

2018

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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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. 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,

1. See *Seeking Asylum – and Jobs, Too Few Refugees, Not Too Many Are Working in Europe*, ECONOMIST (Nov. 2, 2016, 5:45 PM), <http://www.economist.com/news/finance-economics/21709511-too-few-refugees-not-too-many-are-working-europe-refugees-sweden-are>.

2. See *Id.* (explaining that the mass influx of refugees led to stock shortages on household goods).

3. See Marissa Hill, Note, *No Due Process, No Asylum, and No Accountability: The Dissonance Between Refugee Due Process and International Obligations in the United States*, 31 AM. U. INT'L L. REV. 445, 446 (2016) (describing the global impacts and coverage of the Syrian refugee crisis).

4. Patrick Kingsley, *Over a Million Migrants and Refugees Have Reached Europe This Year, Says IOM*, GUARDIAN (Dec. 22, 2015, 7:43 PM), <https://www.theguardian.com/world/2015/dec/22/one-million-migrants-and-refugees-have-reached-europe-this-year-iom>.

5. See *id.* (explaining that other national groups fleeing conflict and repression include large numbers of Iraqis, Afghans, and Eritreans; and pointing out that the influx of migrants has been greater in Turkey, with 2.2 million refugees now residing there).

6. See generally Lydia Tomkiw, *European Refugee Crisis in 2015: Why So Many People Are Fleeing the Middle East and North Africa*, INT'L BUS. TIMES (Sept. 3, 2015, 11:03 AM), <http://www.ibtimes.com/european-refugee-crisis-2015-why-so-many-people-are-fleeing-middle-east-north-africa-2081454> (providing background on conflicts in the Middle East and North Africa which have contributed to the refugee crisis).

7. See, e.g., Associated Press, *Inside look at ISIS' Brutal Persecution of Gays*, CBS NEWS (Dec. 2, 2015, 7:17 AM), <http://www.cbsnews.com/news/isis->

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.⁸ This unfortunate reality incentivizes LGBTQ individuals to seek asylum in Europe even in the absence of civil war and widespread conflict.⁹

Individuals seeking asylum and refugee status in Europe face different processes and subsequent outcomes depending on their country of origin and personal circumstances.¹⁰ Economic migrants are not entitled to protection, asylum, or refugee status in European Union (“EU”) Member States.¹¹ By contrast, individuals from war-torn countries are afforded significantly increased possibilities of asylum, work authorization, and residency.¹² 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.¹³ LGBTQ asylum seekers are amongst the groups adversely

persecution-gay-men-murder-lgbt-muslim-society/ (describing how an ISIS “judge” ordered two men accused of homosexual activity to be executed by being thrown from a building top, and pointing out that at least thirty-six men in Syria and Iraq have been killed by ISIS militants on charges of sodomy).

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).

10. See, e.g., *How Many Migrants to Europe Are Refugees?*, ECONOMIST: THE ECONOMIST EXPLAINS (Sept. 8, 2015, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2015/09/economist-explains-4> (explaining the difference between economic migrants and refugees, and how that distinction impacts how individuals are received in 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.¹⁴ 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.¹⁵

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”).¹⁶ 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.¹⁷ 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 3.¹⁸ Section IV recommends three reforms.¹⁹ 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).

14. See *EU Asylum Policy for Gays and Lesbians Criticized by LGBT Groups*, DEUTSCHE WELLE (May 19, 2011), <http://www.dw.com/en/eu-asylum-policy-for-gays-and-lesbians-criticized-by-lgbt-groups/a-15089739> (noting the legal difficulties of claiming asylum under threat of persecution for being LGBTQ).

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).

16. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, June 1, 2010, 213 U.N.T.S. 222, [hereinafter ECHR].

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.²⁰ Consequently, LGBTQ individuals began fleeing to Europe years before the onset of widespread conflict and social upheaval prompted the current mass migration.²¹ New anti-LGBTQ legislation and the spread of terrorist networks have caused the number of LGBTQ individuals fleeing to Europe to rise.²² LGBTQ asylum seekers find themselves in many different EU Member States, but in 2015 an overwhelming number arrived in Germany.²³

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).

21. See Justin Salhani, *What Life Is Like For 'One of the Most Unprotected of All Refugee Communities'*, THINK PROGRESS (Oct. 24, 2015), <https://thinkprogress.org/what-life-is-like-for-one-of-the-most-unprotected-of-all-refugee-communities-e6bc5afb0c75#.xhlt5mahk>.

22. See Michelle O'Toole, *Russia Wants to Expand Anti-Gay Law to Ban All 'Public' Displays of Homosexuality*, PINK NEWS (Nov. 6, 2015, 11:35 AM), <http://www.pinknews.co.uk/2015/11/06/russia-wants-to-expand-anti-gay-law-to-ban-all-public-homosexuality/> (detailing the homophobic laws and policies that are evolving in Russia); see also Joseph Patrick McCormick, *Small Kids Made to Look on as ISIS Throws 'Gay' Man Off Building and Stone Him to Death*, PINK NEWS (May 8, 2016, 5:56 PM), <http://www.pinknews.co.uk/2016/05/08/small-kids-made-to-look-on-as-isis-throws-gay-man-off-building-and-stone-him-to-death/> (describing horrific events illustrating the plights of LGBTQ individuals in ISIS-controlled places in the Middle East); see generally Cameron Glenn, *Timeline: Rise and Spread of the Islamic State*, WILSON CTR. (July 5, 2016), <https://www.wilsoncenter.org/article/timeline-rise-and-spread-the-islamic-state> (explaining the origins of ISIS).

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.²⁴ In this context, the Convention is the most applicable body of law binding on the members of the Council of Europe (“Council”) including Germany.²⁵ 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 forth norms to be applied to EU society, including immigration and the asylum process.²⁶ 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.²⁷ Member States of the Council are bound by the Convention and bound by the judgments that the Court renders in interpretation.²⁸ 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

in 2015 alone); *cf.* Kathleen Marie Whitney, *Does the European Convention on Human Rights Protect Refugees from “Safe” Countries?*, 26 GA. J. INT'L & COMP. L., 375, 386 (1997) (illustrating that historically Germany had the most generous asylum laws and accepted more refugees than other European countries).

24. See *EU: Asylum Policy: Gaining Asylum in the Union*, UNHRC (Dec. 14, 2016), <http://www.unhcr-centraleurope.org/en/what-we-do/ensuring-legal-protection/eu-asylum-policy.html> (demonstrating that while there are international norms and developing EU commonalities, asylum laws and procedures differ from one Member State to the next).

25. ECHR, *supra* note 16; see generally *The Council of Europe and the European Union*, COUNCIL OF EUROPE, <http://www.coe.int/en/web/portal/european-union> (Oct. 28, 2016) (providing background on the difference between the Council of Europe and the EU, the former being a group of European states that agree to be bound by a common legal standard and provide mechanisms to enforce it, the latter referring to the same values reflected in the Council, building a trade bloc for economic efficiency).

26. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 6-8 (Dec. 10, 1948); see generally Aisha Gani, *What is the European Convention on Human Rights?*, GUARDIAN (Oct. 3, 2014, 10:48 AM), <https://www.theguardian.com/law/2014/oct/03/what-is-european-convention-on-human-rights-echr> (offering context and history of the U.N. Declaration and the EU Convention, and demonstrating that the latter was modeled on the former).

27. See *Human Rights: The European Convention*, BBC NEWS: UK (Sept. 29, 2000, 3:19 PM), http://news.bbc.co.uk/2/hi/uk_news/948143.stm (explaining the philosophical origins of the E.U. judicial organs).

28. *Id.*

treatment.²⁹

A. OVERVIEW OF ARTICLE 3 JURISPRUDENCE

Freedom from torture is recognized as a fundamental human right in international law.³⁰ Article 3 of the Convention is an absolute prohibition of torture and maltreatment, and thus effectuates this indispensable concept.³¹ Specifically, Article 3 reads, “[n]o one shall be subjected to torture or to inhumane or degrading treatment.”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.³³ Article 3 rights are absolute; infringement upon them assaults the dignity of the individual person, and Europe’s public order.³⁴ It is a non-derogable provision of the Convention, meaning it cannot be circumvented under any circumstances.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.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

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).

30. See, e.g., Yutaka Arai-Yokoi, *Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment Under Article 3 ECHR*, 21/3 NETH. Q. HUM. RTS. 385, 385-86 (2003) (delineating the boundaries of Article 3’s protections).

31. *Id.*

32. ECHR, *supra* note 16, art. 3.

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

34. *Id.*

35. See, e.g., *id.*; Rachel Ball, *Absolute and Non-Derogable Rights in International Law*, 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).

36. See Deirdre E. Donahue, *Human Rights in Northern Ireland: Ireland v. the United Kingdom*, 3 B.C. INT’L & COMP. L. REV. 377, 385 (1980) (describing the origin of the Court and its adjudicative authority).

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

37. See Debra Long, *Guide to Jurisprudence on Torture and Ill-Treatment: Article 3 of the European Convention for the Protection of Human Rights*, ASS'N FOR THE PREVENTION OF TORTURE 7, 13 (2001), http://www.ap.t.ch/content/files_res/Article3_en.pdf; accord Aisling Reidy, *The Prohibition of Torture*, in HUMAN RIGHTS HANDBOOK NO. 6 10 (Council of Europe, 2002). https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMCo_DisplayDCTMContent?documentId=090000168007ff4c (clarifying that, per the *de minimis* Rule, not all types of harsh treatment fall within the scope of Article 3; rather, the Court holds that Article 3 protection refers to ill treatment reaching a certain threshold assessed on a case-by-case basis).

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).

country.”⁴⁴ Such a risk need not come from the state’s direct action.⁴⁵ Rather, the Court focuses on whether ill treatment comes about by either the state’s actions or actions of private citizens.⁴⁶ Moreover, “jurisdiction” regarding an Article 3 breach is not restricted to the national territory of a Member State.⁴⁷ A Member State may bear responsibility for the acts of its agents, which produce effects beyond its borders.⁴⁸

Immutable characteristics such as sexual orientation, race, and gender, prove decisive in the assessment of whether Article 3 has been breached.⁴⁹

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.⁵⁰

Regarding accommodation facilities, Article 3 obligates Member States to regularly review conditions and meet requirements of health and well-being.⁵¹ 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.⁵² 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*⁵³ and the Greek Case.⁵⁴ The Greek Case involved the conduct of Greek security forces following the military coup of 1967.⁵⁵ This case established the first review of prohibited treatment, and remains the approach that the Court takes regarding Article 3.⁵⁶ The Court's holding in the Greek Case established the three-tiered hierarchy as Article 3's standard of review.⁵⁷

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.⁵⁸ In subsequent interrogation sessions, U.K. officials employed inhumane practices for which the Republic of Ireland asserted breach of Article 3.⁵⁹ The Court held that the interrogation tactics amounted to inhumane treatment, in clear violation of Article 3.⁶⁰ This case

53. *Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (ser. B) at 23 (1976).

54. Greek Case, App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 12 Y.B. Eur. Conv. on H.R. at 11 (Eur. Comm'n on H.R.) (establishing the first ruling on Article 3 regarding physical mistreatment); *cf.* *X v. Turkey*, App. No. 24626/09, Eur. Ct. H.R. (2012) (finding a violation of Article 3 when a homosexual prisoner was kept in isolation for nearly one year, allegedly to protect other inmates, marking the first time the Court found a violation of Article 3 for discrimination based on sexual orientation).

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.⁶¹ The Court looks to both physical and mental treatment on a subjective case-by-case basis.⁶²

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.⁶³

Many contemporary cases for breach of Article 3 relate specifically to how the LGBTQ community is treated.⁶⁴ In *Identoba and Others v. Georgia*,⁶⁵ 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.⁶⁶ The Court held that the event evinced a violation of Article 3 because of this omission.⁶⁷ Moreover, the authorities knew, or had reason to know, of the risks surrounding the demonstration. Therefore, under Article 3, they were obligated to

need not be bodily injury for ill treatment to occur).

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).

65. *Identoba v. Georgia*, App. No. 73235/12, Eur. Ct. H.R. 1, 30 (2015).

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.⁶⁸

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).

70. *Stasi v. France*, App. No. 25001/07, Eur. Ct. H.R. (2011).

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).

75. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 5 (1989).

would face the death penalty.⁷⁶ 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.⁷⁷ However, to date, the Court has not applied such logic to the deportation of LGBTQ asylees.⁷⁸ In *M.K.N. v. Sweden*,⁷⁹ an Iraqi asylum applicant contended that he was unable to return to Iraq because he would be at risk of persecution for being homosexual.⁸⁰ The applicant explained further that his partner had already been executed by the Mujahedin.⁸¹ The Court held that deporting the applicant would not violate Article 3 because the security situation in Iraq was "slowly improving."⁸² 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.⁸³

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).

77. See, e.g., *Nasri v. France*, App. No. 19465/92, A320 Eur. H.R. Rep. (ser. B) at 467 (1995) (deporting a deaf alien violates Article 3 because his handicap would expose him to complete sensory isolation in his home country resulting in fear, anguish, and degradation).

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://echrso.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).

79. *M.K.N. v. Sweden*, App. No. 72413/10, Eur. Ct. H.R. (2013).

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

81. Cf. Jason Burke, *Frankenstein the CIA Created*, GUARDIAN (Jan. 17, 1999, 12:42 AM), <https://www.theguardian.com/world/1999/jan/17/yemen.islam>. (discussing the Mujahedin's history of being originally funded by American forces, only to develop into a radical guerilla force throughout MENA).

82. *M.K.N. v. Sweden*, Eur. Ct. H.R. at 8.

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.⁸⁴ The right to asylum is a fundamental right, and the only one that is afforded to foreign nationals.⁸⁵ The process begins with an individual's registration and application.⁸⁶ Asylum seekers are then sent to accommodation facilities and their applications are assessed.⁸⁷ Asylum seekers are required to participate in an in-person interview wherein a Government decision-maker is present.⁸⁸ Beyond testimony, whether an individual arrived from, or traveled through, a so-called "safe" country will play a crucial role.⁸⁹ While seemingly straightforward, the asylum process in Germany is replete with complexities, rule exceptions, and ancillary procedures.⁹⁰ This process is further complicated by the clustering system used to assess asylum applications, the conditions in accommodation facilities, and the "safe" countries policy.⁹¹

84. See GRUNDGESETZ [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).

86. *The Stages of the Asylum Procedure*, FED. OFF. MIGRATION & REFUGEES: ASYLUM & REFUGEE PROTECTION, <http://www.bamf.de/EN/Fluechtlingsschutz/AblaufAsylv/ablauf-des-asylverfahrens-node.html>. (last visited Mar. 24, 2017).

87. *Id.*

88. *Id.*

89. See *The Safe Country Concepts*, ASYLUM INFO. DATABASE, <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/safe-country-concepts> (last visited Oct. 2, 2016) (defining a "safe country of origin" as a state that, per EU legal standards, evinces no danger to a person sent back after rejection of an asylum request).

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.⁹² Applications for asylum will be placed in a “cluster” based on the asylee’s characteristics, including nationality, minority status, and travel route.⁹³ This system is meant to make review of applications more efficient.⁹⁴ There are four cluster categories for asylum applications, each designated for different groups.⁹⁵ 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.⁹⁶ Cluster B applies to individuals arriving from a “safe country of origin” and yields a low likelihood of approval for asylum.⁹⁷ Cluster C refers to “complex cases” or cases not included in Clusters A or B, and also yields a low rate of approval.⁹⁸ 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.⁹⁹

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).

96. Fed. Office for Migration and Refugees, *The German Asylum Procedure, Arrival Centers* (Oct. 1, 2016), <http://www.bamf.de/EN/Fluechtlingschutz/Ankunftsentren/ankunftsentren-node.html>.

97. *Id.*

98. See Chris Tomlinson, *Over 6,000 Migrants Sue Germany for Taking Too Long with Asylum Claims*, BREITBART (Aug. 10, 2016), <http://www.breitbart.com/london/2016/08/10/thousands-migrants-sue-germany-taking-long-asylum-claims/> (discussing a “complex” asylum case as one involving a migrant without a passport, documents, or any kind of identification).

99. See *The German Asylum Procedure, Arrival Centers*, *supra* note 96 (explaining the mechanics of the Dublin Regulation); see also *Country responsible for asylum application (Dublin)*, EUROPEAN COMM’N MIGRATION & HOME AFFAIRS, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/index_en.htm (last visited Oct. 2, 2016) (clarifying that

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.¹⁰⁰ Applications from Cluster A are seen to need the highest level.¹⁰¹ LGBTQ applicants from countries not deemed to need heightened international protection will often be sent back.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.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.¹⁰⁴

During the application process, asylees stay in accommodation

the Dublin Regulation is an EU directive enacted to prevent “forum shopping” in the asylum process).

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).

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).

102. *See Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU*, at 2-5, COM (2015) 452 final (Sept. 9, 2015) [hereinafter *Proposal for a Regulation*] (detailing the concept of “safe” countries, indicting that incidents of discrimination against LGBTQ persons occur in Albania and pointing out that in 2014, the Court found only four out of 150 alleged human rights abuses admissible for review).

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).

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.¹⁰⁵ Violence pervades throughout these facilities.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.¹⁰⁷ Reports of widespread violence against LGBTQ individuals, including physical and sexual assault, are widely reported across Germany, with many other incidents going unreported.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.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

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).

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).

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

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).

109. See Nuala Mole, *Asylum and the European Convention on Human Rights*, AIRE CENTRE 26-27 (2000), [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-09\(2000\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-09(2000).pdf) (providing context concerning the development of the “safe” countries practice, beginning with the Geneva Convention).

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).

117. *See* Christoph Hasselbach, *Different Origin Means Different Chance of Success for Asylum Seekers in Germany*, DEUTSCHE WELLE (Sept. 24, 2015), <http://www.dw.com/en/different-origin-means-different-chance-of-success-for-asylum-seekers-in-germany/a-18736823> (specifying the difficulties and low prospects of attaining asylum for migrants who arrive from countries in this

from these countries are denied with accelerated procedures, and without detailed examination of the applicant's circumstances.¹¹⁸ Such a high rejection rate has produced controversial outcomes and case law.¹¹⁹

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.¹²⁰ 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.¹²¹ 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.

category).

118. *Accord Zoran Arbutina, The Hazy Notion of Safe Countries of Origin*, DEUTSCHE WELLE (Sept. 24, 2016), <http://www.dw.com/en/the-hazy-notion-of-safe-countries-of-origin/a-18648450> (pointing out the social unrest and economic instability in Albania and Kosovo, indicating that they should not be characterized as "safe" countries of origin for purposes of asylum applications).

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 Iruretagoyena 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 3.¹²² 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.¹²³ "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.¹²⁴ 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.¹²⁵

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.¹²⁶ 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.¹²⁷ 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.¹²⁸ This is most evident in the accommodation centers.¹²⁹ 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.¹³⁰ Such reports are indisputably only a small fraction of the total number of violent incidents that occur with many other incidents going unreported.¹³¹ 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.¹³² 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).

129. See *Violence Getting 'Out of Hand' at German Refugee Centers*, IRISH TIMES (Oct. 2, 2015, 12:54 PM), <http://www.irishtimes.com/news/world/europe/violence-getting-out-of-hand-at-german-refugee-centres-1.2376111> (detailing acts of violence that have occurred in accommodation centers).

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. Turki* [*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).

violation.¹³³

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.¹³⁴ The German authorities should reasonably be aware that this carryover of unfortunate social norms occurs.¹³⁵ 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.¹³⁶

The Court's reasoning in *Stasi v. France* lends further support to a conclusion that the conditions in the accommodation centers violate Article 3.¹³⁷ 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.¹³⁸ Much like the reported abuse evident in *Stasi*, LGBTQ asylees are targets because of their sexual orientation.¹³⁹ 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.¹⁴⁰ By contrast, the German authorities make minimal efforts to provide protection or

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.

136. *Identoba v. Georgia*, App. No. 73235/12, at 1, 23.

137. *Affaire Stasi c. France* [*Stasi v. France*], App. No. 25001/07, Eur. Ct. H.R. 5, (2011).

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-9bbfa50eeca7#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.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.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 3.¹⁴³

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.¹⁴⁴ To this end, the clustering system violates Article 3 as applied to LGBTQ asylees because, as a result of the “safe” countries

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).

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).

143. Cf. Stijn Smet, *X. v. Turkey: Why a Ruling on the Basis of Discriminatory Effects Would Have Been Preferable*, STRASBOURG OBSERVERS (Oct. 25, 2012), <https://strasbourgoobservers.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).

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).

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 country 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. 32829/96, Eur. Ct. H.R. (1998) (explaining how "safe countries" are in fact often 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.¹⁵¹ The same holds true for MENA and Slavic countries, which Germany also designates as “safe.”¹⁵² In this way, the clustering system discriminates against LGBTQ asylees based upon their country of origin or the third countries through which they traveled.¹⁵³ 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.¹⁵⁴

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.¹⁵⁵ Because this system’s effect on LGBTQ asylees clearly falls within Article 3’s purview, the clustering system violates Article 3.¹⁵⁶

<http://www.washingtonblade.com/2015/10/31/poll-anti-lgbt-discrimination-attitudes-common-in-balkans/> (providing poll data relating to abuse of LGBTQ individuals in the Balkans revealing alarmingly high rates and percentages); see also James Horsey, *With Visibility Comes a Cost: To Be Gay in the Balkans*, YALE GLOBALIST (Oct. 18, 2015), <http://tyglobalist.org/in-the-magazine/features/with-visibility-comes-a-cost-to-be-gay-in-the-balkans/> (documenting how homosexuality in the Balkans region entails severe discrimination); cf. *The Safe Country Concepts*, *supra* note 89 (listing Germany’s “safe” countries list).

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

164. See generally *M.K.N. v. Sweden*, App. No. 72413/10, Eur. Ct. H.R. (2013).

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).

171. See generally *A.N. v. France* [*A.N. v. France*], App. No. 12956/15, Eur. Ct. H.R. (2016).

172. *Id.*

173. See *E.S. c. l’Espagne* [*E.S. v Spain*], App. No. 13273/16, Eur. Ct. H.R. (2016) (providing case law analysis regarding Article 3 and a possible breach by

action, homophobic sentiments and social norms have led to abuse and degradation of LGBTQ individuals.¹⁷⁴ 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.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷

deporting a gay man to Senegal); *see also* Jay Michaelson, *11 Arrested For Being Gay in Senegal – Is President Obama to Blame?*, DAILY BEAST (Dec. 30, 2015, 12:01 AM), <http://www.thedailybeast.com/articles/2015/12/30/11-arrested-for-being-gay-in-senegal-is-president-obama-to-blame.html> (pointing out recent cases of criminalization for LGBTQ persons in Senegal).

174. *See 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, *Top Five African Countries Least 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).

175. *See 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).

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).

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

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.¹⁸² 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.¹⁸³ 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.¹⁸⁴ 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.¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷ By virtue of their circumstances, certain individuals are in need of heightened levels of international protection often connected to their country of origin.¹⁸⁸ 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.¹⁸⁹ 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).

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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.