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The Individual Right to Asylum Under Article 3 of the European Convention on Human Rights

David Scott Nance*

INTRODUCTION

In a series of decisions beginning in 1961, the European Commission of Human Rights¹ has recognized a limited right of asylum under the European Convention on Human Rights² for persons subject to deportation or extradition proceedings in countries party to the Convention. This development is remarkable because, as the Commission itself recognizes, "the right to political asylum is not as such included among the rights and freedoms guaranteed by the Convention."³ The Commission found the basis for a right of nondeportation in Article 3 of the Convention, which declares that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Specifically, the Commission has advanced the principle that a state party violates its Article 3 obligations when it returns an alien to a country where he or she might be subjected to treatment which, if inflicted by a party to the Convention, would itself constitute a violation of Article 3.⁴

International law does not recognize an individual right to be granted asylum.⁵ The emergence of a variant of such a right under the European Convention on Human Rights, albeit under limited conditions, therefore marks a major departure from customary law, a departure particularly noteworthy given that the parties to the Convention represent some of the most advanced legal systems in the world. The recognition of a right to asylum not only establishes a valuable precedent, but also has a direct impact on the status of refugees in Europe. Although no right of entry is provided, aliens already in countries of refuge in Europe are now protected from forced return to countries where their fundamental human rights

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might be denied. To appreciate the significance of such a development, the right recognized by the Commission, limited as it is, must be evaluated with three objectives in mind: to examine how the doctrine evolved through the decisions of the European Commission of Human Rights, to isolate the substantive features of the doctrine, and finally to identify limits to future applications of the doctrine. Before exploring the content and ramifications of the asylum decisions of the Commission, however, it is necessary to understand the role of the Commission in the enforcement of the European Convention on Human Rights.

THE CONVENTION ENFORCEMENT SYSTEM

Two organs of the Council of Europe⁶ were created by the Convention to oversee enforcement of its provisions: the European Commission of Human Rights and the European Court of Human Rights.⁷ Only the Commission has as yet played any role in developing the doctrine of nondeportation. The Commission is the "court of first resort," receiving petitions alleging violations of the Convention directly from aggrieved parties either states or individuals.⁸ The Commission has the same number of members as there are parties to the Convention; no two members may be of the same nationality.⁹ The Committee of Ministers of the Council of Europe elects the members from a list drawn up by the Bureau of the Consultative Assembly.¹⁰

On receiving a petition alleging violations of the Convention, the Commission's first task is to decide if it is admissible, that is, whether it is eligible under the Convention for further consideration of its facts and the claim it states.¹¹ Under Article 27(2), the Commission may reject an application which it considers "manifestly ill-founded."¹² For example, a petition is inadmissible if it claims a right not found in the Convention¹³ or if the facts do not indicate a violation of the Convention.¹⁴ There is no provision in the Convention for appeal of a finding of inadmissibility.

If an application is admitted, the Commission has broad powers to investigate the claims it contains. The Convention requires the state accused of a violation to furnish all necessary information and to cooperate with the Commission.¹⁵ The avowed aim of the Commission is to help the parties reach a friendly settlement "on the basis of respect for Human Rights as defined in [the] Convention."¹⁶ If it can do so, the Commission's work is ended.¹⁷ If not, the Commission will draw up a report stating whether it believes the facts disclose a violation of the Convention.¹⁸ It will then transmit the report to the Committee of Ministers of the Council of Europe,¹⁹ along with any proposals it may have on the matter.²⁰ The Commission may then leave to the Committee of Ministers the final deci-

sion on whether there has been a breach,²¹ or it may refer the case to the European Court of Human Rights under Article 48.²² The Court renders a final decision on all cases referred to it.²³

Each party to the Convention has the right to submit petitions to the Commission alleging violations by other parties.²⁴ More significantly, individuals too, may petition the Commission directly as provided in Article 25. The Commission may receive an individual application, however, only if the state it is lodged against has accepted Article 25. The right of individual application, and the degree to which member states have voluntarily subscribed to it, may be considered both a sign of and a factor in the Convention's success.²⁵ As of June 1979, fourteen of the twenty-one member states had ratified Article 25.²⁶ This provision for individual petition stands in sharp contrast to customary, and most conventional, international law, which does not recognize individuals as subjects.²⁷ Each of the applications discussed below came before the Commission by individual petition.

Even if a state has not ratified Article 25, an individual may claim the Convention's protection directly if the respondent state has incorporated the Convention into its domestic law. This enables the individual to bring suit in a municipal court to enforce his or her rights under the Convention, in many ways a simpler procedure than petitioning the Commission.²⁸ At present ten states have explicitly incorporated the Convention into municipal law.²⁹ The effectiveness of the Convention is further enhanced by Article 46, which allows any party to the Convention to declare that it recognizes as compulsory the jurisdiction of the European Court of Human Rights in all matters of application and interpretation of the Convention. This declaration means that a state accepts the competence of the Court to deal with any case alleging a violation of the Convention within its territory.³⁰ At present sixteen states have ratified Article 46.³¹

EVOLUTION OF THE DOCTRINE OF NONDEPORTATION

1961-1964: Establishing a Foundation

The Commission first recognized that deportation might constitute a violation of the Convention in its opinion on the application of *X contra la Belgique* (1961).³² The applicant, a Hungarian residing in Brussels, was considered a menace to public order and was ordered by the Belgian police to leave the country within thirty days. The applicant claimed that he was physically unable to leave because of recent surgery and that the taking of his identification papers by the police would make it impossible for him to settle elsewhere. He petitioned the Commission under Article 25, alleging that deportation would violate his right under Article 3 of the Convention.

The Commission refused to admit the application on the grounds that the Belgian authorities had taken no further official action to deport the applicant. In its discussion of the law, however, the Commission raised the question of whether the expulsion of an alien could, under certain exceptional circumstances, constitute inhuman or degrading treatment within the meaning of Article 3.³³ The pronouncement was guarded; the Commission merely implied that deportation could be a violation of Article 3. Nonetheless, simply raising the question in this case influenced a series of decisions by which the principle of nondeportation became Convention law.

The next two decisions by the Commission on the admissibility of petitions alleging violations of the Convention in the context of deportation or extradition restated the principle enunciated in *X contra la Belgique*. In *X against the Federal Republic of Germany* (FRG) (1962),³⁴ the Commission affirmed that the legality of deportation could be scrutinized under Article 3. The FRG had threatened to return a Christian Egyptian citizen to Egypt after his conviction in Germany for selling smuggled goods. The applicant feared persecution in Egypt as a result of earlier pro-Jewish activities. He did not allege that he would be subjected to political persecution, but rather that the situation in Egypt under Nasser, which was strongly anti-Israel, presented a danger to his life and liberty.³⁵ The Commission rejected his application, but noted that the question of a violation of Article 3 might arise in connection with deportation to a particular country.³⁶ The Commission refused to decide the issue because Germany had ceased its efforts to deport the applicant.

The Commission's opinion in a second case of the same name elaborated on the elements necessary to state a violation of Article 3. In *X against the Federal Republic of Germany* (1962)³⁷ the respondent-state desired to return a former Turkish citizen to Turkey, which had requested his extradition on charges of forgery, fraud, illegal currency transactions, and espionage. The applicant denied these charges, and claimed that the new government in Turkey wanted to punish him for his acts on behalf of the former Menderes regime.³⁸ The Commission held that the question of a violation of Article 3 might arise when a person was to be returned "to a particular country in which, due to the very nature of the regime of that country or to a particular situation in that country, basic human rights . . . might be either grossly violated or entirely suppressed."³⁹ Without elaborating upon the reasons for its conclusion, the Commission declared that these conditions were not fulfilled in the instant case.⁴⁰

In deciding the admissibility of the petition of *X against Austria and Yugoslavia* (1964),⁴¹ the Commission stated more explicitly the doctrine it was applying to extradition and deportation cases. The applicant alleged a violation of Article 3 by Austria, which had agreed to extradite him to

Yugoslavia to face charges of embezzlement. The applicant argued that the Yugoslav charges against him were politically motivated as a result of his known opposition to the Tito government and alleged that, should he return to Yugoslavia, he would face severe and inhuman reprisal. He admitted that he had embezzled an amount of money from his enterprise, although much less than the Yugoslavs claimed.⁴² The Austrian authorities maintained that he was a common fugitive from justice.⁴³ While maintaining that extradition could constitute inhuman or degrading treatment in violation of Article 3 in exceptional cases, the Commission found that Austrian judicial procedure in extradition cases which here resulted in a denial of political asylum, contained sufficient procedural safeguards to preclude the possibility of a violation of Article 3.⁴⁴ The petition was dismissed.

The Commission expressed the rationale underlying the application of Article 3 to extradition and deportation cases as follows:

[A]lthough extradition and the right of asylum are not, as such, among the matters governed by the Convention . . . the Contracting States have nevertheless accepted to restrict the free exercise of their powers under general international law, *including the power to control the entry and exit of aliens*, to the extent and within the limits of the obligations which they have assumed under the Convention.⁴⁵

By emphasizing that all sovereign powers are limited by the obligations contained in the Convention, the Commission indicated that the right it was expounding, although not expressly set out in the convention, was nevertheless inherent in it. The enforcement of a limited right of asylum in exceptional circumstances, therefore, is merely incidental to the Commission's duty to protect the right under Article 3 not to be subjected to inhuman or degrading treatment. The contracting states to the European Convention on Human Rights entrusted the Commission with a primary role in safeguarding the human rights of persons in Europe, whether nationals of contracting parties or not.⁴⁶ If the Commission observes actions taken in Europe that would have the result of depriving an individual of his or her rights, it must intervene to stop such actions. Deportation or extradition are actions which, in exceptional circumstances, could result in a gross deprivation of human rights. The Commission may therefore enjoin the deportation or extradition, even though such actions do not constitute immediate violations of the Convention, if their effect would be to allow a later violation of the terms of the Convention, albeit by a state not party to the Convention.

Application and Reaffirmation of the Doctrine

Although the Commission stated as early as 1961 that deportation could give rise to the question of a violation of Article 3, and by 1964 explained the rationale underlying this principle, the doctrine was not actually applied until 1967. In that year the Commission admitted the application of *X against the Federal Republic of Germany* (1967).⁴⁷ West Germany wished to deport the applicant, an Algerian citizen, to Algeria. The applicant feared grave harm should he be returned to Algeria because of his contacts with the French Army during the Algerian Civil War. The Commission admitted the case for further study, finding that the facts stated showed that deportation might lead to inhuman treatment in violation of Article 3.⁴⁸ During its investigation after admitting the case, however, the Commission discovered that the applicant had disappeared, and ordered the case struck from its list.⁴⁹

The second case to be admitted was *Amekrane against the United Kingdom* (1972).⁵⁰ The applicant's husband, a senior Moroccan Air Force officer, fled to British Gibraltar after an unsuccessful attempt on the life of the King of Morocco.⁵¹ The Gibraltar authorities refused his request for political asylum⁵² and turned him over to the Moroccan officials in Gibraltar.⁵³ He was tried by a military court and executed for treason in January 1973. In her petition, his widow charged the UK with violating Article 3.⁵⁴ She alleged that the British authorities in Gibraltar had held her husband incommunicado in a Gibraltar prison, that they had used subterfuge to take him from the prison to turn him over to the Moroccans, and that at the time he was so sick as to be endangered by the move. Ms. Amekrane further charged that her husband had been tortured before his trial in Morocco, and that the trial itself was a farce. She concluded by insisting that the Gibraltar authorities were fully aware of the probable consequences of their actions, and that their actions not only contravened the municipal law of Gibraltar, but also Article 3 of the Convention.⁵⁵ The British Government denied the allegations, and insisted that the authorities in Gibraltar had acted in complete conformity with municipal and Convention law.⁵⁶ After examining the facts as submitted by the parties, the Commission found sufficient evidence of a violation of the Convention to warrant admission.⁵⁷ The Commission then helped the parties reach an amicable settlement, under which the UK paid the applicant £37,500 while maintaining that it had committed no violation.⁵⁸ The Commission therefore conducted no full investigation nor gave a formal recommendation on the case.

In its opinions on admissibility since *Amekrane*, the Commission has consistently stated that deportation can constitute a breach of Article 3, although it has refused to admit most claims on their merits.⁵⁹ In *X v/*

Federal Republic of Germany (1973), the Commission reemphasized that the states parties had voluntarily restricted their powers of control over the entry and exit of foreigners, and that this cession enabled the Commission to hold deportation under some circumstances to be a violation of Article 3.⁶⁰ West Germany had ordered an Algerian citizen expelled to France after conviction for various ordinary criminal offenses. The Algerian feared the French would then deport him to Algeria, where he faced a death sentence for participation in an unsuccessful coup against the current regime. In this instance, the Commission stated, deportation to Algeria would constitute a violation of Article 3. Expulsion to France would not, however, since the German Government could not be held responsible for the actions of the French, and had indeed planned to send the French Government a note expressing the assumption that the applicant would not be deported to Algeria.⁶¹ In *X v/Federal Republic of Germany* (1976),⁶² which dealt with attempts by West Germany to deport a Jordanian citizen after his conviction of a common criminal offense in Germany, the Commission noted that it had consistently upheld the doctrine of nondeportation, although it rejected the application in the instant case due to factual inconsistencies in the applicant's allegations.⁶³ And in the most recent case to come before the Commission, *M. Giama v/Belgium* (1980),⁶⁴ the Commission affirmed the principle once more, and admitted the application for further investigation. After acceptance, however, the parties were able to achieve a friendly settlement.⁶⁵

Contours of the Doctrine

The line of decisions starting with *X contra la Belgique* sets forth a two-pronged test for determining if deportation or extradition contravenes Article 3. The first and simplest element is that the applicant is to be deported to a country known for its denial of human rights.⁶⁶ By deliberately sending a person to a country where he or she clearly will be subjected to inhuman or degrading treatment, the expelling state is committing an act without which the subsequent ill-treatment would not be possible. In a real sense, therefore, the deporting state is causing severe suffering to the deportee, although it remains one step removed from the actual infliction of pain. In *X against the Federal Republic of Germany* (1962), the Commission placed special emphasis on the requirement that the receiving country be a known human rights violator.⁶⁷ This indicates that the Commission includes a scienter element in the Article 3 violation and will fault the expelling state only if it had good reason to believe that the applicant would be harmed upon deportation or extradition. The requisite knowledge could come from the applicant's presentation of information to the national authorities⁶⁸ or through independent knowledge on their part.⁶⁹

The Commission has not directly addressed the question of whether there could be a violation if the applicant could prove that deportation to a country respecting human rights would be followed by expulsion to a state where his or her rights might be suppressed. In *X v/Federal Republic of Germany* (1973), discussed above, the Commission raised the issues, but rejected the application upon finding that the applicant had not established with certainty that the subsequent deportation would occur.⁷⁰

The second requirement is that the circumstances be "exceptional."⁷¹ Although it has never defined precisely what it means by exceptional circumstances, the Commission's examinations of fact situations have focused on the existence of "serious reasons to believe that the person concerned will be subjected, in the State to which he is to be sent, to treatment which is in violation of this Article (3)."⁷² Inhuman or degrading treatment has been defined by the Commission as "such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable."⁷³ The level of proof required of the applicant has been quite high.⁷⁴ He or she is expected to furnish in detail "the exact nature of the dangers which might threaten him in the event of his deportation. . . ."⁷⁵ That the Commission demands a high degree of proof may be seen from the fact that, of the twelve cases examined here, only three were declared admissible.

The strict proof requirement reflects the Commission's acknowledgment that deportation and extradition are normally permissible under the Convention. The Commission has no desire to usurp this important aspect of sovereignty and will interfere only in truly extraordinary circumstances with a state's right to expel aliens from its territory.

Before admitting a petition, the Commission will weigh the facts as submitted by the parties and to some extent probe the evidence behind them; it need not accept the applicant's allegations as true.⁷⁶ The degree to which it may reject as unfounded facts alleged by the applicant is apparent in *Becker against Denmark* (1975).⁷⁷ The applicant sought to halt the planned repatriation of approximately 200 Vietnamese war orphans from Denmark to Vietnam after the end of the Vietnamese War. The orphans had been evacuated from Vietnam in April 1975 pursuant to agreements between the applicant and the Danish and South Vietnamese Governments which contemplated their return after the cessation of hostilities.⁷⁸ In support of his claim that the children would be subjected upon their return to inhuman or degrading treatment because of their ethnic origin (Montagnard) and their ties to the anti-Communist regime in the south, the applicant presented extensive evidence of reprisals taken by the new Vietnamese Government, evidence in the form of journalistic accounts and letters from experts on Vietnamese affairs.⁷⁹ The Commission examined the evidence, but declared the application inadmissible, choosing to be-

lieve the Danish Government's assurances that the children would be safe.⁸⁰

PROSPECTS FOR FURTHER DEVELOPMENT

The application of Article 3 to deportation and extradition has been evolving over the past twenty years as outlined in the foregoing discussion. An assessment of how far the doctrine of nondeportation might extend in the future necessitates closer scrutiny of key components of the doctrine. The doctrine applies when the applicant can prove that deportation or extradition to a specific state has a great likelihood of leading to inhuman treatment. Two questions follow from this: what factors has the Commission considered in evaluating the likelihood of inhuman treatment, and what constitutes a breach of rights in the receiving state sufficient to make deportation itself inhuman treatment?

The Commission has, in its opinions on the admissibility of various applications, shed some light on these questions and their corollaries. Deportation or extradition to a party to the Convention seems to be proof that inhuman treatment will not occur.⁸¹ The Commission has also held that no inhuman or degrading treatment can occur if the state against which the applicant seeks to enforce his or her rights has dropped any further formal actions against the applicant.⁸² Beyond this, the possibility of an Article 3 violation depends on the specific circumstances of the case. Among other things, the Commission will consider the efforts by the returning state to ensure that the returnee will not be harmed. Factors that may have a special impact are the government's use of individualized screening procedures to decide on a case-by-case basis whether a returnee faces a possible danger in returning to the receiving state,⁸³ and cooperation by the government with international organizations such as the Office of the United Nations High Commissioner for Refugees, in arranging the individual's return.⁸⁴

Although the Commission noted in *Becker against Denmark*, that "it is not within the power of the respondent government to give guarantees as to what should not happen to the children in South Vietnam," the Commission nevertheless placed great emphasis on the approval of the repatriation agreement by the UNHCR, the availability of the UNHCR to offer financial support to the children through its Saigon office, and the negotiation of special arrangements between the Danish Government and the Danish and Vietnamese Red Cross Societies to follow up the reestablishment of the children in their homeland.⁸⁵ In particular, it was noted that "it seems to the Commission hardly probable that the High Commissariat would

lend its assistance to a repatriation of the children if their fate were at stake."⁸⁶

Defining what is inhuman or degrading treatment on the part of the receiving state for purposes of the doctrine is more difficult. As noted above, the standard definition of inhuman or degrading treatment is "such treatment as deliberately causes severe suffering, mental or physical which, in the particular situation, is unjustifiable."⁸⁷ The Commission has held that certain practices are not inhuman treatment. Military conscription is not inhuman, and so not ground for delaying deportation.⁸⁸ Nor is imprisonment for nonpolitical crimes contrary to Article 3, as it is specifically allowed under Article 5. The Commission has held that prosecution for desertion is not political persecution.⁸⁹ In considering cases of extradition, the Commission will take into account both the nature of the crime the applicant is charged with and the practices of the receiving state. If the receiving state respects the doctrine of speciality,⁹⁰ the Commission is likely to allow extradition.⁹¹

These holdings leave uncharted much of the field of inhuman or degrading treatment. Inhuman treatment may result in mental as well as physical suffering,⁹² but the quantum or quality of suffering required to establish the violation is by no means clear. Incarceration under wretched conditions, although it does not amount to torture, has been held to constitute inhuman treatment.⁹³ Solitary confinement has never been found to do so.⁹⁴ A harder problem is presented by the use of administrative machinery for the harassment of a returnee. Persecution may occur directly or obliquely, through such acts as denying the newly arrived deportee a good job, adequate housing, or the chance to educate his or her children. That such treatment may occur, however, is difficult to prove beforehand, and the strict proof requirements developed by the Commission for nondeportation cases compounds the difficulty.

The Commission has consistently required the applicant to prove that he or she personally is likely to suffer inhuman or degrading treatment. In the early decision of *X against the Federal Republic of Germany* (1962), however, the Commission implied that a petition is sufficient to state a violation of Article 3 if it alleges that the receiving state is a systematic violator of human rights.⁹⁵ This raises the possibility that any deportation or extradition to certain countries would be a violation of Article 3 by the expelling state. If this were the case, it would reduce the applicant's burden of proof greatly, since he or she would have to allege only generally inimical practices, rather than the details of the probability that, because of personal characteristics, he or she would be harmed.

Such an approach would be consistent with the Commission's purpose in applying Article 3 to cases of deportation and extradition, namely, the prevention of inhuman or degrading treatment after expulsion. It is possi-

ble, and indeed probable, that deportation to a nation that systematically violates human rights would expose the applicant to a sufficient likelihood of harm to invoke Article 3. The most obvious drawback to this approach lies in the difficulty of categorizing states. As relatively few states outside of the Convention parties guarantee human rights on the same scale as the Convention, categorization may become an exercise in weighing relative suppressions of rights. This approach would also impinge significantly, perhaps unduly, on the policy independence of Convention parties. The finding that any deportation to a particular country constitutes a violation of Article 3 would amount to a blanket prohibition of deportation to that country; contracting parties might well resent such a broad usurpation of their sovereign power to control the entry and exit of aliens, even though they are willing to concede this power to the Commission in individual cases. Finally, labeling a country as a human rights violator might cause severe problems in the foreign relations of the member states. The state so labeled would doubtless protest, and the moral judgment attached to the label could be a source of anger and tension interfering in bilateral relations between the offender and any of the contracting parties.

Acts by nonofficial parties in the receiving country present another question on the scope of the doctrine of nondeportation. In *X v/Federal Republic of Germany* (1975),⁹⁶ the applicant, a Lebanese Moslem, alleged that he had been a terrorist in the Black September group, but that he had abandoned the organization before entering West Germany. After his conviction for illegal entry and other criminal offenses, the applicant was ordered to leave by the German Government. The applicant claimed that if he were deported to Lebanon, he would be killed by the Palestinian Liberation Organization for his refusal to rejoin Black September. Due to substantial inconsistencies in the facts alleged by the applicant in his petition, the Commission declined to decide whether such a threat fell under Article 3 and the nondeportation doctrine.⁹⁷ The argument advanced by the applicant has some merit. The possible actions of an autonomous group could well present a definite threat to a returnee. If the applicant could prove the probability of the harm fully, the same arguments stand as if the receiving state itself were the threat. If the Commission required solid proof of individual danger, the admission of a claim on such facts would be consistent with its rationale in prior cases.

CONCLUSION: TOWARD A GENERAL RIGHT OF ASYLUM?

The ultimate question on the scope of the nondeportation doctrine is whether it might be expanded into, or be a precursor of, a right of entry— asylum at the border. The European Convention contains no such right,

and the right of nondeportation under Article 3 as developed by the Commission, diverges from what might be expected of a full-fledged right of asylum. It can arise only in situations where an individual has already entered the country in which he or she seeks asylum. The right depends not on the conditions from which an individual has fled, but on the anticipated treatment the individual will experience if returned to the country of origin. The reprieve from deportation depends on the standard of "inhuman or degrading" treatment, a standard which may not be entirely coterminous with or as favorable toward applicants as the related standard of persecution that governs determinations of refugee status under the 1951 Convention relating to the Status of Refugees.⁹⁸

Despite its limitations, the doctrine of nondeportation represents a significant step in the development of human rights law and in the illumination of a corner of the field of territorial asylum. Its significance as a precursor of a right of asylum at the frontier is another matter, as a recent case before the Commission demonstrates. In *3 East African Asians v. the United Kingdom* (1978),⁹⁹ the applicants were British protected persons who had resided in three former British colonies in East Africa. They had been harassed because of their Asian ethnicity, and two of them were finally ordered to leave their countries. All three sought entry to the UK, which refused to admit them. The applicants alleged that the British immigration laws under which they were denied entry were racially discriminatory and in violation of Article 3. The Commission concluded that the laws were not discriminatory and that they did not subject the applicants to degrading treatment.¹⁰⁰ Although these cases arguably are distinguishable from cases under the deportation and extradition doctrine, since the applicants did not allege that they would be in danger of inhuman or degrading treatment if not allowed into the UK, the import of the Commission's opinion is clear. It remains quite unwilling to interfere with the sovereign right of a state to admit or refuse admission to whomever it will, at least so long as the decision is not based on discriminatory grounds.

Traditionally, the grant of asylum has been purely a matter of national prerogative. Over the last twenty years, the European Commission of Human Rights has modified this rule. For those countries which are parties to the European Convention on Human Rights, the doctrine of non-deportation enunciated by the Commission has reduced the rights of states to deport aliens and has increased the security of refugees in Western Europe.

It is certainly too soon to conclude that the cases discussed above mark the beginning of a worldwide trend in international law toward an individual right of asylum. The system set up by the European Convention on Human Rights is unique. Moreover, the doctrine of non-deportation itself has been applied only in special circumstances. The doctrine is nonetheless a marked departure from traditional international law, and

constitutes an advance in international efforts to protect the rights and lives of refugees.

NOTES

¹ See text at notes 6-23 *infra* for a discussion of the European Commission of Human Rights.

² 213 U.N.T.S. 221. The full name of the agreement is the Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention was drafted by the International Juridical Section of the International Committee of Movements for European Unity, and adopted by the Consultative Assembly of the Council of Europe in 1950 after extensive review by the Committee of Ministers. The Convention was opened for signature by member states of the Council of Europe in 1951, and entered into force on September 3, 1953. See generally, A. ROBERTSON, *HUMAN RIGHTS IN EUROPE* 5-16 (1976)

³ X against the Federal Republic of Germany, Application No. 3040/67, 22 COLL. OF DECISIONS 133, 136 (Eur. Comm. on Human Rights) (1967).

⁴ See *M. Giama v. Belgium*, Council of Europe Press Release B(80) 36, July 31, 1980, at 4 (1980); *X v. Federal Republic of Germany*, Application No. 7334/76, 5 DECISIONS AND REPORTS 154 (Eur. Comm. of Human Rights) (1976); *X v. Federal Republic of Germany*, Application No. 7216/75, 5 DECISIONS AND REPORTS 137 (Eur. Comm. on Human Rights) (1976); *Becker against Denmark*, Application No. 7011/75, [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 416 (Eur. Comm. of Human Rights), *X v. Federal Republic of Germany*, Application No. 6315/73, 1 DECISIONS AND REPORTS 73 (Eur. Comm. of Human Rights) (1975); *Amekrane v. United Kingdom*, Application No. 5961/72, [1973] Y.B. EUR. CONV. HUMAN RIGHTS 356 (Eur. Comm. of Human Rights); *X against the Federal Republic of Germany*, Application No. 4314/69, [1970] Y.B. EUR. CONV. ON HUMAN RIGHTS 900 (Eur. Comm. of Human Rights); *Report of the Commission on X against the Federal Republic of Germany*, Application No. 2396/65, [1970] Y.B. EUR. CONV. ON HUMAN RIGHTS 1094 (Eur. Comm. of Human Rights); *X against Austria and Yugoslavia*, Application No. 2143/64, [1964] Y.B. EUR. CONV. ON HUMAN RIGHTS 314 (Eur. Comm. of Human Rights); *X against Federal Republic of Germany*, Application No. 1802/62, [1963] Y.B. EUR. CONV. ON HUMAN RIGHTS 462 (Eur. Comm. of Human Rights); *against the Federal Republic of Germany*, Application No. 1465/62 9 COLL. OF DECISIONS 63 (Eur. Comm. of Human Rights) (1963); *X contra la Belgique*, Application No. 984/61, 6 COLL. OF DECISIONS 39 (Eur. Comm. of Human Rights) (1961).

⁵ See S. SINHA, *ASYLUM AND INTERNATIONAL LAW* 50 (1971).

⁶ The Council of Europe is an organization of European states formed in 1949 with the aim of bringing about greater unity among its members. Its main organs are the Committee of Ministers, consisting of the minister of foreign affairs of each member, and the Consultative Assembly. Delegates to the Consultative Assembly may be appointed by their national government or parliament. At present the Council includes Austria, Belgium, Cyprus, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxemburg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. See A. ROBERTSON, *EUROPEAN INSTITUTIONS* 36-71 (3d ed. 1973), for a brief survey of the Council and its activities.

⁷ European Convention on Human Rights, *supra* note 2, art. 19.

⁸ *Id.*, arts. 24, 25.

⁹ *Id.*, art. 20.

¹⁰ *Id.*, art. 21.

¹¹ See ROBERTSON, *supra* note 2, at 158-70 for a thorough discussion of admissibility.

- 12 *See, e.g., X against the Federal Republic of Germany*, 5 DECISIONS AND REPORTS at 155.
- 13 *X against the Federal Republic of Germany*, 22 COLL. OF DECISIONS at 136.
- 14 *See* ROBERTSON, *supra* note 2, at 167-168
- 15 European Convention on Human Rights, *supra* note 2, art. 28 (a). *See generally*, ROBERTSON, *supra* note 2, for a full discussion of article 28(a).
- 16 European Convention on Human Rights, *supra* note 2, art. 28 (b).
- 17 *See* the European Convention on Human Rights, *supra* note 2, art. 30, for the procedure followed upon reaching a friendly settlement.
- 18 *Id.*, art. 31(1).
- 19 *Id.*, art. 31(2).
- 20 *Id.*, art. 31(3).
- 21 *Id.*, art. 32(1).
- 22 The Convention does not specify any criteria to be followed in sending a case to one body or the other, and the matter remains entirely within the discretion of the Commission. The Committee of Ministers may decide the case only if the report of the Commission is not also transmitted to the Court within three months; once the report is transmitted to the Court it has exclusive power to decide the case.
- 23 European Convention on Human Rights, *supra* note 2, art. 52.
- 24 *Id.*, art. 24.
- 25 *See* ROBERTSON, *supra* note 2, at 149-158, for a full analysis of the role of Article 25 within the Convention as a whole.
- 26 COUNCIL OF EUROPE, CHART SHOWING SIGNATURES AND RATIFICATIONS OF COUNCIL OF EUROPE CONVENTIONS AND AGREEMENTS 17 (1980). The states that have ratified Article 25 are Austria, Belgium, Denmark, the Federal Republic of Germany, Iceland, Ireland, Italy, Luxemburg, Netherlands, Norway, Portugal, Sweden, Switzerland, and the United Kingdom.
- 27 *See* 2 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 56-63 (1972) for a discussion of the standing of individuals under most international instruments.
- 28 Drzemczewski, *The Domestic Status of the European Convention on Human Rights: New Dimensions*, [1977] 1 LEGAL ISSUES OF EUROPEAN INTEGRATION 1, 2.
- 29 The ten states incorporating the Convention into domestic law are Austria, Belgium, Cyprus, France, Germany, Greece, Italy, Luxemburg, Netherlands, and Switzerland. *See id.* at 22-64 on the incorporation of the Convention into domestic legal systems.
- 30 ROBERTSON, *supra* note 2, at 204.
- 31 Council of Europe, *supra* note 26, at 17. The states accepting Article 46 are Austria, Belgium, Denmark, France, West Germany, Greece, Iceland, Ireland, Italy, Luxemburg, Netherlands, Norway, Portugal, Sweden, Switzerland and the United Kingdom.
- 32 *X contra la Belgique*, 6 COLL. OF DECISIONS 39.
- 33 *Id.* at 39-40 (emphasis added).
- 34 *X against the Federal Republic of Germany*, 9 COLL. OF DECISIONS 63.
- 35 *Id.* at 63-64.
- 36 *Id.* at 65-66.
- 37 *X against the Federal Republic of Germany*, [1963] Y.B. EUR. CONV. ON HUMAN RIGHTS 462.
- 38 *Id.* at 462-464.
- 39 *Id.* at 480.
- 40 *Id.* at 480-484.
- 41 *X against Austria and Yugoslavia*, [1964] Y.B. EUR. CONV. ON HUMAN RIGHTS 314.
- 42 *Id.* at 314-316.
- 43 *Id.* at 324.
- 44 *Id.* at 330.

45 *Id.* at 328 (emphasis added). The claim against Yugoslavia was immediately dismissed, as Yugoslavia was not a party to the Convention.

46 The Convention applies to all persons within a state party to the Convention. A state may limit application of the Convention to certain designated portions of its territory under Article 63(1), though the right of restriction seems to have been meant to apply only to colonies and dependencies, and not to the municipal territory itself. ROBERTSON, *supra* note 2, at 272-73.

47 The Commission has never published its opinion in this case. For the order striking it from the Commission's list, *see* X against the Federal Republic of Germany, [1970] Y.B. EUR. CONV. ON HUMAN RIGHTS 1094.

48 For the facts of the case, *see* Danelius, *A Survey of the Jurisprudence Concerning the Rights Protected by the European Convention on Human Rights*, 8 HUMAN RIGHTS J. 431, 434-435 (1975).

49 X against the Federal Republic of Germany, [1970] Y.B. EUR. CONV. ON HUMAN RIGHTS 1094.

50 *Amekrane v. the United Kingdom*, [1973] Y.B. EUR. CONV. ON HUMAN RIGHTS 356.

51 The parties agreed that planes of the Moroccan Air Force attacked the royal jet while the king was returning to Morocco, and that an airport and the royal palace were also subsequently attacked, causing some loss of life. [1973] Y.B. EUR. CONV. ON HUMAN RIGHTS at 358. The British Government further alleged that Amekrane directed the attack on the royal jet from the ground. *Id.* at 366. After the attempt failed, Amekrane commandeered a helicopter and flew to Gibraltar. The facts as to the conditions of his reception and subsequent arrest were disputed. *Id.* at 358-368.

52 Many extradition agreements and national laws provide that an attempt on the life of a chief of state is not a political offense for which extradition may be refused. *See* 2 M. BASSIONI & V. NANDA, *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 316 (1973).

53 The British Government, in its submissions, alleged that Amekrane was not extradited pursuant to any agreement with the Government of Morocco, there being no extradition agreement in force between Britain and Morocco, but rather that Amekrane was expelled pursuant to the law of Gibraltar as a prohibited immigrant. The Moroccan Government had, however, requested his return, and sent an Air Force plane to collect him. [1973] EUR. Y.B. HUMAN RIGHTS 366-368.

54 *Id.* at 370.

55 *See id.* at 356-366 for the full version of the facts as alleged by the applicant.

56 *Id.* at 368.

57 *Id.* at 388.

58 EUROPEAN COMMISSION OF HUMAN RIGHTS, REPORT OF THE COMMISSION ON APPLICATION NO. 5961/72, *AMEKRANE AGAINST THE UNITED KINGDOM* 4 (1974).

59 *See, e.g.*, X v. Federal Republic of Germany, 1 DECISIONS AND REPORTS 73; X v. Federal Republic of Germany, 5 DECISIONS AND REPORTS 137; X v. Federal Republic of Germany, 5 DECISIONS AND REPORTS 154.

60 X v. Federal Republic of Germany, 1 DECISIONS AND REPORTS 73.

61 *Id.*

62 X v. Federal Republic of Germany, 5 DECISIONS AND REPORTS at 155.

63 *Id.* at 155.

64 M. Giama v. Belgium, Council of Europe Press Release B (80) 36, July 7, 1980, at 4 (1980).

65 *Id.* The applicant, claiming to be stateless, alleged that expulsion of a person lacking travel documents in itself violates Article 3. No further facts are yet available.

66 *See* X against the Federal Republic of Germany, 9 COLL. OF DECISIONS 63.

67 *See* X against the Federal Republic of Germany, [1963] Y.B. EUR. CONV. ON HUMAN RIGHTS 462, 480.

68 X against the Federal Republic of Germany, Application No. 4436/70, [1970] Y.B. EUR. CONV. ON HUMAN RIGHTS 1028, 1034.

69 Becker against Denmark, [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS at 432.

70 See X v. Federal Republic of Germany, 1 DECISIONS AND REPORTS at 75.

71 See, e.g., X contra la Belgique, 6 COLL. OF DECISIONS at 40.

72 Becker against Denmark, [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS, 452.

73 Report of the Commission on the Greek Case, Application No. 3321/67, [1969] Y.B. EUR. CONV. ON HUMAN RIGHTS 1 (Eur. Comm. of Human Rights) (concerning the future of prisoners in Greece).

74 Becker against Denmark, [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 452.

75 X against the Federal Republic of Germany, [1970] Y.B. EUR. CONV. ON HUMAN RIGHTS 1034.

76 See ROBERTSON, *supra* note 2, at 166-169.

77 Becker against Denmark, [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 416.

78 *Id.* at 418-20.

79 *Id.* at 418, 424, 432-36.

80 *Id.* at 452-454.

81 See e.g., X against the Federal Republic of Germany, [1963] Y.B. EUR. CONV. ON HUMAN RIGHTS 462; X v. Federal Republic of Germany, 1 DECISIONS AND REPORTS 73.

82 See e.g., X contra la Belgique, 6 COLL. OF DECISIONS at 40; X against the Federal Republic of Germany, 9 COLL. OF DECISIONS at 65-66.

83 See Becker against Denmark, [1975] Y.B. EUR. CONV. ON HUMAN RIGHTS at 452.

84 X against Austria and Yugoslavia [1964] Y.B. EUR. CONV. ON HUMAN RIGHTS at 330. (approval of UNHCR was sought and obtained prior to return).

85 Becker against Denmark, [1975] Y.B. EUR. CONV. ON HUMAN RIGHTS 452-54.

86 *Id.* at 454.

87 Report of the Commission on the Greek Case, Application No. 3321/67, [1969] Y.B. EUR. CONV. ON HUMAN RIGHTS 1.

88 X against the Federal Republic of Germany, [1970] Y.B. EUR. CONV. ON HUMAN RIGHTS 904.

89 X v. Federal Republic of Germany, 5 DECISIONS AND REPORTS, at 155.

90 The doctrine of speciality states that a state seeking extradition of an individual will try him only for those crimes it give as the grounds for his extradition.

91 X against the Federal Republic of Germany, 22 COLL. OF DECISION at 136.

92 See text at note 73 *supra*.

93 Report of the Commission on the Greek Case, [1969] Y.B. EUR. CONV. ON HUMAN RIGHTS 505.

94 Doswald-Bech, *What does the Prohibition of "Torture or Inhuman or Degrading Treatment or Punishment" mean? The Interpretation of the European Commission and Court of Human Rights*, 25 NETH. INT'L L. REV. 24, 28 (1978). This article provides an excellent survey of the interpretation of Article 3 and its dimensions by the Commission, especially with reference to detainees.

95 X against the Federal Republic of Germany, [1963] Y.B. EUR. CONV. ON HUMAN RIGHTS 480.

96 X v. Federal Republic of Germany, 5 DECISIONS AND REPORTS at 141.

97 *Id.* at 143.

98 189 U.N.T.S. 137 (1951).

99 3 East African Asians v. The United Kingdom, Application Nos. 4715/70, 4783/71, and 4827/71, 13 DECISIONS AND REPORTS 17 (Eur. Comm. of Human Rights) (1978).

100 *Id.* at 18.