively expelled when there was evidence that these cases had been individually examined. A complaint under this provision has recently been communicated to the Belgian Government concerning the expulsion of a number of Slovak Roma from Belgium<sup>96</sup> in the case of *Conka* referred to above.

### **8. Expulsion to “safe” countries**

As regards the material scope of both Conventions it is well settled that neither provides for a right to be granted asylum but only to be protected from “refoulement”. Article 33 (1) of the Geneva Convention, in parallel to Article 3 of the European Convention on Human Rights, establishes only the principle of *non-refoulement*, which requires Contracting States to refrain from expelling or returning refugees to territories where their lives or freedom would be threatened.<sup>97</sup> It follows that there is, in principle, no prohibition on the return of a refugee to a country in which he will be safe, however reluctant he may be to go there.<sup>98</sup> It is from this concept that the widespread practice has developed of returning refugees to the territories of states through which they passed to reach the country where they applied for asylum. Such states are often referred to as countries of “first asylum” or as “safe third countries.”

The practice of returning asylum-seekers to a “safe third country” has been common since the 1980s. During the 1990s it was applied more systematically, and has been incorporated into the national asylum legislation of most western European countries and forms a major plank in the construction of international co-operation particularly within the European Union.

The criteria applied by states in identifying safe third countries are by no means uniform. This is particularly the case when an asylum-seeker has passed through one or more intermediate countries. Certain states simply apply a geographical criterion. Others place emphasis on the time element. Some take account of the nature of the asylum-seeker’s sojourn in an intermediate country. Others have regard to the fugitive’s intentions. Some apply a combination of various criteria. Others do not apply any specific criteria.<sup>99</sup>

These criteria continue to differ widely, although there has been a widespread tendency to tighten them. Increasingly states have either sought to conclude, or to update, bilateral re-admission agreements allowing the return of asylum-seekers who face deportation after rejection of their application or whose claims are deemed manifestly ill-founded.

In particular the Dublin and Schengen Conventions, which were both signed in June 1990, seek amongst other things to identify which signatory country is responsible for substantive consideration of an asylum application and thus to apply the "safe third country" concept on a systematic basis. Under the two conventions Contracting States agree, under certain prescribed circumstances, to admit or readmit to their territory persons who have applied for asylum in another Contracting State in order to consider their claim.

This policy is also found in the London Declarations made by the European Community [now European Union, EU] immigration ministers on 30 November-1 December 1992,<sup>100</sup> although this declaration also envisages the possibility of removing asylum-seekers to non-EU countries without those countries' consent. It can be seen that even this degree of clarification and co-operation on the "safe third country" concept applies not only to EU states but is also imposed on other European states, who may not have developed the legislation and practices to deal with asylum applications equitably and efficiently.<sup>101</sup>

As a result of the adoption of the Dublin Convention and a phalanx of bilateral re-admission agreements, many states are now sending people back, not directly to the state where they fear ill-treatment, but to a state which may then expel them onwards to that state.<sup>102</sup>

There are two fundamental potential dangers for the asylum-seeker inherent in the "safe third country" concept. The first is that he or she will be "bounced" back and forth from one alleged "safe third country" to another, as successive states refuse to examine their application substantively. Whilst not contravening the Geneva Convention, this practice raises serious issues under the European Convention on Human Rights. The Commission has considered the problem of "refugees in orbit" under Article 3:

Under certain circumstances the repeated expulsion of a foreigner without identity papers or travel documents and whose state of origin is unknown or refuses to accept him could raise a problem under Article 3 of the Convention which prohibits inhuman or degrading treatment.<sup>103</sup>

While the Dublin Convention has sought to identify the state responsible for assessing an asylum application and thus to eliminate the phenomenon of "refugees in orbit," the practice of "bouncing back" asylum-seekers nevertheless continues. The United Nations High Commissioner for Refugees (UNHCR) sees such practices as contrary to the premise that "an asylum-seeker cannot be removed to a third country in order that he apply for asylum there, **unless that country agrees to admit him to its territory as an asylum-seeker and consider his request.**"<sup>104</sup> [emphasis added].

Concerns have also been raised that some Council of Europe member states, which are generally deemed to be safe third countries, are not necessarily safe for certain types of asylum-seeker because of the lack of a harmonised approach and consistency of procedural safeguards. For example, Austrian law did not protect deserters, or conscientious objectors, even if they faced the death penalty in their home state, while civil war victims who cited subjection to arbitrary arrest, torture or rape as reasons for being granted asylum could be turned down.<sup>105</sup> As late as 1997 Kosovan Albanians who feared serving in Milosevic's army were refused asylum in Germany.<sup>106</sup>

The second danger is that, in a process of "chain removal," the asylum-seeker is ultimately expelled from one country to the next and back to his or her country of origin without a substantive examination (or re-examination) of his or her claim.

On this issue the United Nations High Commissioner for Refugees has written:

The policy whereby an asylum-seeker arriving from a so-called "safe third country" is returned to that country without his substantive claim having been considered is based on the assumption that there is an international principle by virtue of which a person who has left his country in order to escape persecution must apply for recognition of refugee status and/or for asylum in the first safe country he has been able to reach. Although the persistent repetition of this assumption has led many to accept it uncritically, the reality is that no such an international principle exists and that the claim which has been advanced to this effect appears to be the product of a misreading of the principle of "first country of asylum". As such, removals of asylum-seekers to third countries carried out solely on the basis of this supposed principle risk running counter to accepted principles of refugee protection and may involve breaches of the international obligations of the removing country under the 1951 Convention.<sup>107</sup>

The extent to which the responsibility of the expelling state is engaged under the European Convention on Human Rights in these situations has been examined by both the Commission and now the Court.

In *Amuur v. France*<sup>108</sup> a complaint under Article 3 was declared inadmissible by the Commission because the Somali applicants were returned to Syria, where they were not at risk and there was no evidence to suggest that Syria would have returned them on to Somalia.

In the recent case of *T.I. v. the United Kingdom*<sup>109</sup> the Court went further. It made it clear that under the Convention Contracting Parties' obligations do not stop at protecting people from expulsion to states where they will risk ill-treatment. The Convention also forbids expulsion to states which do not have the necessary guarantees to protect individuals from onward expulsion to situations where they will be at risk. This clarification of Convention law is of crucial importance in the light of the many re-admission agreements which are now being concluded, particularly in central and eastern Europe and the former Soviet Union. The case of *T.I.* concerned an asylum seeker who had been refused asylum in Germany because he feared persecution by non-state agents and because his claim was not considered credible by the German authorities. He was being returned there by the United Kingdom under the Dublin Convention. On the facts his claim to asylum, had it been examined in the United Kingdom, would have been likely to succeed. The European Court considered that the evidence showed grave concerns that he would be at risk if returned to Sri Lanka. The Court accepted the German Government's assurances that he would be able to submit a second asylum claim. Although it was conceded that he would be unlikely to succeed in this or in obtaining protection under the

provisions relating to the application of Article 3 of the European Convention on Human Rights (see above) the Court accepted that there was in place a discretionary procedure which would fill the “protection gap”. The case was therefore declared inadmissible.

Some two weeks after this decision another asylum seeker was removed from the United Kingdom to Germany. Despite the assurances given to the Court in *T.I.* by the Government of Germany he was not permitted to submit a fresh claim and was sent by the border guards onward to his own country where he was arrested and ill-treated. Concern has been expressed that the decision in *T.I.* did not meet the Convention’s requirement that the rights guaranteed must be “practical and effective not theoretical and illusory”.

The UNHCR defines a “country of first asylum” as “the country where the person has already found protection” and maintains that the “fact that the person *could have sought protection* in a country where he was previously present is irrelevant. [...] Legal protection cannot be obtained by default or be implied. It has to be explicitly granted by the State, [...] It must therefore be concluded that a person who requests to be admitted to a country as a refugee upon arriving from a country where he did not receive protection in the sense described above, *cannot be returned to that country on the basis of the principle of ‘first country of asylum’.*”<sup>110</sup> It maintains that “an examination of the internationally accepted principles relating to asylum reveals that none of them suggest – much less prescribe – that the right to seek asylum has to be exercised in any particular country, or that a person who has been forced to escape his country to save his life or freedom would forfeit his right to seek asylum if he does not exercise it in the first country whose territory he has entered”.<sup>111</sup>

It is interesting to note that because the Dublin Convention and the other EU “third pillar” measures refer only to those who seek Geneva Convention refugee status, an individual who simply sought the protection of Article 3 European Convention on Human Rights could presumably not be made subject to Dublin Convention procedures.

Another concept which has been used increasingly by western European states has been that of the “safe country of origin”. Asylum-seekers whose country of origin is generally deemed to be free of persecution can be returned there, often without substantive consideration of their individual

circumstances. The asylum applications of individuals from such safe countries are generally subjected to consideration under an accelerated procedure. Individuals can sometimes even be refused leave to enter the country where they are trying to seek asylum.<sup>112</sup>

The case of *Irruretagoyena v. France*<sup>113</sup> concerned an ETA member who feared reprisals from the Spanish police on his return. His application for a Rule 36 (as it then was) indication was refused and he was handed over to the Spanish police who subjected him to ill treatment including the administration of electric shocks. His complaint was rejected, *inter alia*, because the CPT<sup>114</sup> had recently reported a diminution of the well-documented practices of the Spanish police contrary to Article 3 and it did not therefore consider that at the time of his expulsion there were serious reasons for believing that he would be submitted to the ill-treatment which he subsequently suffered. The Commission also noted, however, that he could bring a complaint against Spain in relation to the torture which he suffered at the hands of the police on his return.<sup>115</sup> The Court noted that he had not made an asylum application in France. Since he was an EEA national he had a directly effective right to reside in France under EU law.

The European Convention on Human Rights organs seem to share the approach in practice if not in theory of the rest of the European Union (Belgium excepted) that other EU member states are safe countries of origin. Belgium, Finland, Ireland and Italy are the only EU states that do not operate the safe country of origin principle.<sup>116</sup>

The concepts both of the "safe third country" and the "safe country of origin" have been used to define asylum applications as "inadmissible", or as "manifestly unfounded". The asylum applications of those who have come through or, from such countries are generally subjected to an accelerated procedure. This often precludes a substantive examination of the application.<sup>117</sup>

The test under the European Convention on Human Rights remains the same for all these cases. Is there a real risk of exposure to ill-treatment, either in the state of proposed destination or through chain refoulement? If there has been an arguable violation, was there an effective remedy?



## ***9. Procedural guarantees and the right to an effective remedy where expulsion is threatened***

The rights guaranteed under the Convention and set out above depend on the buttressing of procedural guarantees if they are to be practical and effective not theoretical and illusory as the Convention requires.<sup>118</sup>

### *Access to asylum determination procedures*

Since the mid-1980s western European states have consistently tightened regulations and procedures in order to reduce the incentives for asylum-seekers to come to western Europe and thus to weed out those whose claims are “manifestly unfounded”. In particular, states have sought to stop individuals with such claims from entering the country and gaining access to the full asylum procedure.

Visa requirements have been introduced for those coming from areas of conflict such as the former Yugoslavia or Sri Lanka. Asylum-seekers coming from safe countries of origin or via “safe third states” are “fast tracked” and denied access to full asylum procedures. The concept of liability of carriers for transporting those without valid papers has been applied with increased rigour and the payment of fines has been imposed, in addition to the obligation on the airline to bear the cost of returning such passengers to their country of departure. As the UNHCR reported in 1993, “where possible, governments prefer exclusion to expulsion.”<sup>119</sup>

Western European states have also introduced accelerated asylum procedures for those with “manifestly unfounded” claims and sought with limited success to speed up procedures so that the long period spent waiting for a claim to be considered does not act as an incentive for those asylum-seekers who are viewed as economic migrants and whose claims will eventually be rejected. Fingerprinting and photographing of asylum-seekers have also become more prevalent in order to discourage multiple and fraudulent asylum applications.<sup>120</sup> The Schengen signatories have set up a computerised Schengen Information System (SIS) to enable participating states to avoid having to consider applications from asylum-seekers whose applications have been rejected in another state.

## Visas

At national level, visa restrictions have the effect of limiting asylum-seekers' access to the countries which impose them. The Commission found many years ago that in principle the acts of visa officials in an embassy can engage the responsibility of the state concerned (*X v. the Federal Republic of Germany*).<sup>121</sup> The Court in *Loizidou v. Turkey* (Preliminary Objections)<sup>122</sup> upheld the view which it had adopted in *Drozdz and Janousek v. France and Spain*<sup>123</sup> that the responsibility of Contracting Parties can be engaged by the acts of their authorities whether performed within or outside national boundaries. This is so even if they also produce effects outside their own territory. Several cases before the Convention organs have concerned the refusal of visas to family members.<sup>124</sup> In most jurisdictions it is not possible to be granted a visa as an asylum-seeker, and for reasons of alienage it is not possible to be recognised as a refugee unless one is outside one's own country. In principle the Convention applies to an asylum-seeker who seeks a visa from an embassy in order to flee to that embassy's country. In practice, because most diplomatic posts employ local staff in their visa sections, disclosing the basis of an asylum application before the applicant is securely outside the territory is fraught with danger.

Visa requirements have, however, been used extensively by western European states, which in many instances now also require visas for passengers in transit.<sup>125</sup>

## Carriers' liability

The enforcement of carriers' liability has also been used to limit to access of asylum-seekers. Carriers' liability imposes on the airline (or less frequently, the ferry operator) responsibility for transporting someone who arrived without valid papers to another state. The airline is expected to bear the cost of returning refused passengers to their country of departure and increasingly also face a fine. In the United States carriers have been fined for bringing in aliens without valid papers since the 1950s, but in Europe it is only in recent years that this practice has been introduced. Earlier it was generally considered sufficient to oblige the carrier to bear the costs of returning illegal aliens. Fines were imposed from 1987 in Belgium, Germany and the United Kingdom and in Denmark from 1989. Since then most of Europe has followed suit.<sup>126</sup>

Legislation on carriers' liability has differed widely from state to state and has been implemented with varying degrees of thoroughness.<sup>127</sup> The implementation of carriers' liability has been much stricter in Denmark, Germany and, especially the United Kingdom, than in other EU states. The situation has been summed up by the Parliamentary Assembly of the Council of Europe, as follows:

Some countries have imposed airline sanctions which undermine the basic principles of refugee protection and the right of refugees to claim asylum while placing a considerable legal, administrative and financial burden upon carriers, and moving the responsibility away from the immigration officers.<sup>128</sup>

The Court has not yet ruled on the application of visa regimes or carriers sanctions in asylum-related cases.

### *On arrival at the port*

Those who are going to be swiftly turned round are often kept in the transit zones of airports. It has sometimes been argued by Governments that since these people have not technically entered the country they do not fall under Article 1 of the Convention as they are still in the "international zone". The Court in *Amuur* made it clear that no such concept existed in respect of the interpretation the term of jurisdiction under Article 1 of the Convention,<sup>129</sup> and that the responsibilities of the state in relation to expulsion under Article 3 are engaged wherever the action of the state occurs. In *D. v. the United Kingdom* the Court noted "regardless of whether he ever entered the United Kingdom in the technical sense it is to be noted that he has been physically present there and thus within the jurisdiction within the meaning of Article 1. It is for the respondent state to secure to the applicant the rights guaranteed under Article 3."<sup>130</sup>

Firstly, as explained above, the general application of the "safe third country" concept can result in an individual being successively deported to his country of origin where he might face inhuman or degrading treatment, with the result that the first deporting state might ultimately be in breach both of Article 3 of the European Convention on Human Rights and Article 33 (1) of the Geneva Convention. The use of the "safe country of origin" concept carries similar risks.

Secondly, the European Commission of Human Rights has clearly ruled in the cases of both *Harabi* and *Giama*<sup>131</sup> that the repeated "bouncing back"

(or “shuttlecocking”) of asylum-seekers is in contravention of Article 3 of the European Convention on Human Rights.

Thirdly, it would appear that there is a danger that the increased use of fast track procedures, against which there is often no appeal, could be found to deny an asylum-seeker access to an independent and impartial body capable of reviewing a decision to return him or her to a country in which she or he claims that she or he will be persecuted. Legislative changes introduced in recent years in most western European countries have sought to limit the number of applicants gaining access to asylum procedures (as well as to restrict illegal immigration). Lambert writes:

Procedural guarantees (i.e., the right to be heard, the right to be assisted by counsel and an interpreter, the right to contact the UNHCR or a voluntary organization) appear to be better guaranteed once the asylum-seeker has been authorized access to the territory. Most facilities are, in fact, denied at the border where refugees need them most to be allowed entry in the country and access to the procedure. This practice is common to all countries and shows the present willingness of states to consider [the] fight against illegal immigration a priority over the protection of even the most basic human rights.<sup>132</sup>

### *Right to appeal or review and Article 13*

Article 13 of the European Convention on Human Rights provides:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 13 has been consistently interpreted by the Court as requiring a remedy in domestic law only in respect of grievances which can be regarded as “arguable” in terms of the Convention.<sup>133</sup>

An individual only needs an arguable claim that he or she is at risk for the protection of Article 13 to be engaged. The Court in the case of *Powell and Rayner v. the United Kingdom*<sup>134</sup> held that a grievance could not be called unarguable even if it had been eventually adjudged by the Convention organs to be “manifestly ill-founded”. The Court recognised that “manifestly ill-founded” was a term of art “which extends further than the literal meaning of the word manifest would suggest at first reading”. It recognised that some “serious claims” might ultimately be rejected as manifestly ill-founded despite their arguable character.

It follows that under the Convention an asylum claimant who has an arguable case must have access to both asylum (or other protection) determination procedures and a national remedy in the case of refusal and the consequent threatened expulsion. The fact that the claim may later be found to be “manifestly ill-founded” in European Convention on Human Rights terms is not sufficient to excuse Contracting Parties from satisfying this obligation. As the Court noted in *Powell and Rayner*, the concept of “manifestly ill-founded” in Strasbourg terms is a broad one. Although the expression “manifestly unfounded” is used in various European domestic legal systems its meaning is not necessarily the same as “manifestly ill founded” in the European Convention on Human Rights.

Whether or not an available remedy against a refusal of asylum is effective was considered in the case of *Vilvarajah*.<sup>135</sup> In that case the refused asylum-seekers had no right of appeal on the merits before they were sent back to Sri Lanka. The only available remedy was the administrative one of judicial review. This remedy only permits the United Kingdom courts to examine the procedural propriety of a decision and not the merits. The European Court, overturning the Commission’s findings in the same case, was, however, satisfied that the way in which judicial review had operated in the applicants’ case had permitted the British courts to subject the decision to the “most anxious scrutiny”. It was therefore an effective remedy. Two judges (both familiar with the operation of the common law) dissented, holding that a remedy which could not examine the merits could not be described as effective.

The Commission has since considered the matter again in *Chahal* where it found that judicial review was inadequate because of the restrictions which applied in national security cases. The basic rule is that a remedy cannot be effective if it does not have suspensive effect. In *Vijaynathan and Pushparajah v. France*<sup>136</sup> the Commission and Court attached considerable importance to the existence of an appeal with suspensive effect when rejecting the claim for non-exhaustion of domestic remedies

At national level, recent legislation introduced in western European states has tended to reduce rights of appeal against a rejection of an asylum claim. Such measures have been seen not least as a way of dealing with the massive increase in the number of asylum applications, but also to speeding up what can otherwise amount to a lengthy and cumbersome process.

As the *Golder* and *Klass* cases have shown, the right set out in Article 13 of the European Convention on Human Rights to “an effective remedy before a national authority” for those “whose rights and freedoms as set forth in this Convention are violated” does not necessarily have in all instances to be a judicial authority in the strict sense.<sup>137</sup> Indeed, only Germany of the major western European states provides for an appeals system through the normal courts. Other states provide for a special tribunal or commission. Such a body was only established in Belgium (as the Permanent Refugees’ Appeals Commission) from 1989, and in Sweden (as the Aliens’ Appeals Board) in January 1992. In the United Kingdom it was not until the 1993 Asylum and Immigration and Appeals Act came into force that all asylum-seekers refused entry were granted the right of appeal (to the Immigration Appeals Authority).

Among the limitations to the right of appeal which have been introduced has been the abolition in the Netherlands of a second instance of appeal to the highest court, which was revoked under legislation approved in December 1993.<sup>138</sup> Furthermore, in France, the Federal Republic of Germany and Sweden, an appeal against a negative asylum decision does not necessarily have suspensive effect, especially if the application is deemed “manifestly ill-founded”.<sup>139</sup>

### *The application of Article 6 – the right to a fair trial*

The Commission and Court have been invited on innumerable occasions to find that the proceedings for the determination of an asylum application, or for the review of a refusal to grant asylum, or to accede to a request to quash a decision to expel, have failed to comply with the standards of fairness set out in Article 6. More than forty decisions since 1981<sup>140</sup> now make it clear that Article 6 does not apply to expulsion cases. This is because the right to protection from expulsion is seen not as a civil right but as an act of public authorities governed by public law.<sup>141</sup> Whilst the right to an effective remedy may demand a degree of fairness in the implementation of the remedy, and some of the guarantees of Article 6 may by analogy be transposed into the requirement that there should be “inherent procedural safeguards” this cannot be founded directly on Article 6 itself.

However, the Grand Chamber has recently declared admissible the case of *Maaouia v. France*,<sup>142</sup> which concerns the application of Article 6 to depor-

tation and exclusion orders connected to criminal proceedings. A decision on the merits is awaited.

### ***10. The subsidiary protection of the European Court of Human Rights***

#### *The right of individual petition under the European Convention on Human Rights*

Even when refugee instruments have the same force in internal law as the European Convention on Human Rights, the latter, because of the existence of the right of individual petition under Articles 34 and 35 of the Convention, always affords an additional safeguard to refugees asserting rights against states. There is no comparable international judicial mechanism for the uniform application of the Geneva Convention.

Even where a state's treaty obligations under international law are normally enforceable domestically, lack of familiarity with both Conventions may lead to an imperfect application of their provisions. Given the extensive moves by western European states to tighten asylum legislation, the right to petition the Court provided by the European Convention is an important safeguard against attempts by states to curtail the protection offered in international law to refugees and asylum-seekers. As seen above, recourse to the Convention organs will frequently achieve the protection which was not accorded by the domestic authorities. The European Court of Human Rights has, however, been reluctant to find itself cast in the role of a European court of appeal for unsatisfactory asylum decisions. It has often repeated that it considers the governments to be best placed to assess the risk to which any given individual might be exposed. The Court expressed this view in both *Cruz Varas*<sup>143</sup> and *Vilvarajah*.<sup>144</sup>

#### *Interim measures under Rule 39 of the Rules of Procedure*

Rule 39 of the Court's Rules of Procedure replaced Rule 36 of the Commission's rules and Rule 36 of the Court's rules. The new and old rules are substantially the same. Rule 39 provides:

The Chamber, or where appropriate its President, may at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interest of the parties or the proper conduct of the proceedings before it.

The case of *Cruz Varas v. Sweden*<sup>145</sup> considered the role of “Rule 36 indications”. In that case a Chilean had been refused asylum in Sweden and was the subject of removal directions. The Commission indicated to the Swedish Government that he should not be removed pending consideration of the case, but Sweden did not comply with the indication.

The Commission and Court then had to consider whether this failure to comply constituted a breach of the Convention. The Court came to the conclusion that it did not. It noted, however, that, in the event of a finding of a substantive violation of the Convention, a failure to comply with a Rule 36 indication would be a matter for serious concern. In its judgment, the Court gave important guidance as to the role and scope of Rule 36.

The Court noted that an indication under Rule 36 would only be given

where it appears that irreparable damage would result from the implementation of the measure complained of. This might be the case where expulsion or extradition is imminent and the applicant alleges that he is likely to be treated contrary to Article 2 (the right to life) or [Article] 3 of the Convention in the receiving state. Normally Rule 36 (now Rule 39) will only apply to cases involving allegations of this nature. Further there must exist a certain degree of probability that a person would be subjected to treatment in breach of these provisions if sent to the country concerned. Evidence must thus be presented to the Commission which reveals such a risk.

This is one of the issues in the case of *Conka v. Belgium*,<sup>146</sup> which the Court has recently communicated to the Belgium Government. The applicants and 74 other gypsy refugees who had been refused asylum were put on board a plane bound for Slovakia, notwithstanding the fact that the Court had applied Rule 39 to indicate to the Belgium Government that they should not be expelled pending the Court's consideration of the case.

### ***11. Forced expulsion of reluctant deportees***

The standards demanded by Article 3 of the Convention (and the moral and physical integrity dimension of Article 8) apply not only to the treatment or situation which will await a person in the country of destination, but also to the manner in which the expulsion is carried out. Amnesty International has documented a significant increase in the instances of life-threatening and sometimes fatal methods of restraint which have been used to carry out forced expulsions. The Committee on Migration, Refugees and Demography in the Parliamentary Assembly of the Council of



Europe is at the time of writing preparing a Report on forced expulsions. Methods such as the cushion treatment (to stifle protests), which risk (and have actually caused) suffocation, the administration of drugs, the taping over of mouth and nose, confinement in a straitjacket, handcuffing to a wheelchair or airline seat, and forcing adults to undertake long journeys wearing incontinence pads so that they do not have to be unshackled to use the toilet, are all in regular use.<sup>147</sup> They have all been documented, as has resorting to beating and kicking by the police and immigration officers. The Court has not yet examined any complaint about these cases, but the jurisprudence relating to the use of force by police officers in the context of arrest relating to criminal charges is instructive.

The Commission and Court have held that inhuman treatment includes such treatment as deliberately causes severe mental and physical suffering. In addition to condemning the treatment the Court in *Ribitsch*<sup>148</sup> added a very strong statement that any recourse to physical force which has not been made "strictly necessary" by his own conduct diminishes human dignity and is in principle a violation of Article 3. In *Hurtado*<sup>149</sup> the applicant had defecated on arrest and had been unable to change his clothes until the next day. The Commission found that such treatment was humiliating and debasing and thus in violation of Article 3. In the same case however they found that having his ribs cracked by an officer kneeling on him whilst effecting the arrest was not a violation of Article 3 because of the circumstances surrounding the arrest. In *Selmouni v. France*<sup>150</sup> physical and psychological abuse in a police station were found to be in violation of Article 3. Reflecting the standards laid down in the UN Convention Against Torture, the Court has also found that a failure by the authorities to take prompt effective measures to investigate allegations of violations of Article 3 and to bring those accused to justice violates the "inherent procedural safeguards" of the Article.<sup>151</sup> As far as the use of drugs is concerned, the Court has considered this in the context of the compulsory treatment of a psychiatric patient. As it was satisfied that being strapped down and subjected to the compulsory administration of drugs constituted a "therapeutic necessity in line with current medical practice", it found no violation.<sup>152</sup> The situation might be different where there is, as in the case of forced expulsion, no therapeutic element involved. The Court has recently communicated to the Belgium Government the case of *Conka*,<sup>153</sup> where it is alleged that asylum-seekers were marked on their arms with identification numbers in indelible ink.

If, taking all the circumstance into account, the treatment has reached the requisite threshold of severity required by Article 3, then nothing can justify it. The age, sex and health of the deportee will be relevant in deciding this. However, the concept of proportionality which runs through all Convention case-law is of particular importance in this field. In determining whether the Article 3 threshold is met, or whether, if the treatment falls under Article 8 (moral and physical integrity) the test will be whether the deportation could have been effected in a way which constituted less of an infringement to the dignity of the deportee. In order to determine whether there were "relevant and sufficient reasons" for the interference, the Convention demands that the State should show that other methods were investigated and rejected and that the force that was used was no more than was absolutely necessary.

Because of resistance from the airlines, and complaints by pilots, crew and other passengers travelling with forced deportees, many states have now adopted a practice of chartering planes on a weekly basis to return illegal immigrants and those whose asylum applications have been rejected to their country of origin.<sup>154</sup> This is now a common practice throughout Europe and has led to concerns that factors associated with the efficient economic use of the charter planes may lead to precipitate decision-making in order to fill expensive empty seats.

## **Part Two: The role of the European Convention on Human Rights in situations not involving protection from expulsion**

### **1. Detention of asylum-seekers and those threatened with expulsion**

Article 5 of the European Convention on Human Rights provides that:

Everyone has a right to liberty and security of person. No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

[...]

1.f. the lawful arrest or detention of a person to prevent his affecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

[...]

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been a victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Currently, asylum-seekers in European countries are often subject to extended periods of detention while their applications are considered. This process can still take years in spite of repeated efforts by governments to reduce the length of time taken to consider applications. The case law on Article 5, paragraph 1.f, is sparse but the Commission has had occasion to consider whether the detention of persons pending removal violated the obligations under Article 5, paragraphs 1.f and 4. In the case of *Caprino v. the United Kingdom*,<sup>155</sup> the Commission recalled its earlier case-law in

which it consistently understood the word “lawful” in Article 5, paragraph 1.f to mean lawful under the applicable domestic law.

Since Article 18 of the Convention provides that the restrictions permitted under the Convention shall not be applied for any purpose other than those for which they have been prescribed, the detention of a proposed deportee can only be justified under Article 5, paragraph 1.f, if it is related to the deportation proceedings and not for any other purpose. The question arose as to whether this requires that there should actually be a deportation (or removal) order in force, or merely that deportation (or removal) proceedings have been instituted.

The Commission in *Caprino* took the latter view, and found that there was an adequate relationship between the detention and the deportation proceedings. It did not consider, however, whether the United Kingdom law provided the necessary safeguards under Article 5, paragraph 4, since the power of the Courts to review the detention was very limited because it was a national security case. Interestingly, a majority of the Commission in its report in *Chahal* (also a national security case) found a violation of Article 5, paragraph 1.f, and found it unnecessary to examine the alleged violation of Article 5, paragraph 4, despite its earlier jurisprudence in the *Caprino* case. It preferred to consider the question of the judicial review of the lawfulness of the detention under Article 13, where it found a violation. One member of the Commission expressed disagreement with the majority view and found a violation of Article 5, paragraph 4.<sup>156</sup>

In a series of decisions the Commission has held that if proceedings are not conducted with the necessary diligence the detention ceases to be justifiable under Article 5, paragraph 1.f. In *Chahal*, the Commission followed the guidance given by the Court in the extradition case *Kolompar*.<sup>157</sup> It found a violation of 5 (1) holding that five years was excessive and that the proceedings had not been pursued with the requisite speed. It also noted that there was no abuse of the judicial review process by the applicant in order to delay his deportation.

The Court adopted the reverse position in its judgment in *Chahal*. In this case, it found no violation of Article 5 (1), holding that the complexities of the case justified the long period of detention, and that the advisory panel procedure used in national security cases provided “an important safeguard against arbitrariness”.<sup>158</sup> It also re-affirmed that “it is immaterial, for the

purpose of Article 5 (1) (f), whether the underlying decision to expel can be justified under national or Convention law".<sup>159</sup> The Court did, however, find a violation of Article 5 (4), but failed to award compensation in accordance with Article 5 (5), despite suggesting that there might well have been a compensation order had there been a violation of Article 5 (1). It is unclear why the Court made a distinction between Article 5 (1) and Article 5 (4) in this way, which finds no echo in the wording of Article 5 (5). Mr Chahal has since brought domestic proceedings claiming compensation for the violation of Article 5 (4).

Many asylum-seekers arriving in Europe are either not in possession of any identity documents or those documents which they have are clearly false. If their asylum claims are rejected the fear is that they will abscond if not detained, but without documentation it is difficult to remove them. The Court ruled in the case of *Bozano v. France*<sup>160</sup> that detention was not with a view to deportation when it was in fact to circumvent the requirements of the extradition procedure. In *Ali v. Switzerland*<sup>161</sup> the Swiss wanted to expel the applicant to Somalia, but since he had no travel document this was not possible and the Commission held that the detention was not therefore "with a view to expulsion" and was in violation of Article 5 (1).<sup>162</sup>

### **Detention pending determination of an asylum application**

The text of Article 5 (1) (f) refers to preventing an "unauthorised entry" into the country. It is not entirely clear whether a person who has submitted an asylum application is attempting an "unauthorised" entry. This consideration is of particular importance in the context of the Roma asylum-seekers from central and eastern Europe who are making asylum claims within the member states of the European Union. Most of those claiming asylum – and therefore detained – could settle freely in the EU if they were informed of their rights under the Europe Agreements and chose to exercise them. A recent parliamentary question asked in the United Kingdom disclosed that the rights which they have under the Europe Agreements<sup>163</sup> to reside as economic migrants throughout the EU are not taken into account when deciding on detention, nor those who are potentially eligible under these Agreements informed of those rights whilst in detention or at the time of making their asylum claims. The case of *Conka v. Belgium*,<sup>164</sup> currently pending before the Court, may throw some light on this issue.

On 2 September 1991 the Parliamentary Assembly of the Council of Europe drew up a report on the arrival of asylum-seekers at European airports.<sup>165</sup> This was followed in June 1994 by a recommendation of the Committee of Ministers on guidelines to inspire practices of the member states of the Council of Europe concerning the arrival of asylum-seekers at European airports.<sup>166</sup>

The Commission has had the opportunity to consider at great length the whole question of the detention of asylum-seekers on arrival. In the case of *Amuur v. France*, it found that the “detention” in the international zone of the airport (extended to a nearby hotel) was not a deprivation of liberty of the kind governed by Article 5, because the “detainees” were at liberty to leave for another country.<sup>167</sup> They were restricted in that they were not permitted to enter France. They found consequently that it was immaterial that the “detention” had been declared illegal by the French courts. Not surprisingly, ten members of the Commission dissented from this view and the case was referred to the Court. The Court found that there had been a violation of Article 5 (1). It stated “where a national law authorises deprivation of liberty – especially in respect of a foreign asylum-seeker – it must be sufficiently accessible and precise in order to avoid all risk of arbitrariness. These characteristics are of fundamental importance with regard to asylum-seekers at airport particularly in view of the need to reconcile the protection of fundamental rights with the requirements of states’ immigration policies”. The Court considered the French regulations in force at the time and noted that “at the material time none of these texts allowed the ordinary courts to review the conditions under which aliens were held or, if necessary, to impose a limit on the administrative authorities as regards the length of time for which they were held. They did not provide for legal humanitarian and social assistance, nor did they lay down procedures and time-limits for access to such assistance so that asylum-seekers like the applicants could take the necessary steps”.<sup>168</sup> In the context of Article 53 of the Convention, the decision of the UN Human Rights Committee in *A. v. Australia*<sup>169</sup> is significant, in that it established that immigration detention is not automatically lawful because it is lawful in domestic law (though the converse is true) and that detained asylum-seekers must have access to legal advice and assistance if they request it.

## **The role of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

Detention may also raise issues under Article 3 (or Article 8, moral and physical integrity) relating to duration and conditions. In the case of two Lebanese asylum-seekers who were kept in the “transit zone” of Vienna Schwechat airport in March 1990, a majority of the European Commission of Human Rights found that this detention did not contravene Article 3 of the European Convention on Human Rights. It stated that “the conditions of the applicants’ stay” in the transit area may have been uncomfortable but did not reach the level of severity which would violate Article 3.

The dissenting members of the Commission in *Amuur* had noted in particular that the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), which is authorised under its Convention to visit places where people are deprived of their liberty, felt entitled to include the Hotel Arcade at Roissy airport in its itinerary when visiting France. The CPT was established to provide a preventive measure to complement the right of individual petition under the European Convention on Human Rights in order to strengthen further the protection from torture or inhuman and degrading treatment. Its mandate covers all places of detention.

The CPT has visited places where asylum-seekers are detained in many countries, and has been particularly concerned about the vulnerable position of asylum-seekers.<sup>170</sup> The CPT suggested to the Greek Government that they should be particularly careful when choosing police officers to work in the Holding Centre for Aliens at Athens airport, given language considerations and difficulties in communication generally. The Court has recently declared admissible a case against Greece<sup>171</sup> where the conditions of detention at police headquarters had already been severely criticised by the CPT.<sup>172</sup> The Swedes were asked as a matter of urgency to take steps to ensure that persons detained under the aliens legislation were not held on prison premises after some sixteen asylum-seekers were found held in a remand centre with a routine indistinguishable from that for prisoners. One Committee report on Austria noted, as all the reports do, difficulties with language and interpretation, and more particularly difficulties in contacting families and lawyers, with conflicting evidence as to whether there was in practice access to legal advice.

The Human Rights Committee of the Covenant on International Civil and Political Rights found in July 1995 that in the United Kingdom:

The treatment of illegal immigrants, asylum-seekers and those ordered to be deported gives cause for concern. The Committee observes that the incarceration of persons ordered to be deported and particularly the length of their detention may not be necessary in every case and it is gravely concerned at incidences of the use of excessive force in the execution of deportation orders. The Committee also notes with concern that adequate legal representation is not available for asylum-seekers effectively to challenge administrative decisions.<sup>173</sup>

Of considerable concern in the context of the importance of the fight against racism in immigration and asylum matters, is the recent decision of the Court in the case of *Aslan v. Malta*.<sup>174</sup> The applicant, a Turkish Muslim seeking entry into Malta with friends, was detained for ten hours, during which time he alleged that one of the police officers insulted them for being Muslims and Turkish, making references to long past conflicts between their respective countries, and that violence was used against them. The Court found that the making of racist and other provocative utterances by State officials during border controls did not amount to degrading treatment. It further found that such conduct was not even admissible as a violation of Article 8 which it held, "does not guarantee the right to honour and dignity in the absence of any prejudice to an applicant's right to respect for his private life". The Court was careful to state that it did not condone the racist remarks but nevertheless could not bring itself to condemn them.

## 2. Family life

The relevance of Article 8's private life rubric (the right to respect for moral and physical integrity) has already been looked at in the context of protection from expulsion. The second situation in which Article 8 may be relevant concerns the family life of the refugee or individual who has been recognised as being a person it is unlawful or unreasonable to expel. The issue came before the Court in the case of *Gül v. Switzerland*.<sup>175</sup> A Turkish Kurd who had sought asylum in Switzerland had left his family behind in Turkey when he fled. His wife, an epileptic, had fallen into a fire and was brought to Switzerland for life-saving treatment. Her injuries and her condition even after treatment remained so grave that the Swiss gave her a humanitarian residence permit on the basis that her life would still be



endangered if she were returned to Turkey. The husband withdrew his asylum appeal because this was a legal requirement for the issue of the humanitarian permits that they had been granted. The couple had another child in Switzerland who had to be placed in a foster home as the mother was physically incapable of caring for a new-born baby. They then sought permission for their older child, who had been left behind in Turkey, to join them in Switzerland but were refused because they were only resident, not domiciled, in Switzerland. The matter was contested for many years. Each year the parents' residence permits were renewed on the basis that the wife could not return to Turkey. This is a similar situation to that of many refugees who are outside the protection of the Geneva Convention.

Under Article 8 the Convention organs must first decide whether there has been an "interference" with the right to respect for family life, and then determine whether that interference is justified under Article 8 (2). The Court found in *Gul* that there was no interference (and thus no need to justify it under Article 8 (2)) since "it has not been proved that she could not later have received appropriate medical treatment in specialist hospitals in Turkey". This was a surprising finding as it had never been argued or even suggested by the Swiss authorities that, at the time of the Court's consideration of the case, the wife could return to Turkey, although they pointed out that this situation might change and that she might at some stage in the future be able to return. The younger child had lived for many years in the foster home and could not be abruptly removed from it but her plight is not mentioned in the judgment. The Court also held that the applicant had left Turkey of his own free will "preferring" to seek employment in Switzerland, although there was no evidence to find that he had abandoned his asylum claim for any reason other than that he was required to do so in order to accept the humanitarian permit.

The Court also found that the older child had grown up in the "cultural and linguistic environment" of Turkey, although the child was Kurdish, had lived with various Kurdish families, had never been to school and did not speak Turkish. On the basis of the foregoing "facts" the Court held that there had been no interference with the right to respect for family life as it considered that there were no obstacles preventing them from conducting their family life in Turkey.

In a strongly worded dissenting opinion Judges Martens and Russo noted that the Court "remains free to make its own appreciation" of the facts,

but they warned of the danger of the Court taking into account “facts other than those which are properly established”.<sup>176</sup> The Court did not, however, exclude the possibility of a violation of Article 8 in circumstances where it was established that family life could not be conducted in the state of origin. In *Bulus v. Sweden*,<sup>177</sup> the Commission declared admissible under Article 8 a case concerning Syrian adolescents threatened with expulsion when their mother and sister were permitted to remain. The matter was resolved by way of friendly settlement.<sup>178</sup> In *Askar v. the United Kingdom*<sup>179</sup> the Commission declared inadmissible a complaint concerning both the refusal to admit the extended family of a Somali with refugee status in the United Kingdom and the delays in processing the application.

### **3. Status of those whose claim is being examined or has been rejected.**

Article 8 also governs the status (in relation to the right to residence documents, access to welfare and health care, and employment) of those who cannot be expelled. A separate opinion annexed to the Commission's Report in *H.L.R. v. France* is on point. Mr Cabral Barreto (now the Portuguese judge in the Court) considered that a finding by the Strasbourg organs that an expulsion would constitute a violation of Article 3 implied not only that no expulsion should take place but also that any extant expulsion order must be cancelled. He also considered that if a breach of Article 8 of the Convention were to be avoided some kind of residence permit must be granted which would allow the individual access to employment and social welfare system.<sup>180</sup> The point was not expressly taken up by the Court in *B.B. v. France* where the Court considered that the complaint could be struck off once the threat of immediate expulsion had been lifted even though this meant that a very sick man was left in an uncertain status requiring “safe conduct” to attend hospital appointments and reporting at regular intervals to the gendarmerie and the police. In *Ahmed v. Austria*, the Court had found that it would be a violation of the Convention to expel the applicant to Somalia, but had no jurisdiction to rule on whether or not he had been rightfully stripped of his status as a refugee under the Geneva Convention. His entitlement to social medical and welfare benefits was dependent on his refugee status. Ironically and tragically although prevented from being expelled to Somalia by the ruling of the European Court he was left in such isolation and destitution as a

result of the loss of refugee status that he committed suicide some months later.

A central issue, over which western European states adopt differing positions, concerns the questions as to whether asylum-seekers awaiting consideration of their claim should be obliged to work, should be permitted to work, or denied a work permit. In earlier years, some states required asylum-seekers to undertake "community work", raising the question as to whether such work was effectively "forced or compulsory labour" as defined by the International Labour Organization,<sup>181</sup> and thus raising issues under Article 4 European Convention on Human Rights. One member of the Commission in a separate opinion in the report in *H.L.R. v. France* expressed the view that the refusal to accord the means of subsistence to a person whose expulsion had been ruled to be in violation of the Convention raised issues under Article 8.<sup>182</sup> The same must apply to those who cannot be expelled whilst their applications to remain are being determined.

It should also be noted that fewer and fewer asylum-seekers are now formally recognised as Convention refugees.<sup>183</sup> Instead they tend to be given exceptional leave to remain (in the United Kingdom), or are otherwise permitted to remain temporarily on humanitarian grounds.<sup>184</sup> Such *de facto* refugees are more susceptible to arbitrary decisions by competent authorities and do not automatically enjoy the same rights as "Convention refugees." These rights are spelt out in the Geneva Convention and include, for instance, the right to public relief and assistance, and the right to engage in wage-earning employment. Other organs of the Council of Europe have sought to improve the condition of *de facto* refugees. In particular, Recommendation (84) 1 of the Committee of Ministers reaffirms that the principle of *non-refoulement* applies to both Convention and *de facto* refugees.<sup>185</sup> The European Convention on Human Rights however, does not include any right to work<sup>186</sup> so any complaint made on that basis would be inadmissible *ratione materiae*.

### ***Article 16 – Restrictions on the political activities of aliens***

Article 16 states:

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activities of aliens.<sup>187</sup>

There has been very little jurisprudence of either the Commission or Court on this Article and as long ago as 1977 the Parliamentary Assembly of the Council of Europe recommended its deletion from the Convention.<sup>188</sup> The Court recently had the opportunity to consider its scope in the case of *Piermont v. France*<sup>189</sup> which concerned the rights of a German MEP in a French territory. The Court held that the French Government could not rely on Article 16 as the applicant was not only an EU citizen but also a MEP, and the relevant territory participated in the European elections. Since the ruling of the Court in *Chahal*, that a person cannot be expelled to face risk of treatment contrary to Article 3 even if he is allegedly a threat to national security, governments may try to rely in the provisions of Article 16 in the future. It will of course be for the Strasbourg organs to define the content of the phrase “political activities”. It has been suggested that a narrow interpretation might well be taken which would include only matters directly part of the political process such as the setting up and operating of political parties or participation in elections.<sup>190</sup> At the Funchal Colloquy, Mr Frowein suggested that it could not be discounted that the Commission and Court would consider that the principle of proportionality, inasmuch as it applies to the provisions of the Convention in general, should also be applied to Article 16.<sup>191</sup> The importance of Article 53<sup>192</sup> should be remembered in this context. Articles 10, 11 and 14 all have corresponding provisions in the International Covenant on Civil and Political Rights (Articles 19, 21, 22 and 26 ICCPR) but the Covenant has no provision corresponding to Article 16.<sup>193</sup>

### ***Racism, xenophobia and the media***

In the past decade the media have frequently been responsible for encouraging the public to adopt and develop negative attitudes towards asylum-seekers, frequently labelling as “bogus” all those who are not eventually admitted to the very exclusive category of Geneva Convention refugees. Governments have often not found it in their interest to discourage this. At the beginning of the 1990s the Danish Government took action against a journalist who had made a television programme about racism. The journalist took his case to Strasbourg. In the case of *Jersild v. Denmark*<sup>194</sup> the Court had to consider whether this television programme, which reported but did not criticise racist views, had been rightly sanctioned by the national authorities. The Court found a violation of Article 10 (the right to

freedom of expression) because the film was a serious news programme and its presentation showed that it was not designed to be racist. A minority of the Court considered that the fight against racism was so fundamental to a democratic society that the journalist could have been required to make a more active criticism of racial discrimination without compromising his right to freedom of expression. It is important to note that in the *Jersild* case there was no suggestion that that journalist shared the racist views he was reporting. Some media reports in Europe in the recent years cannot benefit from that fact.

The number of racial attacks in Europe including attacks on asylum-seekers and their hostels is disturbing. The positive duty under Article 1 to ensure that the Convention rights of everyone within the jurisdiction – including their right to life, to freedom from inhuman or degrading treatment, to moral and physical integrity and to the peaceful enjoyment of their possessions – are effectively protected is clearly engaged. In relation to the protected rights of the asylum-seekers the question posed by the European Court in *Osman*<sup>195</sup> arises. Did the state do everything which it could reasonably have been expected to do to protect an individual from harm of which it knew or ought to have known?



## **Conclusion**

In many European countries a right of individual petition to an international tribunal exists only under the European Convention on Human Rights. The protection which the Convention organs offer to asylum-seekers and refugees is consequently the most important safeguard against the interests of the state eclipsing the human rights of individuals. The last decade of the millennium saw important developments in the Convention jurisprudence in this field and the robust statements of principle made by the Court have made an important contribution to safeguarding the rights of those who are at risk from prohibited treatment in their country of origin. How the Court will continue to respond in the new millennium to the needs of those at risk not only in their countries of origin but exposed to racism and xenophobia in the host countries remains to be seen.

## Appendices

### I. Key European Union texts relating to asylum

**Dublin Convention** determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities and measures for implementation (15 June 1990)

**Resolution** on manifestly unfounded applications for asylum (30 November 1992)

**Resolution** on a harmonised approach to questions concerning host third countries (30 November 1992)

**Conclusions** on countries in which there is generally no serious risk of persecution (30 November 1992)

**Decision** establishing a clearing house (CIREA) 30 November 1992

**Decision** setting up a centre for Information Discussion and Exchange on the Crossing of Borders and Immigration (CIREFI) 30 November 1992

**Recommendation** regarding practices followed by Member States on expulsion (30 November 1992)

**Recommendation** regarding transit for the purposes of expulsion (30 November 1992)

**Resolution** on certain common guidelines as regards the admission of particularly vulnerable persons from the former Yugoslavia

**Resolution** on minimum guarantees for asylum procedures (20 June 1995)



**Joint Position** on the harmonised application of the definition of the term “refugee” in Article 1 of the Geneva Convention relating to the Status of Refugees. (4 March 1996)

## **II. Selected Council of Europe instruments relating to asylum**

**Resolution 28** (1953) on the promotion of a European policy for assisting refugees, Parliamentary Assembly

**European Agreement** on the Abolition of Visas for Refugees, 1959

**Recommendation 434** (1965) on the granting of the right of asylum to European refugees, Parliamentary Assembly

**Protocol** to the European Convention on Consular Functions concerning the protection of Refugees, 1967

**Resolution 14** (1967) on asylum to persons in danger of persecution, Committee of Ministers

**Recommendation No. 564** (1969) on the acquisition by refugees of the nationality of their country of residence, Parliamentary Assembly

**Recommendation 773** (1976) on *de facto* refugees, Parliamentary Assembly

**Recommendation 775** (1976) on the preparation of an agreement concerning the transfer of responsibility for refugees who move lawfully from one member state of the Council of Europe to another, Parliamentary Assembly

**Recommendation 787** (1976) on harmonisation of eligibility practice, Parliamentary Assembly

**Recommendation 817** (1977) on the right of asylum, Parliamentary Assembly

**Declaration** on territorial asylum, 1977, Committee of Ministers

**European Agreement** on Transfer of Responsibility for Refugees, 1980

- Recommendation No. R (81) 16** on the harmonisation of national procedures relating to asylum, 1981, Committee of Ministers
- Recommendation No. R (84) 1** on the protection of persons not formally recognised as refugees, 1984, Committee of Ministers
- Recommendation No. R (84) 21** on the acquisition by refugees of the nationality of the host country, 1984, Committee of Ministers
- Recommendation 984** (1984) on the acquisition by refugees of the nationality of the receiving country, Parliamentary Assembly
- Recommendation 1016** (1985) on living and working conditions of refugees and asylum-seekers, Parliamentary Assembly
- Recommendation 1088** (1988) on the right to territorial asylum, Parliamentary Assembly
- Order No. 442** (1988) on the right to asylum, Parliamentary Assembly
- Recommendation 1081** (1988) on the problems of nationality in mixed marriages, Parliamentary Assembly
- Recommendation 1149** (1991) on Europe of 1992 and refugee policies, Parliamentary Assembly
- Recommendation 1163** (1991) on the arrival of asylum-seekers at European airports, Parliamentary Assembly
- Recommendation 1144** (1991) on the situation of frontier populations and workers, Parliamentary Assembly
- Recommendation 1211** (1993) on clandestine migration: traffickers and employers of clandestine migrants, Parliamentary Assembly
- Recommendation 1236** (1994) on the right of asylum, Parliamentary Assembly
- Recommendation 1237** (1994) on the situation of asylum-seekers whose asylum applications have been rejected, Parliamentary Assembly
- Recommendation 1261** (1995) on the situation of immigrant women in Europe, Parliamentary Assembly

- Recommendation 1277** (1995) on migrants, ethnic minorities and media, Parliamentary Assembly
- Recommendation 1309** (1996) on the training of officials receiving asylum-seekers at border points, Parliamentary Assembly
- Recommendation 1327** (1997) on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe, Parliamentary Assembly
- Recommendation No. R (94) 5** on guidelines to inspire practices of the member states of the Council of Europe concerning the arrival of asylum-seekers at European airports, 1997, Committee of Ministers
- Recommendation No. R (98) 13** on the right to an effective remedy by rejected asylum seekers against decision on expulsion in the context of Article 3 of the European Convention on Human Rights, 1998, Committee of Ministers
- Recommendation No. R (98) 15** on the training of officials who first come into contact with asylum-seekers, in particular at border points, 1998, Committee of Ministers
- Recommendation No. R (99) 12** on the return of rejected asylum-seekers, 1999, Committee of Ministers
- Recommendation 1440** (2000) on restrictions on asylum in the member states of the Council of Europe and the European Union, Parliamentary Assembly

### III. Members of the Council of Europe which have ratified the European Convention on Human Rights (as at 15 May 2000)

Albania – ratified 02/10/96	Iceland – ratified 29/06/53	Romania – ratified 20/06/94
Andorra – ratified 22/01/96	Ireland – ratified 25/02/53	Russia – ratified 05/05/98
Austria – ratified 03/09/58	Italy – ratified 26/10/55	San Marino – ratified 22/03/89
Belgium – ratified 14/06/55	Latvia – ratified 27/06/97	Slovakia – ratified 18/03/92
Bulgaria – ratified 07/09/92	Liechtenstein – ratified 08/09/82	Slovenia – ratified 28/06/94
Croatia – ratified 05/11/97	Lithuania – ratified 20/06/95	Spain – ratified 04/10/79
Cyprus – ratified 06/10/62	Luxembourg – ratified 03/09/53	Sweden – ratified 04/02/52
Czech Republic – ratified 18/03/92	Malta – ratified 23/01/67	Switzerland – ratified 28/11/74
Denmark – ratified 13/04/53	Moldova – ratified 12/09/97	“The former Yugoslav Republic of Macedonia” – ratified 10/04/97
Estonia – ratified 16/04/96	Netherlands – ratified 31/08/54	Turkey – ratified 18/05/54
Finland – ratified 10/05/90	Norway – ratified 15/01/52	Ukraine – ratified 11/09/97
France – ratified 03/05/74	Poland – ratified 19/01/93	United Kingdom – ratified 08/03/51
Georgia – ratified 20/05/99	Portugal – ratified 09/11/78	
Germany – ratified 05/12/52		
Greece – ratified 28/11/74		
Hungary – ratified 05/11/92		

For up-to-date information, see  
<http://conventions.coe.int/treaty/EN/searchsig.asp?NumSTE=005>

#### **IV. Countries which have accepted the right of individual petition under the United Nations Convention against Torture (as at 15 May 2000)**

Algeria	Greece	Senegal
Argentina	Hungary	Slovakia
Australia	Iceland	Slovenia
Austria	Italy	South Africa
Belgium	Liechtenstein	Spain
Bulgaria	Luxembourg	Sweden
Canada	Malta	Switzerland
Croatia	Monaco	Togo
Cyprus	Netherlands	Tunisia
Czech Republic	New Zealand	Turkey
Denmark	Norway	Uruguay
Ecuador	Poland	Venezuela
Finland	Portugal	Yugoslavia
France	Russian Federation	

For up-to-date information, see <http://www.unhchr.ch/pdf/report.pdf>

## Notes

1. See, for example, the case of *Nasri v. France*, judgment of 13 July 1995.
2. Article 1.a (2) states, "As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such a fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

3. Article 33 (1) states, "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."
4. New York Protocol to the Geneva Convention, 1967, Article 1 (2).
5. Of the Council of Europe member states, only Turkey still retains it. Malta has recently passed legislation to enable it to be removed during 2000.
6. See *Refugee Rights and Realities*, eds. Nicholson and Twomey, Cambridge University Press, 1999.
7. The Schengen Agreement was signed in June 1990 by Belgium, France, the Federal Republic of Germany, Luxembourg and the Netherlands (following a first meeting of these countries in Schengen, Luxembourg, in June 1985 and extending to the Benelux border-free zone to France and the Federal Republic of Germany). It was later signed by Italy on 27 November 1990, by Spain and Portugal on 25 June 1991 and by Greece on 6 November 1992. Of the then twelve EC countries only Denmark, Ireland and the United Kingdom have not signed. It entered into force on 26 March 1995 and on 28 April 1995 was signed by Austria. Both Finland and Sweden have expressed interest in signing the agreement if it can be reconciled with the existing free movement of persons in effect amongst Nordic states.

The Dublin Convention was also signed by eleven of the then twelve European Community member states in 1990 and by Denmark a year later. Austria, Finland and Sweden, which joined the EU in January 1995, have yet to sign the Convention.

A third convention on external frontiers, which was also drafted in 1990 and establishes the external controls and information system needed to secure European Union borders, has yet to be signed.

8. A selection of Council of Europe instruments relating to refugees appears in Appendix II, p. 57.
9. Article 34 states, "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."
10. Article 35 (1) states, "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."
11. A number of other international instruments also affect the rights of asylum-seekers: the Universal Declaration of Human Rights, Articles 13 and 14; the International Covenant on Civil and Political Rights, Articles 12 and 13; the International Convention for the Elimination of All Forms of Racial Discrimination, Articles 5.d.i and ii; the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3; the Convention on the Status of Stateless Persons, Articles 27 and 28; the Organization of African Unity's Refugee Convention (1969); the Organization of American States' Declaration; the United Nations Declaration on Territorial Asylum; and the United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country where they Live.
12. See e.g. *Vilvarajah v. the United Kingdom*, judgment of 30 October 1991, paragraph 102.
13. See, for example, *Soering v. the United Kingdom*, judgment of 7 July 1989; *Cruz Varas v. Sweden*, judgment of 20 March 1991; *Vilvarajah v. the United Kingdom*, judgment of 30 October 1991; *Nasri v. France*, judgment of 13 July 1995.
14. *Soering v. the United Kingdom*, judgment of 7 July 1989.
15. *Id.* at p. 26, paragraph 86.
16. *Id.* at p. 26, paragraph 88.
17. *Id.* at p. 27, paragraph 90.
18. *Id.* at p. 27, paragraph 91.
19. *Cruz Varas v. Sweden*, judgment of 20 March 1991, p. 22, paragraph 70.
20. *Vilvarajah v. the United Kingdom*, judgment of 30 October 1991, p. 32, paragraph 103.
21. *Chahal v. the United Kingdom*, Appl. No. 22414/93, Report of 27 June 1995.
22. *Id.*
23. *Chahal* judgment, paragraph 74.
24. Appl. No. 13078/87.

25. This provision could not be invoked the case of *Fadele* as the United Kingdom is not a party to Protocol No. 4. It was noted by Fawcett in the Report in the *East African Asians* case that the failure to admit nationals may be a breach of Article 3 (Report paragraph 242, 3 EHRR 76 1973).
26. Application No. 48321/99, January 2000.
27. *Soering v. the United Kingdom*, p. 27, paragraph 91.
28. E.g. in *H.L.R. v. France*.
29. Appl. No. 43844/98, 7 March 2000.
30. Appl. No. 41874/98, 24 June 1998.
31. Judgment of 17 December 1996.
32. Judgment of 29 April 1997.
33. *H.L.R. v. France*, Government Memorial, Cour (96) 322.
34. Judgment of 2 May 1997.
35. Judgment of 7 December 1998.
36. P. Weis, "The concept of the refugee in international law" (1960) 87 *Journal du droit international* 928 at 984-6, cited in Hathaway, *The law of refugee status*, Butterworths 1991.
37. Judgment of 30 October 1997.
38. *Soering v. the United Kingdom*, p. 26, paragraph 88.
39. *Id.* at p. 27, paragraph 89.
40. *Id.*
41. *Chahal v. the United Kingdom*, Report of 27 June 1995, p. 21, paragraph 98.
42. *Vilvarajah*, at p. 34, paragraph 108.
43. *Chahal*, p. 22, paragraph 102.
44. *Chahal*, paragraph 81.
45. See e.g. *R. v. the United Kingdom*, Appl. No. 28038/95, Admissibility Decision 17 January 1997.
46. *Cruz Varas* judgment, 20 March 1991, paragraphs 75-76.
47. *Chahal* judgment, paragraph 86.
48. The English text uses the word "secure". The French text uses the word "*reconnaissent*".
49. Judgment of 7 September 1998.
50. Judgment of 20 March 1991, paragraph 83.
51. *X v. the Federal Republic of Germany*, DR 5, p. 137.



52. Compare Article 2 OAU 1969 Refugees Convention 1000 UNTS 46, which expressly covers such situations; "The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."
53. See the judgments of the Court and reports of the Commission in *Vilvarajah*, *Cruz Varas* and many unpublished admissibility decisions. As late as 1997 the Commission was rejecting claims from Kosovan Albanians that they were at risk from Milosevic's regime in Serbia. See *Haliti v. Germany* (Appl. No. 31182/97), *Tahiri v. Sweden* (Appl. No. 25129/94), *R.B. v. Sweden* (Appl. No. 22508/93).
54. *Vilvarajah*, paragraph 111.
55. Appl. No. 36863/97, 19 October 1998.
56. Appl. No. 40035/98, 28 October 1999.
57. See, for example, *S., N. and T. v. France*, Appl. No. 18560/91, *Iruretagoyena v. France*, Appl. No. 32829/96 12 January 1998.
58. Appl. No. 29482/95, Report of 6 December 1996
59. Decision 28 April 1997, Communication No. 39/1996 UN Decision CAT /C/18/D/39/1996
60. Judgment of 7 September 1998.
61. 22 June 1999.
62. Judgment of 28 November 1996. This case was not struck off because the applicant had actually been expelled and then permitted to return without the government acknowledging that the expulsion was a violation of the Convention.
63. Judgment, paragraph 105.
64. Judgment of 19 February 1998.
65. Appl. No. 43844/98, 7 March 2000.
66. Appl. No. 32448/96, Report of 23 April 1998.
67. *Ibid.*
68. Comm. No. 13/1993 UN Decision CAT/C/12/D/13/1993.
69. *Kisoki v. Sweden* (41/1996) *Ismail Alan v. Switzerland* (21/1995) see also *Aemi v. Switzerland* (34/1995), *Khan v. Canada* (15/94), *Korban v. Sweden* (88/1997) *Falakaflaki v. Sweden* (89/1997), *A v. the Netherlands* (91/1997). In all the above cases the Committee held that it would be a violation to return.
70. Case 41/1996.
71. Case 21/1995.

72. "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."
73. *Soering v. the United Kingdom*, judgment of 7 July 1989.
74. Article 2 provides:
  1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
  2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
    - a. in defence of any person from unlawful violence;
    - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
    - c. in action lawfully taken for the purpose of quelling a riot or insurrection.
75. Judgment, paragraph 103.
76. *Y v. the Netherlands*, Appl. No. 16531/90, 68 DR 299. *Aylor Davis v. France*, 76 DR 164. *Leong Chong v. Portugal*, Series A, No. 83A, DR 88. *Alla Raidl v. Austria*, Appl. No. 25342/94.
77. Appl. No. 24573/94, Report of 7 December 1995.
78. Judgment of 2 May 1997.
79. Report of 13 September 1996.
80. Application 28030/95
81. Admissibility Decision, 16 January 1997.
82. Paragraph 113.
83. Judgment of 26 June 1992, paragraph 110.
84. See *M.A.R. v. the United Kingdom*, Appl. No. 28038/95, 16 January 1997; *Hilal v. the United Kingdom*, Appl. No. 45276/99, declared admissible by the Court on 8 February 2000. The decision on the merits in *Hilal* was awaited at the time of writing.
85. Article 7 states: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."
86. The decision in *X v. the Netherlands*, Appl. No. 7512/76, 6 DR 184 (1974), should be read in the light of the cumulative later general Convention jurisprudence.
87. Appl. No. 21072/92 *Gestra v. Italy* 80B DR 89.

88. Judgment of 25 March 1993.
89. Appl. No. 44599/98, Admissibility Decision 25 January 2000.
90. Appl. No. 51564/99. See also p. 40.
91. Agreement between the European Union and Slovakia 1993 [OJ 1994 L 359/2] Article 45 *et seq.* Similar agreements are in force between the European Union and Romania, Bulgaria, the Czech Republic, Poland, Hungary, Lithuania and Slovenia.
92. Their economic activities are restricted to self-employment. They may not enter into the labour market and may be subject to a visa requirement.
93. Article 4 of Protocol No. 4 states: "Collective expulsion of aliens is prohibited." (Not all member states of the Council of Europe are parties to Protocol No. 4.)
94. Appl. No. 7011/75, 4 DR at 235 (1975).
95. Appl. No. 14209/88, 59 DR 274 (1988).
96. Appl. No. 51564/99.
97. See above, note 3.
98. See *Rosenberg v. Yee Chien Woo*, 402 United States 49 (1970) (US Supreme Court); *Hurt v. Minister of Manpower and Immigration* (1978), 2 C.F. 340 (Canadian Federal Court of Appeal).
99. "Note on asylum submitted by United Nations High Commissioner for Refugees", 30 August 1979, EC/SCP/12. See now the European Parliament Report on Asylum in the EU Member States, LIBE 108 EN, January 2000.
100. See "Part II: Specific considerations", p. 43 for further details.
101. The effect of such practices is to oblige other states also to follow the same practice if they do not want to become a dumping ground for unwanted asylum-seekers. Of the western European states, Sweden is unusual in applying the "third safe country" rule on the basis that the case is examined in its substance, unlike the Schengen countries (although there is a fast track procedure for those coming from a "safe country of origin"). Lambert, *Seeking asylum: comparative law and practice in selected European countries*, Martinus Nijhoff Publishers, Dordrecht, the Netherlands, 1995, p. 95. Generally, eastern European states can be assumed to have less developed systems and practices in operation.
102. See European Parliament Working paper "Asylum in the EU Member States" LIBE 108, January 2000
103. Appl. No. 8100/77, *X v. the Federal Republic of Germany*, not reported. See further Appl. No. 7612/76, *Giama v. Belgium*, Yearbook 23 (1980), 428.
104. *The "safe third country" policy in the light of the international obligations of countries vis-à-vis refugees and asylum-seekers*, UNHCR, London, July 1993, paragraph 4.2.14.
105. *Neue Zürcher Zeitung*, 8 April 1994, *Frankfurter Rundschau*, 11 April 1994.

106. The European Court of Human Rights has upheld the German approach, see e.g. *Haliti v. Germany*, Appl. No. 31182/96.
107. *The "safe third country" policy in the light of the international obligations of countries vis-à-vis refugees and asylum-seekers*, UNHCR, London, July 1993, paragraphs 1.1 and 1.2.
108. Judgment of 10 June 1996.
109. Appl. No. 43844/98, Admissibility Decision 7 March 2000
110. *Ibid.* paragraphs 4.1.1, 4.1.12, and 4.1.13.
111. *Ibid.*, paragraph 2.8.
112. Lambert, *op. cit.* pp. 89-90.
113. Appl. No. 32829/96, Admissibility Decision 12 January 1998. See also *Urotikoetxea v. France*, Appl. No. 3113/96, 87 DR 151.
114. Committee for the Prevention of Torture. See *The role of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* at p. 47 above.
115. It would be unfortunate if the findings of the CPT that states had reduced the number of violations of Article 3 were to be used to deprive individuals of the absolute protection which that article affords. The same concerns apply, *mutatis mutandis*, to the friendly settlement adopted on 5 April 2000 in the *Denmark v. Turkey* inter-state case which records the advances that Turkey has made in improving the training of police and increasing the penalties for violations of Article 3. Whilst these advances are to be welcomed and encouraged they should not be invoked to exculpate any future violations which occur either in the countries themselves or by the states expelling individuals to those countries.
116. European Parliament Report "Asylum in the EU Member States", January 2000.
117. *Amnesty International, Europe: the need for minimum standards in asylum procedures*, Amnesty International EU Association, Brussels, Belgium, June 1994, p. 9.
118. *Artico v. Italy*, judgment of 13 May 1980.
119. *The state of the world's refugees 1993*, UNHCR, Penguin Books, Harmondsworth, Middlesex, United Kingdom, 1993, p. 39.
120. See e.g. Eurodac Convention.
121. Appl. No. 1611/62, *Yearbook* 8 (1965), p.158 (163).
122. Judgment of 23 March 1995.
123. Judgment of 26 June 1992.
124. See e.g. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985.
125. Lambert, *op. cit.*, p.199.

126. See generally *Shifting responsibility: carriers' liability in the member states of the European Union and North America*, António Cruz, Trentham Books and School of Oriental and African Studies, Stoke-on-Trent, United Kingdom, 1995; and Frances Nicholson, *Implementation of the Immigration (Carriers Liability) Act 1987: privatising immigration functions at the expense of international obligations*, forthcoming ICLQ.
127. The level of fine varies, as does the thoroughness with which it is collected. Some states impose carriers' liability only on those arriving from third countries, while others make no distinction. Some states reimburse or cancel the fine if an asylum-seeker's claim is found to be genuine, while others see this as irrelevant. See *Shifting responsibility: carriers' liability in the member states of the European Union and North America*, António Cruz, Trentham Books and School of Oriental and African Studies, Stoke-on-Trent, UK, 1995, chapter five.
128. Recommendation 1163 (1991) of the Parliament Assembly of the Council of Europe on the arrival of asylum-seekers at European airports, 43rd Ordinary Session, 1991, paragraph 10.
129. Judgment of 25 June 1996. This is the only logical approach. Someone who committed a crime in the transit area of an airport would be liable to prosecution under the laws of that land.
130. Judgment of 2 May 1997, paragraph 48.
131. DR 46 (1986), p. 112 (116) and DR 21, p. 73 (84).
132. Lambert, *op. cit.*
133. Boyle and Rice v. the United Kingdom, 20 May 1987, Series A No. 131.
134. Judgment of 21 February 1990.
135. Judgment of 30 October 1991.
136. Judgment of 27 August 1992.
137. European Court of Human Rights, Series A, No. 18 (1975), paragraph 33, and European Court of Human Rights, Series A, No. 28 (1978).
138. *Neue Zürcher Zeitung*, 23 December 1993.
139. Lambert. *op. cit.* pp. 57, 26, 34.
140. *X v. Switzerland* 8118/77, March 1981 25 DR 105.
141. For further discussion of the public/private law divide see the recent judgment in *Pelligrin v. France*.
142. Appl. No. 39652/98, decision of 22 March 2000.
143. Judgment of 20 March 1991.
144. Judgment of 30 October 1991.
145. Judgment of 20 March 1991.

146. Appl. No. 51564/99.
147. See Amnesty International documents: *Austria – Amnesty International Concerns in Europe: January-June 1999*, AI Index EUR 01/02/99; *Austria before the UN Committee against Torture: allegations of police ill-treatment*, EUR 13/01/2000; *Belgium – A summary of Amnesty International Concerns: July-December 1999*, EUR 01/01/00; *Germany – FRG: continuing pattern of police ill-treatment*, EUR 23/04/97; *Spain – Amnesty International Concerns in Europe: July-December 1996*, EUR 01/01/97; *Amnesty International Concerns in Europe: January-June 1998*, EUR 01/02/98, *Amnesty International Concerns in Europe: January-June 1999*, EUR 01/02/99, *Switzerland, A summary of Amnesty International Concerns: July-December 1999*, EUR 01/01/00; *UK Death in Police Custody of Joy Gardner*, EUR 45/05/95; *UK Amnesty International Report 1995*; *UK Cruel, inhuman and degrading treatment during forcible deportation*, EUR 45/05/94; *Amnesty International News March 2000* Col. 30 No. 2.
148. Judgment of 4 December 1995.
149. Judgment of 28 January 1994.
150. Judgment of 28 July 1999.
151. *Assenov v. Bulgaria*, 28 October 1998, *Selmouni v. France*, 28 July 1999.
152. *Herczegfalvy v. Austria*, judgment of 24 September 1992.
153. See p. 40.
154. *Le Monde*, 12 and 20 July 1995; 24 August 1995.
155. DR 12, p. 14.
156. At p. 33: partially dissenting opinion of Mr Trechsel.
157. *Kolompar*, judgment of 24 September 1992.
158. Paragraph 123.
159. Paragraph 112.
160. Judgment of 18 November 1986.
161. Judgment of 5 August 1998; but see also Commission Report of 20 February 1997.
162. The case was struck out of the list as the applicant had disappeared and his lawyer was without up-to-date instructions.
163. The Agreement concluded between the European Union and Poland, Romania, Hungary, Czech and Slovak Republics, Bulgaria, Lithuania and Slovenia which entitles citizens of those countries to move as economic migrants to any member state of the EU provided they remain self-employed or in business.
164. See p. 40.
165. Recommendation 1163 (1991).
166. Recommendation No. R (94) 5.

167. *Amuur v. France*, Appl. No. 19776/92, report of 10 January 1995.
168. Paragraph 53.
169. 1997 4 BHRC 210.
170. See regular country report of the CPT.
171. *Dougoz v. Greece*, Appl. No. 40907/98, 8 February 2000.
172. A negative finding by the CPT does not, unfortunately, lead to a negative finding by the Court. See *Aerts v. Belgium*, 30 July 1998, where the CPT had severely criticised the conditions in a psychiatric hospital, but the Court found no violation.
173. Consideration of reports submitted by states parties under Article 40 of the Covenant on International Civil and Political Rights], Comments of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, 27 July 1995, paragraph 15, p. 3.
174. Appl. No. 29493/95, 3 February 2000.
175. 53/1995/559/645, judgment of 19 February 1996.
176. The dissenting opinion further noted that, leaving the question of medical care on one side, the "choice" in question was between renouncing their son or their little daughter whose interests almost certainly would have required that she should be left behind.
177. 35 DR 57.
178. 39 DR 75.
179. Appl. No. 26373/95, 16 October 1995.
180. Separate opinion of Mr Cabral Barreto, *H.L.R. v. France*, Appl. No. 24573/94, Report of 7 December 1995.
181. For instance, in the *Iversen* case a majority of the Commission concluded that: "The concept of compulsory or forced labour cannot be understood solely in terms of the literal meaning of the words, and has in fact come to be regarded in international law and practice, as evidenced in part by the provisions and applications of the ILO conventions and resolutions on forced labour, as having certain elements [...] these elements of forced or compulsory labour are, first, that the work or service is performed by the worker against his will and, secondly, that the requirement that the work or service be performed is unjust or oppressive or the work or service itself involves avoidable hardship." Appl. No. 1468/62, *Iversen v. Norway*, *Yearbook* 6 (1963) 278 at 328. The Commission appears to take the view that service is capable of constituting "forced or compulsory labour" within the meaning of the Convention, even when it has been undertaken by the consent of a person who was in fact incapable of exercising a free choice. Appl. Nos. 3435, 3436, 3437 and 3438/67, *W, X, Y and Z v. the United Kingdom*, XI *Yearbook* (1968) 562 at 594. The Court has further added that remunerated work may also qualify as forced or compulsory labour and a lack of remuneration and of reimbursement of expenses

- may constitute a relevant factor in considering what is proportionate (*Van der Mussele* case, judgment of 27 November 1983, Series A, No. 70).
182. Separate opinion of Mr Cabral Barreto, Report of the Commission in *H.L.R. v. France*, Appl. No. 24573/94, Report of 7 December 1995. See also Lambert, *op. cit.* pp. 116-125.
  183. The exception to this rule is in Sweden, which applies the Geneva Convention definition in a restrictive way and instead also admits two other categories of refugee on *de facto* or humanitarian grounds. Such refugees enjoy similar rights to residence permits as Convention refugees, although other rights such as those to family reunification are limited. See Lambert, *op. cit.* pp. 131-33.
  184. In Germany, for instance, this temporary permission to stay is known as *Duldung*. Furthermore, the main political parties agreed in 1992 to establish a category of civil war refugees (*Bürgerkriegsflüchtlinge*) who would be granted leave to remain without their having to apply for asylum and thus be drawn into a lengthy procedure, although the implementation of this plan has been delayed because the federal and state governments have failed to agree on who should pay for the care and housing of such refugees.
  185. Committee of Ministers, 25 January 1984.
  186. See e.g. *Neigel v. France*, judgment of 17 March 1997.
  187. Article 10 relates to freedom of expression, Article 11 to freedom of association and assembly and Article 14 to non-discrimination in the enjoyment of Convention rights.
  188. Recommendation 799 (1977) on the political rights of aliens, Council of Europe Parliamentary Assembly 28th Ordinary Session.
  189. Judgment of 27 April 1995.
  190. See e.g., *Law of the European Convention on Human Rights*, Harris, O'Boyle and Warbrick, Butterworths 1995.
  191. *Proceedings of the Funchal Colloquy*, Council of Europe, 1985, quoted in *La Convention européenne des Droits de l'Homme*, Pettit, Decaux, Imbert, Economica 1995.
  192. See page 62, note 72.
  193. Some parties to the ICCPR have entered reservations or declarations to the relevant articles of the Covenant.
  194. Judgment of 23 September 1994.
  195. *Osman v. the United Kingdom*, judgment of 28 October 1998.