Human Rights In Times Of Crisis: Article 3 Prevails-Examining How LGBTQ Asylum Seekers In The European Union Are Denied Equal Protection Of Law

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Recommended Citation
HUMAN RIGHTS IN TIMES OF CRISIS: ARTICLE 3 PREVAILS – EXAMINING HOW LGBTQ ASYLUM SEEKERS IN THE EUROPEAN UNION ARE DENIED EQUAL PROTECTION OF LAW

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* I am a Boston native and proud graduate of Northeastern University. My legal interests include human rights, international accountability, and civil rights. I hope to practice in the areas of government relations after graduation. Beyond legal studies, I have interests in linguistics, political science, and finance.
I. INTRODUCTION

In November of 2016, mattresses were scarce in Sweden’s IKEA headquarters.\(^1\) At first glance it appeared Christmas shopping was already under way, but, in fact, these mattresses went to refugees.\(^2\) The migration crisis in Europe has captivated the world’s attention and concern.\(^3\) In 2015 over one million migrants reached Europe constituting the largest mass migration since the end of the Second World War.\(^4\) This figure is a four-fold increase from 2014 caused mainly by Syrians fleeing civil war.\(^5\) This, amongst other conflicts in the MENA region, is noted as the principle reason why migrants and refugees are fleeing their home countries with hopes of reaching Europe.\(^6\) A less well-known factor is the social norms and persecuting tendencies of sovereign governments and private citizens against minority social groups.\(^7\) Lesbian, gay, bisexual, transgender,
and queer ("LGBTQ") individuals face persecution and discrimination by sovereign governments throughout the MENA, Slavic, and Balkan regions, as well as from private citizens based on societal norms. This unfortunate reality incentivizes LGBTQ individuals to seek asylum in Europe even in the absence of civil war and widespread conflict.

Individuals seeking asylum and refugee status in Europe face different processes and subsequent outcomes depending on their country of origin and personal circumstances. Economic migrants are not entitled to protection, asylum, or refugee status in European Union ("EU") Member States. By contrast, individuals from war-torn countries are afforded significantly increased possibilities of asylum, work authorization, and residency. Thus, the asylum process in the EU is unacceptably discriminatory because it grants asylum and refugee status to certain groups while denying it to others. LGBTQ asylum seekers are amongst the groups adversely

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8. See James Longman, Gay Community Hit Hard by Middle East Turmoil, BBC NEWS (Oct. 29, 2014), http://www.bbc.com/news/world-middle-east-29628281 (addressing the Middle Eastern view on LGBTQ and how civil war has only further ostracized LGBTQ individuals).

9. See id. (emphasizing the pervasive presence of anti-LGBTQ social norms and abuse of the LGBTQ community in many countries surrounding Europe).


11. Id.

12. See, id. (explaining that EU law, pursuant to the 1951 Refugee Convention of the UN, requires Member States to grant asylum to persons fleeing war or persecution); see also Souad Mekhennet & William Booth, Migrants are Disguising Themselves As Syrians to Enter Europe, WASH. POST (Sept. 23, 2015), https://www.washingtonpost.com/world/europe/migrants-are-disguising-themselves-as-syrians-to-gain-entry-to-europe/2015/09/22/827c6026-5bd8-11e5-8475-781cc9851652_story.html (explaining how Syrians are afforded heightened protections in comparison to other migrants, incentivizing many migrants to falsify Syrian identity).

13. See How Many Migrants to Europe Are Refugees?, supra note 10 (highlighting that Syrian migrants receive heightened consideration for asylum status compared to migrants from other countries in the MENA region such as
affected. Moreover, LGBTQ asylees in Europe face discrimination and degrading circumstances over a broad range of contexts both legal and social within the context of their asylum seeking.

This Comment argues that the laws, processes, and procedures that EU Member States utilize in the immigration and asylum application process, exemplified by those employed by Germany, deny LGBTQ individuals equal protection under the law, and violate Article 3 of the European Convention on Human Rights (the “Convention”). Section II of this Comment provides an overview of the German asylum system and the applicable bodies of law that govern it, focusing specifically on asylees from the MENA, Baltic and Slavic regions. Section II also lays out Article 3 of the Convention’s standard of review, and demonstrates how the European Court of Human Rights (the “Court”) interprets this standard with case law. Section III analyzes the legal and societal functions of the German asylum process, explaining how, as applied to LGBTQ asylum seekers, it violates Article 3. Section IV recommends three reforms. These recommendations concern application criteria in the asylum process, conditions in accommodation centers, and policy reform. They are designed to eliminate discriminatory practices in the asylum process regarding LGBTQ asylees and provide more legal protections representative of the values and rights protected by Gambia and Nigeria, who are afforded significantly less consideration under EU immigration and asylum law and policy).


15. See id. (suggesting that many EU countries dismiss asylum claims from LGBTQ asylees without real consideration); see also Tobias Dammers, This Is What It’s Like To Be a Gay Refugee in Germany, VICE (Feb. 9, 2016, 9:30 AM), http://www.vice.com/read/gay-refugees-germany-876 (pointing out that in many cases LGBTQ asylees in the EU face abuse similar to the circumstances they fled from).


17. See infra Section II.

18. See infra Section III.

19. See infra Section IV, (recommending reform to the German “safe” countries policy so as to exclude countries that should not be labeled as such for purposes of reviewing asylum applications).
Article 3.

II. BACKGROUND

Throughout the MENA, Balkan, and Slavic regions, members of the LGBTQ community face widespread discrimination from both the state and private citizens. In many cases, these individuals face criminal charges because of their sexual orientation. Consequently, LGBTQ individuals began fleeing to Europe years before the onset of widespread conflict and social upheaval prompted the current mass migration. New anti-LGBTQ legislation and the spread of terrorist networks have caused the number of LGBTQ individuals fleeing to Europe to rise. LGBTQ asylum seekers find themselves in many different EU Member States, but in 2015 an overwhelming number arrived in Germany.

20. See, e.g., Nabih Bulos, In Islamic State-Held Areas, Being Gay Often Means a Death Sentence, L.A. TIMES (June 13, 2016, 5:10 PM), http://www.latimes.com/world/middleeast/la-fg-islamic-state-anti-gay-violence-20160613-snap-story.html (discussing the punishments, such as amputations, whippings and crucifixions, that may be imposed based on sexuality in the Middle East); see generally The Struggles of LGBT People in One of Europe’s Most Homophobic Countries, VICE (Dec. 8, 2015, 11:15 AM), http://www.vice.com/video/the-growing-lgbt-movement-in-one-of-europes-most-homophobic-countries (investigating the heavily homophobic atmosphere and social norms in Albania).


23. See Migrant Crisis: Migration to Europe Explained in Seven Charts, BBC NEWS (Mar. 4, 2016), http://www.bbc.com/news/world-europe-34131911 (pointing out that Germany is host to an overwhelming number of migrants as compared to other EU Member States, receiving over 476,000 asylum applications.
Upon arriving in Germany, individuals seeking asylum and refugee status face a complex field of both domestic German and international law. In this context, the Convention is the most applicable body of law binding on the members of the Council of Europe (“Council”) including Germany. The Convention, modeled on the United Nations Universal Declaration of Human Rights ("Declaration"), was meant to establish uniformity of legal process throughout the EU, and to set fourth norms to be applied to EU society, including immigration and the asylum process. The Convention entered into force in 1953, establishing the European Court of Human Rights (the “Court”) as the forum with jurisdiction to adjudicate cases and controversies arising under the Convention. Member States of the Council are bound by the Convention and bound by the judgments that the Court renders in interpretation.

This Comment focuses on Article 3 of the Convention, which prohibits torture, degrading and inhumane treatment, and provides protection against refoulement, which proscribes returning refugees or asylum seekers to countries where they are likely to face ill
treatment.\textsuperscript{29}

A. OVERVIEW OF ARTICLE 3 JURISPRUDENCE

Freedom from torture is recognized as a fundamental human right in international law.\textsuperscript{30} Article 3 of the Convention is an absolute prohibition of torture and maltreatment, and thus effectuates this indispensable concept.\textsuperscript{31} Specifically, Article 3 reads, “[n]o one shall be subjected to torture or to inhumane or degrading treatment.”\textsuperscript{32} Article 3’s importance stems from the Court’s resolute submission that a prohibition of torture is a cornerstone of the fundamental values of the democratic societies within the Council of Europe.\textsuperscript{33} Article 3 rights are absolute; infringement upon them assaults the dignity of the individual person, and Europe’s public order.\textsuperscript{34} It is a non-derogable provision of the Convention, meaning it cannot be circumvented under any circumstances.\textsuperscript{35} If the actions or policies of a Member State violate Article 3, the Court has legal authority to review and, if appropriate, provide a remedy.\textsuperscript{36}

In order to fall within Article 3’s purview, the act or conditions complained of must meet an entry-level threshold referred to as the

\textsuperscript{29} ECHR, supra note 16, at art. 3; accord Maarten Den Heijer, Reflections on Refoulement and Collective Expulsion in the Hirsi Case, 25 INT’L J. REFUGEE L. 265, 290 (2013) (describing the Hirsi case which supports the Court’s interpretation of Article 3 as providing protection against refoulement, and describing the Hirsi case as a landmark opinion holding that migrants at sea are entitled to protection against refoulement under Article 3).


\textsuperscript{31} Id.

\textsuperscript{32} ECHR, supra note 16, art. 3.

\textsuperscript{33} See Arai-Yokoi, supra note 30, at 386 (explaining that prohibitions of this nature constitute part of the \textit{jus cogens} of the Council of Europe).

\textsuperscript{34} Id.

\textsuperscript{35} See, e.g., id.; Rachel Ball, Absolute and Non-Derogable Rights in International Law, \textit{Hum. RTS. LAW CTR.} 1, 2 (2011), http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/supplementary_info/263_-_Addendum.pdf (explaining that when a right is non-derogable, whether for national security purposes or otherwise, a state cannot strip an individual of such a right).

de minimis Rule.\(^{37}\) In assessing this threshold, the Court looks to the duration of the treatment, the physical and mental effects thereof, the sex, age, and state of health of the victim.\(^{38}\) This assessment may scrutinize living conditions, risk of ill treatment upon return to the country of origin for refugees, and access to medical attention.\(^{39}\) The Court employs a three-tiered hierarchy of proscribed forms of ill treatment: (1) torture, (2) inhumane treatment or punishment, and (3) degrading treatment or punishment; at each level, the Court assesses both physical and mental suffering of alleged victims.\(^{40}\) The Court considers a finding of any one to be a violation of Article 3.\(^{41}\) The conditions or treatment complained of need not emanate from purposeful conduct or premeditation; negligence and recklessness will satisfy the mens rea required for a breach.\(^{42}\)

Member States’ liability for a breach of Article 3 can arise from direct actions that constitute ill treatment, or from failure to take protective measures that could have prevented ill treatment.\(^{43}\) The Court “has consistently strengthened the protection of asylum seekers or others facing reasonable prospect of ill-treatment in a third

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38. See, e.g., Long, supra note 37, at 17 (clarifying the Court’s holding that inhumane treatment was treatment that deliberately causes severe suffering, mental, or physical harm).

39. See D v. United Kingdom, App. No. 30240/96, 1997-III Eur. Ct. H.R. (holding that the medical facilities in St. Kitts were inadequate, and, in light of the fact that the applicant suffered from a fatal illness, to remove him to St. Kitts would constitute a breach of Article 3).

40. Cf. Arai-Yokoi, supra note 30, at 386-87 (emphasizing that the minimum standard must be assessed with societal progress).

41. Accord id. at 394 (explaining that, for Article 3 to be triggered, there must be a minimum level of severity related to treatment or conditions).

42. See id. at 391 (stating that the Court has accepted different forms of mens rea in assessment of Article 3 noncompliance).

43. Id. at 393 (pointing out that the question of whether a Member State is negligent is of importance when evaluating anticipatory ill treatment).
Such a risk need not come from the state’s direct action. Rather, the Court focuses on whether ill treatment comes about by either the state’s actions or actions of private citizens. Moreover, “jurisdiction” regarding an Article 3 breach is not restricted to the national territory of a Member State. A Member State may bear responsibility for the acts of its agents, which produce effects beyond its borders.

Immutable characteristics such as sexual orientation, race, and gender, prove decisive in the assessment of whether Article 3 has been breached.

A threat of rape or of another sexual or physical assault is an obvious example that can reveal both degrading and inhuman aspects. Further, conditions of detention or imprisonment that fail to pay adequate regard to special needs may amount not only to a physical but also to a mental form of degrading or inhuman treatment.

Regarding accommodation facilities, Article 3 obligates Member States to regularly review conditions and meet requirements of health and well-being. To the extent that a detainee or ward of the state requires special arrangements because of their circumstances, a Member State is obligated under Article 3 to ensure that the accommodation conditions are adequate and safe. In sum, Article 3 protection is broad in scope, and its absolute nature clarifies that legal circumvention is strictly prohibited. Moreover, this protection extends to all persons within the direct and indirect scope of Member States’ actions, including within the asylum process.

44. Arai-Yokoi, supra note 30, at 412.
45. See id. at 401 (describing the circumstances under which the Court has found Article 3 noncompliance, including cases of omissions rather than direct commission).
46. See id. at 413 (detailing the Court’s “victim friendly” policy).
47. See Whitney, supra note 23, at 383 (emphasizing the broad scope with which the Court interprets jurisdiction).
48. Id.
49. See Arai-Yokoi, supra note 30, at 395.
50. Id. at 395-96.
51. See Whitney, supra note 23, at 406 (clarifying that Member States must review all aspects of the potential treatment of an individual before they send them to a country that may persecute them).
52. See id. at 406-07 (explaining that because of the “safe” countries policy, there are not additional reviewing aspects to the asylum process).
B. CASE LAW PRECEDENTS OF ARTICLE 3 CHALLENGES

The Court first established jurisprudential standards concerning Article 3 and the three categories of prohibited treatment in the seminal cases Ireland v. United Kingdom and the Greek Case. The Greek Case involved the conduct of Greek security forces following the military coup of 1967. This case established the first review of prohibited treatment, and remains the approach that the Court takes regarding Article 3. The Court’s holding in the Greek Case established the three-tiered hierarchy as Article 3’s standard of review.

The Court expanded on this holding in Ireland v. United Kingdom, a case involving members of the Irish Republican Army (“IRA”) arrested and detained in the United Kingdom for suspected terrorist acts. In subsequent interrogation sessions, U.K. officials employed inhumane practices for which the Republic of Ireland asserted breach of Article 3. The Court held that the interrogation tactics amounted to inhumane treatment, in clear violation of Article 3. This case

55. See Greek Case, 1969 12 Y.B. Eur. Conv. on H.R.; see also Long, supra note 37, at 13 (describing the Court’s careful approach in evaluating claims of torture and inhuman and degrading treatment by Greek forces).
56. See e.g., Long, supra note 37 at 13 (featuring a detailed review that views each act as a distinct violation with different characteristics, with a focus on the purposeful element of torture).
57. See id. (noting the standard developed in the Greek Case was immediately applied in the Ireland v. United Kingdom dispute).
58. See Ireland v. United Kingdom, 23 Eur. Ct. H.R. (ser. B) at 34; see generally Donahue, supra note 36, at 391 (explaining the history and evolution of Article 3 jurisprudence, including an analysis of the Ireland case).
59. See Ireland v. United Kingdom, 23 Eur. Ct. H.R. (ser. B) at 104; see also Donahue, supra note 36 at 410 (referencing the descending hierarchy within Article 3’s scope regarding five interrogation techniques).
60. See Ireland v. United Kingdom, 23 Eur. Ct. H.R. (ser. B) at 246; see also Donahue, supra note 36 at 413 (discussing the Court’s position that the five sensory-deprivation interrogation techniques used by UK officials constituted inhuman treatment within the meaning of Article 3, specifically noting that there
established the Court’s interpretation of “torture” as involving not only physical treatment but also infliction of emotional anguish. The Court looks to both physical and mental treatment on a subjective case-by-case basis.

In contemporary actions for breach of Article 3, the Court’s standard can be summarized cogently. Generally, the Court will find a breach of Article 3 if a Member State subjects individuals to treatment or conditions falling within one of the three aforementioned categories. Such “state action” may refer to direct commission by the State or its agents, or to an omission whereby the state fails to address situations in which individuals face ill treatment, with knowledge that it occurs. This includes anticipatory ill treatment, where the state places an individual in an environment with knowledge that ill treatment or degradation will occur.

Many contemporary cases for breach of Article 3 relate specifically to how the LGTBQ community is treated. In Identoba and Others v. Georgia, the Court found a violation of Article 3 by the Republic of Georgia where LGBTQ parade marchers were attacked and the Georgian authorities failed to intervene or subsequently investigate. The Court held that the event evinced a violation of Article 3 because of this omission. Moreover, the authorities knew, or had reason to know, of the risks surrounding the demonstration. Therefore, under Article 3, they were obligated to

61. Accord Arai-Yokoi, supra note 30, at 390 (emphasizing that degrading treatment includes punishment that humiliates in such a manner that shows a lack of respect, or diminishes human dignity).
62. See Long, supra note 37, at 13-14 (highlighting the court’s assessment between the levels of ill treatment in relation to Article 3, using the Greek and Ireland cases as a basis).
63. See Arai-Yokoi, supra note 30, at 390, 393, 395-96, 406-07 (expounding on the scope of Article 3 protections regarding anticipatory ill treatment, which includes not only state-sponsored action, but acts by private citizens, insurgents, terrorists, etc.).
64. Cf. id. at 395 (providing an analysis of Article 3’s standard of review regarding breach in the context of immutable characteristics like sex, race, ethnic origin, and religion, and arguing that they are very pertinent to a breach analysis).
66. Id. at 2-6, 30 (detailing a lack of effort by the police to prevent the assault of peaceful protesters by confrontational counter-protesting religious groups).
67. Id. at 30 (holding, by a 6-1 vote, that there had been a violation of Article 3).
provide protection and remedy.  

Pursuant to this holding, Article 3 obligates states to take necessary measures to protect individuals’ human rights and dignity; however, to the extent the state complies with best efforts, there is no violation. 69 In Stasi v. France, 70 a homosexual inmate in a French prison was subject to ill treatment and abuse by other inmates, including rape and assault, because of his sexual orientation. 71 As a result, prison authorities placed him in solitary confinement intended for “vulnerable” prisoners. 72 In the subsequent proceedings, the Court held that there was no violation of Article 3 because the French authorities made best efforts to protect the plaintiff from harm, referencing the separation from other inmates. 73

Beyond living conditions, abuse, and state failures to provide recourse, the Court has held that deportation can give rise to a breach of Article 3 if the asylee is deported to a state wherein they would face ill treatment. 74 In the seminal case in this regard, Soering v. United Kingdom, 75 the Court held that extradition of a German national to the United States to face murder charges constituted a violation of Article 3 because of the likelihood that the plaintiff

68. See id. at 21 (suggesting that the authorities had a clear duty to act given the presence of extreme hostility and fiery hate speech).
69. See Whitney, supra note 23, at 384 (confirming that there is no Article 3 breach where a Member State could not have foreseen ill treatment of an asylee upon return to his or her home country).
71. See Stasi v. France, Eur. Ct. H.R. at 1; see generally European Court of Human Rights Press Release 203, The Registrar of the Court, Prison Authorities had Taken All Necessary Measures to Protect Inmate (Oct. 20, 2011) (noting that the plaintiff was subject to abuses in prison, including being forced to wear a pink star, being beaten, burned, and deprived of food).
72. See European Court of Human Rights Press Release, supra note 70 at 1 (stating that the solitary confinement only lasted for a few weeks until another prisoner was placed in the same cell, and subsequently abused Stasi for several weeks before being transferred).
73. See id. at 3 (holding that although Stasi was abused by his cellmate while in solitary confinement, he never complained to prison authorities about it, meaning they were unaware of the problem).
74. See, e.g., Whitney, supra note 23, at 376 (elaborating on the “safe countries” concept, and explaining that it gives rise to deportations without the possibility of appeal since the home country returned to is considered “safe” and unlikely to persecute the refugee).
would face the death penalty. Subsequent cases have confirmed the Court’s stance that deportation may breach Article 3 to the extent it causes the deportee to face torture, degradation, or ill treatment. However, to date, the Court has not applied such logic to the deportation of LGBTQ asylees. In M.K.N. v. Sweden, an Iraqi asylum applicant contended that he was unable to return to Iraq because he would be at risk of persecution for being homosexual. The applicant explained further that his partner had already been executed by the Mujahedin. The Court held that deporting the applicant would not violate Article 3 because the security situation in Iraq was “slowly improving.” The Court reasoned further that even if subject to persecution in his home city of Mosul, the plaintiff could reasonably relocate to other regions of Iraq wherein he would face no such persecution.

76. See id. at paras. 82, 88, and 91 (clarifying that deportations, evincing danger or degradation for the deportee, constitute a violation of Article 3).


78. See A.E. v. Finland, App. No. 30953/11, Eur. Ct. H.R. ¶ 26 (2015) (illustrating the Court’s continued refusal to find a violation of Article 3 in deporting LGBTQ asylum seekers to dangerous countries of origin); see also I.N.N. v. Netherlands, App. No. 2035/04, Eur. Ct. H.R. (2004) (holding that even though the applicant presented evidence that Iranian police had arrested him and that he faced rampant abuse, the applicant did not establish substantial grounds to show that if he returned to Iran, that his homosexuality would expose him to treatment contrary to Article 3); Whitney, supra note 23, at 397 (discussing the Court’s reliance on Article 3 in cases of deportation of aliens who were not seeking political asylum); accord Paul Johnson, M.B. v. Spain – Complaint by Lesbian Asylum Seeker Declared Inadmissible, ECHR SEXUAL ORIENTATION BLOG (Jan. 22, 2017), http://echro.blogspot.com/2017/01/mb-v-spain-complaint-by-lesbian-asylum.html (emphasizing that the Court has never held that the deportation of a gay person to a country that criminalizes same-sex sexual activity amounts to a violation of the Convention).


80. Id. at 2-3 (arguing he would face persecution from the Mujahedin and Syrian gangs/kidnappers).


83. Id. at 9.
C. ASYLUM LAW & PROCEDURE IN GERMANY

In Germany, the right to asylum is a constitutional matter in accordance with Article 16(a) of the Basic Law. The right to asylum is a fundamental right, and the only one that is afforded to foreign nationals. The process begins with an individual’s registration and application. Asylum seekers are then sent to accommodation facilities and their applications are assessed. Asylum seekers are required to participate in an in-person interview wherein a Government decision-maker is present. Beyond testimony, whether an individual arrived from, or traveled through, a so-called “safe” country will play a crucial role. While seemingly straightforward, the asylum process in Germany is replete with complexities, rule exceptions, and ancillary procedures. This process is further complicated by the clustering system used to assess asylum applications, the conditions in accommodation facilities, and the “safe” countries policy.

84. See GRUNDEGESETZ [GG][BASIC LAW], art. 16(a), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html (clarifying the procedural elements of asylum in Germany).
85. See id. at 23 (listing the legal elements of asylum per German law).
87. Id.
88. Id.
90. See Kay Hailbronner, Asylum Law Reform in the German Constitution, 9 AM. U. INT’L L. REV. 159, 160-62 (1994) (espousing that asylum reform of Article 16(a) of the German Basic Law, restricts asylum applications in employing the “safe” countries policy, and noting that the only exception to this policy to date is in extreme situations).
91. See generally id. (explaining “The New Article 16(a),” referencing amendments to asylum law in Germany which incorporated the “safe” countries policy).
1. The clustering system and accommodation centers.

After registration, migrants are sent to an accommodation center where they stay throughout the application process. Applications for asylum will be placed in a “cluster” based on the asylee’s characteristics, including nationality, minority status, and travel route. This system is meant to make review of applications more efficient. There are four cluster categories for asylum applications, each designated for different groups. Cluster A includes individuals deemed to be in need of heightened international protection because they come from dangerous countries of origin with very good prospects of being able to stay. Cluster B applies to individuals arriving from a “safe country of origin” and yields a low likelihood of approval for asylum. Cluster C refers to “complex cases” or cases not included in Clusters A or B, and also yields a low rate of approval. Finally, Cluster D is reserved for the so-called “Dublin Cases” referring to migrants who may be transferred to other EU Member States to apply for asylum in accordance with the Dublin Procedure.

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92. See The Stages of the Asylum Procedure, supra note 85 (laying out in steps how one applies for, and attains asylum in Germany).

93. See generally Fear and Loathing in Germany: How Terror Will Affect the Policy of the Country, WORLD NEWS, BREAKING NEWS (July 26, 2016, 11:00 AM), http://sevendaynews.com/2016/07/26/fear-and-loathing-in-germany-how-terror-will-affect-the-policy-of-the-country/ (describing the functionality of the clustering system, and how asylum applications are assessed based on it).

94. Id.

95. See The Stages of the Asylum Procedure, supra note 86 (laying out the cluster procedure, and how it functions regarding asylum applications and accommodation centers).


97. Id.


The assessment of the merits each application receives reflects the level of international protection the German Government deems appropriate; sexual orientation, however, does not factor into the analysis.\textsuperscript{100} Applications from Cluster A are seen to need the highest level.\textsuperscript{101} LGBTQ applicants from countries not deemed to need heightened international protection will often be sent back.\textsuperscript{102} Applicants from countries such as Syria and Eritrea, for instance, are assigned heightened protection status due to the high frequency of violence, conflict, and persecution.\textsuperscript{103} Applicants from other countries, such as those in the western Balkans region, are designated as “safe.” Migrants from “safe” countries have a much lower likelihood of a favorable asylum decision.\textsuperscript{104}

During the application process, asylees stay in accommodation

\textsuperscript{100.} Cf. Fear and Loathing in Germany: How Terror Will Affect the Policy of the Country, supra note 93 (contextualizing the application and clustering systems).

\textsuperscript{101.} See The German Asylum Procedure, Arrival Centers, supra note 96 (discussing that the functioning of the German asylum system is such that for countries wherein conflict and violence are prevalent, there is a need to relax stringent asylum standards).


\textsuperscript{103.} See generally One in Four Asylum Seekers in 2016 From Safe Countries – IND, DUTCHNEWS.NL (Mar. 14, 2016), http://www.dutchnews.nl/news/archives/2016/03/one-in-four-asylum-seekers-in-2016-from-safe-countries-ind/ (explaining recent changes to the “safe” countries list in the Netherlands that have hopes of rejecting invalid claims more quickly).

\textsuperscript{104.} Accord id. (noting that in the Netherlands, in order to attain asylum, individuals arriving from “safe” countries must prove that they are in danger); see Yermi Brenner, Roma Fear Paying the Price of Germany’s “Safe Countries” Policy, IRIN (June 15, 2016), http://www.irinnews.org/news/2016/06/15/roma-fear-paying-price-germany-s-safe-countries-policy (clarifying the application of Germany’s “safe countries” policy as it relates to the Balkans region and arguing that it is flawed because the region evinces a social context that poses danger to a number of minority groups).
facilities, often surrounded by fellow asylees from the same country.\textsuperscript{105} Violence pervades throughout these facilities.\textsuperscript{106} Grouped together, the anti-LGBTQ social norms from such countries as Syria, Iraq, and Iran, amongst other MENA countries, carry over into these facilities.\textsuperscript{107} Reports of widespread violence against LGBTQ individuals, including physical and sexual assault, are widely reported across Germany, with many other incidents going unreported.\textsuperscript{108}

2. “Safe” countries policy – origin and third states

The clustering system utilizes the “safe countries of origin” and “safe third countries” policies; both germane to Article 3 and the prohibition against refoulement.\textsuperscript{109} The two are essentially the same policy, with the only differentiating factor being whether an expelled asylee is sent back to their home country, or to a country through which they traveled. If the former, a Member State may simply send an asylee back, but will incur refoulement liability if the asylee’s

\textsuperscript{105} See Sabine Jansen, Good Practices Related to Asylum Applicants in Europe, ILGA EUROPE 47 (2014), http://www.ilga-europe.org/resources/ilga-europe-reports-and-other-materials/good-practices-related-lgbti-asylum-applicants (commenting that many of the societal norms from these countries of origin carry over into the accommodation facilities resulting in pervasive abuse of LGBTQ asylees).

\textsuperscript{106} See Anthony Faiola, Gay Asylum Seekers Face Threat from Fellow Refugees in Europe, WASH. POST (Oct. 24, 2015), https://www.washingtonpost.com/world/europe/gay-asylum-seekers-face-threat-from-fellow-refugees-in-europe/2015/10/23/46762ce2-71b8-11e5-ba14-318f8e87a2fc_story.html (emphasizing the conditions and abuse LGBTQ asylum seekers are subjected to in accommodation facilities in Germany due to a carry-over of homophobic norms from countries in the MENA region).

\textsuperscript{107} See, e.g., id. (describing the abuse that LGBTQ asylum seekers from Syria face from other Syrian migrants).

\textsuperscript{108} Accord id. (indicating that in certain German cities each week there are multiple hospitalizations related to homophobic violence in accommodation centers); see Asylum Shelters in Germany Struggle With Violence, SPIEGEL ONLINE (Oct. 6, 2015, 6:23 PM), http://www.spiegel.de/international/germany/asylum-shelters-in-germany-struggle-with-refugee-violence-a-1056393.html (reiterating the growing concern of pervasive violence in overcrowded German accommodation facilities).

country is not “safe,” i.e., a “safe country of origin.” To avoid such liability for sending asylees back to dangerous countries of origin, states developed a practice of returning them to the states they traveled through en route to countries in which they applied for asylum.110 These are referred to as “safe third countries.”111 The standard applying to both is that an asylum seeker may be returned to a country that is generally considered free of persecution.112 In both cases, asylees may be returned without substantive consideration of their individual circumstances or the merits of their application.113 Both concepts have been challenged as being inconsistent with international humanitarian law and Article 3 of the Convention.114

In Germany, the country from which an asylum seeker arrives can be characterized as “safe” where no state persecution pervades and the state protects against non-state persecution.115 If the German Government deems a country to be “safe,” there is a presumption that there is no risk of persecution and the asylee will be returned.116 Asylum seekers arriving from states designated as “safe countries of origin” or “safe third countries” face increased obstacles in the asylum application process and a significantly decreased likelihood of receiving a favorable decision.117 Overwhelmingly, applications

110. Id. at 27-32.
111. See generally id. (explaining the historical development of the safe countries policy).
112. Id.
113. Accord id. at 31-32 (differentiating between “safe countries of origin” and “safe third countries,” and explaining how the designation will affect an asylum seeker regarding whether asylum will be granted and if not, to which state the seeker will be returned); see Whitney, supra note 23, at 376, 381, 392 (pointing out that asylees from “safe” countries are not assessed on the merits of their application).
114. See generally Whitney, supra note 23, at 376 (noting that by designating a country as “safe,” Member States presume the asylee will not be subjected to ill treatment without examining the asylee’s claim).
115. The Safe Country Concepts, supra note 89.
116. See id. (indicating that an asylee from such a country will be sent back and pointing out that Germany currently categorizes the following as “safe” states: all EU Member States, Albania, Bosnia and Herzegovina, Ghana, Kosovo, the former Yugoslav Republic of Macedonia, Montenegro, Senegal, and Serbia).
from these countries are denied with accelerated procedures, and without detailed examination of the applicant’s circumstances. Such a high rejection rate has produced controversial outcomes and case law.

III. ANALYSIS

Inconsistent case law and a lack of uniform asylum policies amongst Member States make it difficult to predict how the Court will interpret future allegations of noncompliance with Article 3. However, because asylum is a fundamental right in all Member States, and in light of the Court’s precedent, it is apparent that asylum policies in Germany, as applied to LGBTQ asylees, are in violation. This violation applies to the clustering system, security in accommodation centers, and the “safe” countries policy leading to deportation.

How Article 3’s standard of review defines torture and degrading treatment clearly indicates a violation in these areas. Moreover, examining how legal norms and asylum procedures specifically apply to LGBTQ asylum seekers, it is clear that LGBTQ asylees are subjected to a discriminatory standard in the application process.


119. See Mole, supra note 109, at 27-32 (illustrating the conflict between the “safe countries of origin” policy, and the prohibition against refoulement); see also Irruretagoyena v. France, App. No. 32829/96, Eur. Ct. H.R. (1998) (describing a case wherein a member of the Spanish separatist group Euskadi Ta Askatasuna (“ETA”) sought asylum in France out of fear of torture by the Spanish authorities but was denied access since all EU Member States are considered “safe countries of origin” but in this case the policy subjected the asylum seeker to torture).

120. See discussion infra Section II (illustrating the case law of the European Court of Human Rights, and how different cases producing inconsistent holdings with no recognizable legal pattern make it difficult to predict how future cases will evolve).

121. See discussion infra Section II (articulating Article 3’s standard of review with accompanying case law).
A. Meeting the Court’s Standard of Review

The Court’s precedent provides a standard of review and accompanying criteria for a breach of Article 3. The Court will find Article 3 noncompliance if a Member State subjects an individual to treatment or conditions falling within one of the three categories of torture or degradation in Article 3’s scope, by either direct actions or negligent omission, including failing to provide recourse and remedy after abuse is known or reported. “State action” that gives rise to an Article 3 violation includes the placement of an individual in an environment where it is reasonably expected they will face ill treatment or failing to intervene in an environment where ill treatment is present. The clustering system, accommodation centers, and “safe” countries policy, must be analyzed using this standard of review. In these areas, this analysis leads to a conclusion that Germany is in clear violation.

1. Lack of protection and security in accommodation centers violates Article 3

The contexts and environments in which LGBTQ asylees find themselves because of German asylum practices are clearly within Article 3’s scope regarding ill treatment and degradation. The pertinent question is whether the dangers and abuses that LGBTQ asylees face in these contexts are met with adequate protection, security, or recourse by the German authorities. The facts and

122. Accord discussion infra Section II (laying out Article 3’s standard of review).
123. See discussion infra Section II (describing this standard of review and its applicability within the context of asylum and deportation cases).
124. See discussion infra Section II (utilizing case law to clarify that active knowledge that inhumane treatment or conditions exist provides a clear indication that Article 3 has been violated, including cases of anticipatory ill treatment which has not yet occurred, but will in all likelihood occur); see also Whitney, supra note 23, at 384 (noting that a Member State is liable if it removes an alien from its territory and directly exposes that person to a risk of ill treatment contrary to Article 3).
125. See discussion infra Section II (finding the above-mentioned contexts and components of the German asylum process, and giving the legal standard articulated in the precedents set by the European Court of Human Rights).
126. See Identoba v. Georgia, App. No. 73235/12, at 17 (2015) (emphasizing that Article 3 noncompliance occurs when State authorities fail to provide remedy in the form of recourse or security).
holding of the Identoba case are instructive. Similar to the scenario in Identoba, LGBTQ asylum seekers are confined by the state to social settings where they face extreme discrimination, often rising to the level of threats, violence, and physical and sexual assault because of their sexual orientation. This is most evident in the accommodation centers. As previously explained, LGBTQ individuals face extreme abuse in these centers, as evidenced by the number of reported hospitalizations and personal accounts from asylee victims. Such reports are indisputably only a small fraction of the total number of violent incidents that occur with many other incidents going unreported. The German authorities are aware, or reasonably should be aware, that LGBTQ asylees in accommodation centers face abuse. Therefore, Germany is obligated under Article 3 and Identoba to provide adequate protection, security, and legal recourse. The lack of protection afforded to LGBTQ asylees and the failure to provide subsequent recourse indicate a clear

127. See id. at 1 (making reference to the Identoba case regarding the conditions that LGBTQ asylees face in accommodation centers, begging the question of whether the German authorities complete with their obligations under Article 3).

128. See id. (drawing connections between the insecurity experienced by marchers in an LGBTQ parade and asylum seekers in accommodation facilities, suggesting that the same legal standard pursuant to Article 3 should apply).


130. See id.; see also Jansen, supra note 105, at 47 (listing the abuse that occurs in accommodation centers, pointing out that in many cases asylum seekers are alone and face extreme bullying, violence, and discrimination often from their own countrymen).

131. See, e.g., Riham Alkousaa, Julia Klaus, Ann-Katrin Müller & Maximilian Popp, German Refugee Shelters Face Sexual Assault Problem, SPIEGEL ONLINE (May 11, 2016, 4:49 PM), http://www.spiegel.de/international/germany/refugee-hostels-in-germany-beset-by-sexual-assault-a-1091681.html (discussing the growing number of assaults, explaining that most incidents go unreported due to the negligence of the German authorities and fear on behalf of the asylees that reporting incidents will adversely affect their applications).

132. Accord Identoba v. Georgia, App. No. 73235/12, at 1, 5 (holding that the Georgian authorities should have been aware of the obvious violence posed towards marchers in a LGBTQ-themed parade); see Affaire Halat c. Turqui [Halat v. Turkey], App. No. 23607/08, Eur. Ct. H.R. (2012) (declaring that there was a violation of Article 3 when a trans woman who suffered physical and mental abuse by a police officer failed to be given an effective investigation by the authorities).
To illustrate, Syrian LGBTQ asylees reporting abuses perpetrated by other Syrian asylees indicates that anti-LGBTQ social norms rampant in Syria carry over into accommodation centers. The German authorities should reasonably be aware that this carryover of unfortunate social norms occurs. Under Identoba, a violation of Article 3 occurs when an individual is placed in a context where it is known that abuse will occur and the state fails to provide protection and remedy.

The Court’s reasoning in Stasi v. France lends further support to a conclusion that the conditions in the accommodation centers violate Article 3. The situation in accommodation facilities resembles Stasi because the accommodation centers are living quarters with close social interaction between asylees, in many ways akin to a prison. Much like the reported abuse evident in Stasi, LGBTQ asylees are targets because of their sexual orientation. The distinguishing factor between German accommodation centers and Stasi is the Court found no violation when French authorities made best efforts to protect the plaintiff from harm. By contrast, the German authorities make minimal efforts to provide protection or

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133. See Faiola, supra note 106 (illustrating the violence posed towards LGBTQ asylees in German accommodation centers, and noting that incidents of violence often go unreported without official numbers, and without legal recourse).

134. See id. (providing personal accounts of LGBTQ asylees from Syria in a German accommodation center); see also Jansen, supra note 105, at 47 (reiterating that LGBTQ asylees in Europe are often alone, without family, and face bullying and violence from their fellow countrymen).

135. Violence Getting ‘Out of Hand’ at German Refugee Centers, supra note 129.


138. Cf. European Court of Human Rights Press Release, supra note 71 (speaking of the plaintiff in the Stasi case and the conditions and treatment he was subjected to while in prison).

139. Id.; e.g., Esther Yu Hsi Lee, German Authorities Fail to Protect Refugees from Violence, THINK PROGRESS (June 10, 2016), https://thinkprogress.org/german-authorities-fail-to-protect-refugees-from-violence-9bbf350eeca7#.2p1rc06pi.

140. See European Court of Human Rights Press Release, supra note 71 (clarifying that there was no violation of Article 3 because the French authorities made best efforts to protect an LGBTQ inmate from abuse).
adequately investigate violent incidents, which is insufficient to meet the Stasi standard.\textsuperscript{141} Accommodation facilities are not in fact prisons, and asylum seekers are not prisoners, but the two contexts do unfortunately resemble one another regarding state enforced confinement and forced interaction of individuals.\textsuperscript{142} Local authorities monitor accommodation facilities, and lodging asylees are subject to local laws, similar to the prison context in Stasi. If German authorities continue to ignore assaults and abuse with incidents often going unreported, and continue to fail to adequately investigate, it demonstrates that the state is most certainly not making best efforts to protect LGBTQ asylees from known abuse, in violation of Article 3.\textsuperscript{143}

2. The clustering system violates Article 3 through discriminatory practice, disregarding the merits of asylum applications

While many allegations of breach of Article 3 arise from direct ill treatment, degradation, and torture, the Court has held that discrimination and indirect or anticipatory ill treatment also meet the standard.\textsuperscript{144} To this end, the clustering system violates Article 3 as applied to LGBTQ asylees because, as a result of the “safe” countries

\begin{enumerate}
\item \textsuperscript{141} See Lee, supra note 139 (indicating that in 2015 there were 1,031 attacks in Germany, sixteen times greater than the number of attacks in shelters in 2013, and pointing out that the authorities failed to adequately investigate or resolve the majority).
\item \textsuperscript{142} Accord Watchdog: Czech Refugee Camp Offers ‘Worse Conditions’ Than Prisons, DEUTSCHE WELLE (Oct. 13, 2016), http://www.dw.com/en/watchdog-czech-refugee-camp-offers-worse-conditions-than-prisons/a-18779731 (assessing conditions in a Czech accommodation facility and concluding that in many instances conditions are in fact worse than prisons where refugees are handcuffed without provocation by helmet-wearing police officials, and are forced to stand at attention in the middle of the night for counting).
\item \textsuperscript{143} Cf. Stijn Smet, X. v. Turkey: Why a Ruling on the Basis of Discriminatory Effects Would Have Been Preferable, STRASBOURG OBSERVES (Oct. 25, 2012), https://strasbourgobservers.com/2012/10/25/x-v-turkey-why-a-ruling-on-the-basis-of-discriminatory-effects-would-have-been-preferable/ (demonstrating a prison context similar to that in Stasi and in German accommodation facilities, supporting an inference that because the court found such discrimination yielded an Article 3 violation in this case, the same would be true concerning accommodation facilities in Germany because of state negligence).
\item \textsuperscript{144} See Arai-Yokoi, supra note 30, at 401 (explaining that the Court’s standard of review under Article 3 is broadened in scope to include discrimination based on immutable characteristics, specifically referencing homosexuals as carrying a significant burden and distress, enough to cross the Article 3 threshold).
\end{enumerate}
policy, applications are grouped together for review according to
country of origin with different levels of protection applying to each
group.145 As a result, LGBTQ asylees’ applications are not reviewed
on the merits, and are automatically rejected if the asylee arrived
from, or traveled through, a “safe” country. The concepts of a “safe
county of origin” and “safe third country” have been widely
challenged as applied to several groups seeking asylum and refugee
status.146 Such protestations emphatically apply to the LGBTQ
community. Many states listed by Germany as “safe” are places
where LGBTQ individuals face severe discrimination.147 Neither an
asylee’s LGBTQ identity, nor anti-LGBTQ undertones in “safe
countries of origin” and “safe third countries” are taken into
consideration after determining that an asylee arrived from such a
state.148 LGBTQ asylees from “safe” countries who face abuse
because of their sexual orientation in their home countries will be
sent back regardless.149

Countries in the Balkans region, for instance, have well
documented histories of anti-LGBTQ abuse but are designated as
“safe” by Germany.150 As mentioned above, asylees from or

145. See Whitney, supra note 23, at 387 (indicating that under German law, an
alien is not to be deported if (1) they would thereby be exposed to inhumane
treatment or torture, or (2) their deportation would run counter to the Convention).
146. See Constanze Quosh & Michael Wittig, “Safe Country” Lists – A Threat
to International Human Rights?, HUMANITY IN ACTION,
http://www.humanityinaction.org/knowledgebase/205-safe-country-lists-a-threat
to-international-human-rights (last visited Oct. 6, 2016) (explaining how the “safe
country of origin” concept violates international human rights law because of the
ultimate outcome it yields regarding minority groups in need of heightened
international protection); see generally Irruretagoyena v. France, App. No.
very dangerous irrespective of the classifications and assessments Member States
provide).
147. See generally The Struggles of LGBT People in One of Europe’s Most
Homophobic Countries, supra note 20 (describing the discrimination against the
LGBTQ community in Albania).
148. See Whitney, supra note 23, at 376 (indicating that asylum application for
asylees from “safe” countries are not assessed on their merits and are almost
always refused).
149. See Hasselbach, supra note 117 (explaining that asylum seekers can argue
that they face a great deal of persecution even in “safe” countries, but they are very
unlikely to be granted asylum).
150. See Michael K. Lavers, Poll: Anti-LGBT Discrimination, Attitudes
Common in Balkans, WASH. BLADE (Oct. 31, 2015, 9:00 AM),
traveling through such “safe” countries are given lesser protection and have a significantly lower likelihood of attaining asylum. The same holds true for MENA and Slavic countries, which Germany also designates as “safe.” In this way, the clustering system discriminates against LGBTQ asylees based upon their country of origin or the third countries through which they traveled. This discriminatory practice violates Article 3 because an LGBTQ asylum seeker from a “safe” country will likely be sent back, while the expelling Member State is aware of the abuse such an individual will face upon return without the scrutiny of personal circumstances that Article 3 requires.

In sum, the clustering system’s functionality, by sending LGBTQ asylees back to places designated as “safe” violates Article 3 because it discriminatorily denies them needed protection simply because of where they come from, without substantive regard for their circumstances. Ultimately, the clustering system subjects LGBTQ asylees to abuse and ill treatment upon returning home. Because this system’s effect on LGBTQ asylees clearly falls within Article 3’s purview, the clustering system violates Article 3.


151. See The Safe Country Concepts, supra note 89 (pointing out that in most cases applications from “safe” countries will be rejected as “materially unfounded”).
152. Id.
153. See Arai-Yokoi, supra note 30, at 380-400 (confirming that per the Court’s reasoning and precedents, denial of equal protection of law by discriminatory practices in the asylum process gives rise to a violation of Article 3).
154. See id. at 393 (elaborating on the Court’s position regarding anticipatory ill treatment, and noting the responsibility of a Member State is engaged by decisions to extradite an individual to a third country where there is a risk that they will face ill treatment contrary to Article 3).
155. Id. at 393-94.
156. Accord Arai-Yokoi, supra note 30 (describing the Court’s standard of review in assessment of when and how violations of Article 3 will be found).
3. The “safe” countries policy violates Article 3 through illegal deportation under Soering

Beyond how the “safe” countries policy operates within the clustering system, its functioning stance as a legal policy standard in the asylum process alone also violates Article 3, specifically regarding deportation.157 Outside of review of asylum applications within the clustering system, deportation and expulsion to “safe” countries are very common.158 These expulsions are often to states with records of extreme abuse of the LGBTQ community.159 A policy protecting vulnerable individuals from deportation so as to protect them from anticipatory ill treatment is precisely the treatment Article 3 was designed to protect against, as exemplified by the Soering Court.160 Accordingly, even outside of the example of the clustering system, the “safe” countries policy by itself, concerning the deportations of LGBTQ asylum seekers, violates Article 3.161

Under Soering, the Court will find Article 3 breaches in deportation cases if deportation results in ill treatment for the deportee upon return.162 However, in deportation cases involving ill treatment of LGBTQ deportees upon return, the Court has historically failed to uphold the principles of Article 3 in accordance with Soering because of the “safe” countries policy.163 The Court’s reasoning in M.K.N. v. Sweden sheds light on the obvious violation

157. See Proposal for a Regulation, supra note 102 (discussing the “safe” countries concept and pointing out that, per this policy, in 2014 146 out of 150 human rights violation claims were dismissed as inadmissible by the Court).
158. See id. (placing emphasis on how many applications from “safe” countries were dismissed).
159. See Quosh & Wittig, supra note 146 (reiterating that in many of the “safe countries of origin” homosexuality is discriminated against and sometimes criminalized).
160. See Soering v. UK, at 5 (1989) (emphasizing Article 3 protections in the context of deportations); see also Article 3 Anti-torture and Inhumane Treatment, UK HUM. RTS. BLOG, https://ukhumanrightsblog.com/incorporated-rights/articles-index/article-3-of-the-echr/ (last visited Oct. 12, 2016) (noting the evolution of Article 3’s applicability and how it has broadened to cover protection for asylum seekers from dangerous and inhumane conditions and treatment in countries of origin).
161. Article 3 Anti-torture and Inhumane Treatment, supra note 160.
162. Soering v. UK, at 5.
163. See Johnson, supra note 78 (finding that the Court has never held that the deportation of a gay person to a country that criminalizes same-sex sexual activity amounts to a violation of the Convention).
of Article 3 that the “safe countries of origin” and “safe third countries” policies exhibit in this regard, as applied to LGBTQ asylum seekers in deportation cases. 164 The Court committed a fatal error, reasoning that returning an LGBTQ asylee to Iraq could be safe under any circumstances. 165 Iraq not only officially criminalizes homosexuality, but societal norms also encourage egregious abuse from private citizens. 166 Beyond this, the ongoing conflicts and social upheaval throughout the MENA region represent a heightened danger for the LGBTQ community, as the community is increasingly the target of brutal atrocities. 167 This further supports a conclusion that returning an LGBTQ asylee to such a country as Iraq by way of the “safe” countries policy violates Article 3. 168

The M.K.N. v. Sweden case is but one of many examples of deportations of LGBTQ asylees in breach of Article 3, emanating from the “safe” countries policy. 169 Excluding EU Member States, all the countries Germany lists as “safe” are places that exhibit anti-LGBTQ undertones and are dangerous for LGBTQ individuals. Two of these countries officially criminalize homosexuality, including Senegal. 170 The European Court of Human Rights categorized Senegal as a de facto “safe” country when it held in A.N. v. France 171 that an LGBTQ asylum seeker’s application was inadmissible, reasoning that the applicant failed to prove that he would face treatment contrary to Article 3 in Senegal. 172 As recently as 2014, the Senegalese Government sentenced LGBTQ individuals to prison because of their sexual orientation. 173 Apart from official state

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165. Id. at 7.
166. Cf. McCormick, supra note 22 (describing ISIS executing gay men in Iraq).
167. Id.
168. Id.
169. See Johnson, supra note 78 (emphasizing that the Court has never held that deportation of a gay person amounts to a violation of the Convention).
170. See generally The Safe Country Concepts, supra note 89 (stating among Germany’s “safe” countries list Senegal and Ghana).
172. Id.
action, homophobic sentiments and social norms have led to abuse and degradation of LGBTQ individuals.\footnote{174}{See \textit{Associated Press, Even After Death, Abuse Against Gays Continues}, NBC NEWS (April 11, 2010, 12:01 AM), http://www.nbcnews.com/id/36376840/ns/world_news-africa/t/even-after-death-abuse-against-gays-continues/#.V-sQSzLMzUp (detailing the desecration of the bodies of LGBTQ individuals in Senegal, terrorizing the LGBTQ community); see generally Ludovica Laccino, \textit{Top Five African Countries Lease Tolerant of Gay Rights}, INT’L BUS. TIMES (Jan. 16, 2014, 5:26 PM), http://www.ibtimes.co.uk/top-five-african-countries-least-tolerant-gay-rights-1432630 (elaborating on African countries with the most rampant anti-LGBTQ social norms).} Applying the reasoning of both the Court and the German Government demonstrates a clear violation of Article 3 because Senegal and Iraq, amongst other “safe” countries, officially persecute LGBTQ individuals.

Germany’s “safe” list also includes states in the Baltic and Slavic regions where homosexuality is not criminalized, but LGBTQ individuals face egregious abuse from private citizens with limited legal recourse from the authorities.\footnote{175}{See \textit{The Struggles of LGBT People in One of Europe’s Most Homophobic Countries}, supra note 20 (illustrating the systematic abuse of LGBTQ individuals in Albania).} Accordingly, to label such countries as “safe” allows for subsequent deportation, in violation of Article 3. Germany may be attempting to rely on the precedents of the Court to uphold its “safe” countries list and policy, and simultaneously to avoid liability for an Article 3 breach in deporting LGBTQ asylees.\footnote{176}{Cf. Johnson, supra note 78 (supporting an inference that Germany may not be in violation of Article 3 regarding asylum policies because the Court does not historically hold that deportation of an LGBTQ individual to a country with anti-LGBTQ sentiments necessarily amounts to a violation).} However, these holdings of the Court themselves do not adequately uphold the principles that Article 3 is meant to protect, and the mere fact that Germany is able to use such flawed holdings as a shield, does not mitigate Germany’s own transgressions and Article 3 noncompliance.\footnote{177}{See id. (discussing the Court’s history of finding that removal of LGBTQ persons to countries with recorded histories of LGBTQ abuse did not give rise to a breach of Article 3 inferring that this reasoning is inconsistent with Article 3’s purpose).}
Member States’ compliance with the Convention is essential to preserving the democratic public order of Europe. Without this compliance, the rule of law and Europe’s public order will erode.\(^{178}\) The Court has clearly articulated Article 3’s importance in this regard.\(^{179}\) Allowing Member States to breach Article 3’s dictates with impunity, represents a threat to continued legal and political progress, and therefore must be strictly prohibited in all areas of society, including the asylum process.\(^{180}\)

IV. RECOMMENDATIONS

Germany’s asylum laws and policies, as applied to LGBTQ asylees, undeniably violate Article 3. Within the EU context, this violation is highlighted by the Court’s past holdings, allowing for the deportation of LGBTQ asylees to “safe” countries where they will inevitably face degradation and abuse. Reform is accordingly needed to comply with Article 3.

A. THE CLUSTERING SYSTEM MUST BE REPLACED WITH A CASE-BY-CASE ASSESSMENT OF ASYLUM APPLICATIONS AND ACCOMMODATIONS MUST BE VIGILANTLY SUPERVISED.

Regarding LGBTQ asylees, the clustering of applications for review violates Article 3 because it subjects individuals to a discriminatory procedure without assessment of the merits of an application.\(^{181}\) The clustering system should be replaced by a case-by-case assessment of asylum applications with LGBTQ status given weight when considering the asylee’s country of origin, or third country travel route. The clustering system is meant to make the process more efficient and provide heightened international

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178. See Arai-Yokoi, supra note 30, at 386 (describing the Court’s sentiments concerning Article 3, and its importance to Europe’s legal system and public order).
179. Id.
180. See id. (emphasizing the continued importance of continued Article 3 compliance).
181. See Fear and Loathing in Germany: How Terror Will Affect the Policy of the Country, supra note 93 (discussing how the discriminatory pattern and practice in the clustering system is noncompliant with Article 3); see generally Arai-Yokoi, supra note 30, at 395 (explaining that in assessment of asylum applications, the circumstances giving rise to a need for asylum may come about independent of direct discrimination).
protection to groups that require it. However, the clustering system derails both these purposes, as well as the right to asylum in failing to account for the individual circumstances of asylees.

The purpose of the right to asylum is reflective of a respect for human rights, and seeks to protect persons subject to torture and degradation in their home countries. Denying asylum status to LGBTQ asylees who are subject to ill treatment in their home countries nullifies this goal. Moreover, the system remains inefficient despite clustering, because rule exceptions in German asylum laws befuddle the process. Under a reformed system, applications should not be automatically denied or approved. Rather, an assessment must be made as to whether the individual is, in fact, in need of asylum. In this way vulnerable groups, such as LGBTQ asylees, will be protected from refoulement. The “safe” countries policy should not be used in the assessment of applications. Instead, the merits of each application should be individually assessed without grouping into subcategories.

Beyond the application process, accommodation centers should be the subject of heightened scrutiny by German authorities with legal proceedings in the event of transgressions against asylees. Adequate investigation and legal recourse must be afforded to victims in accordance with the jurisprudence of the Court. Because the number of asylees currently residing in Germany is great, an effective remedy to this would be to appoint special investigative authorities to look into assaults and violent incidents in accommodation centers. Furthermore, as a deterrent, perpetrators should be subject to criminal punishment and possible deportation depending on the severity of the transgression.

182. See generally The German Asylum Procedure, Arrival Centers, supra note 96 (suggesting that the clustering system, a reformed policy, makes the process more efficient).
183. See generally Hailbronner, supra note 90, at 160 (providing explanatory background and history on the right to asylum in Germany).
184. See generally id. at 160-62 (providing information regarding the German asylum process and demonstrating numerous exceptions and amendments).
185. See generally Identoba v. Georgia, App. No. 73235/12 (explaining the legal recourse the Court affords).
B. THE LIST OF “SAFE” COUNTRIES MUST BE RE-ASSESSED

Even outside of the clustering system, the concept of “safe countries of origin” and “safe third countries” is particularly precarious because there is no uniform criteria to determine which states should be classified as “safe” and which should not. Whether an asylum seeker originates from such a country or arrives in Germany by way of one ultimately has a determinative effect on the applicant’s status. By virtue of their circumstances, certain individuals are in need of heightened levels of international protection often connected to their country of origin. Thus, the “safe” countries system is not fundamentally flawed but in need of reform. The current list of states that the German Government characterizes as “safe countries of origin” and “safe third countries” violates Article 3 by including countries known to abuse the human rights of LGBTQ individuals. To rectify this noncompliance with Article 3, such lists should be re-written.

There should be very stringent criteria required to categorize a country as “safe.” Such criteria should require strict adherence to international legal norms, vis-à-vis, Article 3 of the Convention. All countries that officially criminalize homosexuality should be stricken from Germany’s safe countries list. Furthermore, because the overwhelming majority of asylum seekers arriving in Germany come from states with homophobic social norms, a heightened level of international protection should be applied to LGBTQ persons in the asylum process.

V. CONCLUSION

The current asylum laws, practices, and procedures in Member States, exemplified by Germany, and as applied the LGBTQ asylees, undeniably violate Article 3. Article 3 goes beyond Germany’s practices in the asylum process regarding the clustering of

186. See Whitney, supra note 23, at 387-88 (pointing out that there is no uniform list of safe countries for Member States, and that the lack of uniformity often leads to complications in the asylum process).
187. Id.
188. Id.
189. See id. at 388 (confirming that the countries Germany lists as “safe” include states that continue to violate human rights); see also The Safe Country Concepts, supra note 89 (listing Germany’s safe countries).
applications and the “safe” countries policy. The purpose of Article 3, and of the Convention as a whole, is universal respect for human rights throughout the Member States. Unless the Court’s case precedents and the practices of Member States outside of the Court reflect that purpose, the Convention is meaningless and its goal is lost. LGBTQ rights in the asylum process are precisely the genre of issue that the Convention was enacted to remedy, and the legal norms and practices of Germany and the rest of the Member States should emulate this.