Constructing the Right "Not to Be Made a Refugee" at the European and Inter-American Courts of Human Rights

Karl C. Procaccini*

Introduction

This note is motivated by a basic premise: Governments must be held accountable for creating refugee flows. There are over nine million refugees in the world today who have been persecuted at home and forced to seek asylum abroad.[1] The human cost of this massive upheaval and migration is incalculable. By definition, refugees have a well-founded fear of persecution in their home country based on their fundamental beliefs or characteristics.[2] Refugees flee persecution, armed conflicts, and brutality.[3] In their new host countries, refugees face numerous challenges adapting to new cultures, languages, and environs while separated from family and social support networks.

In addition to the human cost of refugee flows, the economic cost that they impose on the international community is staggering. Contributions to the United Nations High Commissioner for Refugees ("UNHCR") in

* J.D. Candidate, Harvard Law School, 2010; LL.M., The American University in Cairo, 2007; A.B., Harvard University, 2005. My thanks to Professors Susan Akram and Diana Van Bogaert for their comments on earlier versions of this paper and to the editors and staff of the Harvard Human Rights Journal for their helpful suggestions. Special thanks to Nayla Hamdi for her support.

1. As of the end of 2007, the United Nations High Commissioner for Refugees (UNHCR) counted 11.4 million refugees, including 1.7 million people found to be in "a refugee-like" situation. UNHCR, Statistical Yearbook 2007: Trends in Displacement, Protection and Solutions 7 (2008), *available at* http://www.unhcr.org/statistics/STATISTICS/4981b19d2.html. This number does not include asylum seekers, internally displaced persons, or stateless persons.

2. Under Article 1(A)(2) of the Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, and the Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (*entered into force* Oct. 4, 1967), a refugee is a person who,

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

3. *See* UNHCR, The State of the World's Refugees: Human Displacement in the New Millennium 9–13 (2006), *available at* http://www.unhcr.org/static/publ/sowr2006/toceng.htm (surveying the sources of forced migration).

2008 totaled over $1.5 billion,[4] and that figure is just a small percentage of the global outlay.[5] Worse still is the extent to which the cost of refugee flows "falls disproportionately on nations least able to afford it."[6] In 2007, developing countries hosted eighty-two percent of the world's refugee population.[7] The burden "of large impoverished refugee populations further strains resources and perpetuates poverty in the host nation."[8] In the face of the costs to refugees themselves and to the international community that is obliged to accommodate them, it is important to hold states accountable for creating refugee flows. Accountability encourages states to address their obligations preemptively, while also providing victims an opportunity for redress and compensation.

This note explores the promise of Inter-American and European regional human rights systems as avenues of recourse for refugees. These regional human rights systems offer both procedural and legal advantages over the international legal regime to the potential refugee litigant. Most importantly, the Inter-American and European Courts of Human Rights allow for the filing of individual claims for state violations—an opportunity often lacking from the international system.[9] Furthermore, both the European Court of Human Rights ("ECtHR") and Inter-American Court of Human Rights ("IACtHR") show willingness to find ways to construct a right "not to be made a refugee" out of preexisting human rights provisions contained in the European Convention on Human Rights ("ECHR") and the American Convention on Human Rights ("ACHR"). Though not without limitations, these developments bode well for refugees who seek redress from their home countries and for an international community strained by the burden of large refugee populations. I explore the emerging potential of the two regional human rights courts as avenues of recourse for refugees, and I argue that these courts are gradually constructing a right "not to be made a refugee" from the human rights conventions within their mandates.

This note proceeds in two main parts. Part I discusses the problems with the current international legal regime, under which refugee flows are arguably "illegal," but little action is taken to prevent or punish the creation of such flows. I propose that regional human rights mechanisms, namely the

4. United Nations High Commissioner for Refugees, 2008 Contributions to UNHCR Programmes, Nov. 30, 2008, *available at* http://www.unhcr.org/partners/PARTNERS/45f025a92.pdf.

5. In 1993, Western European countries spent $11.6 billion "processing asylum applications and offering social security to those awaiting decisions." Alan Dowty & Gil Loescher, *Refugee Flows as Grounds for International Action*, Int'l Security, Summer 1996, at 47–53 (citing International Centre for Migration Policy Development, The Key to Europe: A Comparative Analysis of Entry and Asylum Policies in Western Countries (1994)).

6. *Id.* at 47.

7. UNHCR Statistical Yearbook 2007, *supra* note 1, at 7.

8. Dowty & Loescher, *supra* note 5, at 47.

9. The 1951 Convention relating to the Status of Refugees and the 1967 Protocol both provide for the resolution of inter-state disputes, but neither provides a right of individual petition. Convention relating to the Status of Refugees, *supra* note 2, art. 38; Protocol relating to the Status of Refugees, *supra* note 2, art. 4.

ECtHR and IACtHR, may show promise for holding states accountable where more global mechanisms have failed. I then explore three possible categories of litigation available to refugees at the regional level: increasing protection for refugees in the country of refuge, holding home countries responsible for persecution that leads to refugee flows, and making countries liable for the refugee condition itself.

Part II addresses the third category: litigation and jurisprudence that brings to the fore the particular human rights violations associated with forced migration. I show how the regional courts are beginning to concoct a substantive "right not to be made a refugee" out of three distinct areas of rights contained in the ECHR and ACHR: freedom from expulsion and the right to return, freedom of movement and residence, and the right to property. Next I consider the limits of the regional courts in implementing a comprehensive system of redress. I conclude with guarded optimism, noting the ECtHR and IACtHR's influence not only in the countries within their jurisdictions, but also in other emerging human rights systems and in the global human rights discourse.

I. How Can We Hold States Accountable for Creating Refugee Flows?

A. Loud bark, little bite: The problem of accountability at the international level

On its face, international law would appear to be an effective mechanism for holding states accountable for the creation of refugee flows, because the imposition of refugees on another country abuses rights recognized under customary international law and is akin to other recognized transboundary harms such as environmental pollution. Customary law regarding refugee flows has developed over the past hundred years as legal doctrine has adapted to the practical circumstances of modern refugee crises.[10] Some argue that the creation of refugee flows violates customary international law because it falls under the "the generally accepted doctrine of the abuse of rights,"[11] (*i.e.*, one state may not abuse the rights of another state by forcing

10. Dowty & Loescher, *supra* note 5, at 54. For an early exposition of the argument that the creation of refugee flows is a violation of customary international law, see R. Yewdall Jennings, *Some International Law Aspects of the Refugee Question*, 20 Brit. Y.B. Int'l L. 110–113 (1939). Jennings notes that President Benjamin Harrison grounded American "remonstrations" against Russia in 1891 on the large movement of Russian refugees to the United States. *Id.* at 112. More recently, after the 1980 Mariel Boat Lift in which Cuba encouraged the exodus of thousands of refugees, the United States claimed that Cuba's actions violated "international law and practice." 1980 Dig. U.S. Prac. Int'l L. 191.

11. Dowty & Loescher, *supra* note 5, at 55. *See* General Assembly, Report of the Group of Governmental Experts on International Co-Operation to Avert New Flows of Refugees ¶ 51, U.N. Doc. A/41/324 (May 13, 1986) ("[T]he principle that states should refrain in their international relations from using the threat or use of force, enshrined in Article 2, paragraph 4, of the [United Nations] Charter, and the Declaration on Friendly Relations, applies to the prevention of new massive flows of refugees.").

a population into its country). The reasoning here is similar to other cases involving "substantial transboundary harm" such as environmental pollution.[12] Other commentators argue that refugee flows are not only illegal under customary international law but may also constitute a threat to peace under the U.N. Charter.[13] In spite of these recognized obligations, there has been little litigation on these grounds. And, although the 1951 Convention and the 1967 Protocol relating to the Status of Refugees contain inter-state litigation provisions,[14] "[n]o litigation has resulted."[15] Forced migrants are left with a right without a practical remedy.

B. A way forward? Individual claims in regional courts

> International and regional systems for the protection of human rights that do not give individuals and private groups standing to file petitions generally are less effective than those that do grant standing. This is probably why states have been reluctant to recognize the right of private petition.[16]

The regional human rights conventions and courts in Europe and the Americas may offer desirable alternative avenues of recourse. The primary advantage of the regional systems is that individual victims have standing to bring claims against offending nations at competent courts. Victims are able to initiate claims in the regional courts that draw attention to their plight and perhaps secure compensation. Although states seem unwilling to bring claims against one another, it is almost certain that many refugees would welcome the opportunity to seek redress from their oppressors.

Both the Inter-American and European human rights systems grant standing to a large range of potential applicants. The first article of the ACHR extends its protection to "*all persons* subject to the jurisdiction" of state parties to the convention.[17] A claim need not be filed by a direct victim of a human rights violation. In addition to a state's right to file petitions against other states, "[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of

---

12. Guy S. Goodwin-Gill, The Refugee in International Law, at vi (2d ed. 1996).

13. Dowty & Loescher, *supra* note 5, at 58–61.

14. Convention relating to the Status of Refugees, *supra* note 2, art. 38; Protocol relating to the Status of Refugees, *supra* note 2, art. 4.

15. Goodwin-Gill, *supra* note 12, at 218.

16. Thomas Buergenthal, *The American and European Conventions on Human Rights: Similarities and Differences,* 30 Am. U. L. Rev. 159 (1980), *reprinted in* Thomas Buergenthal & Dinah Shelton, Protecting Human Rights in the Americas: Cases and Materials 92 (1995).

17. American Convention on Human Rights art. 1, Nov. 22, 1969, 36 O.A.S.T.S. 1 [hereinafter ACHR] (emphasis added). Approximately two-thirds of the member states of the Organization of American States (OAS) have ratified the ACHR and thereby acceded to its jurisdiction. Notably, neither Canada nor the United States has ratified the ACHR. For a current list of ratifications, see Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica," http://www.oas.org/juridico/english/sigs/b-32.html (last visited Feb. 5, 2009).

the Organization, may lodge petitions with the Commission containing denunciations or complaints of [the] Convention by a State Party."[18]

At the ECtHR, "anyone within [the] jurisdiction" of the forty-six state parties to the ECHR is afforded its protection.[19] The Court's jurisdiction is interpreted broadly to include citizens and non-citizens, both within and without the territory of the contracting states.[20] Until recently, ECHR contracting states could decide whether or not to accept the ECtHR's jurisdiction in cases initiated by individual petitions;[21] however, when Protocol No. 11 was entered into force in 1998, it guaranteed an individual petition procedure for "any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto."[22] This provision brought the ECtHR's standing provisions roughly in line with those of the IACtHR.

The ability of individuals to file claims directly circumvents the cumbersome state-against-state process at the international level and allows for an exchange between victimized individuals and offending nations. Victim-initiated proceedings are desirable because they promote justice and promise remedies even when political circumstances prevent states from engaging with one another at the international level.

C. Types of refugee-related claims at the regional courts

There are three broad categories of claims that refugees might bring at the regional level. First, a refugee might file a claim against the host country (*i.e.*, the country of refuge) in order to resist deportation or secure the fundamental human rights guaranteed by the regional human rights convention. Second, a claim might be filed against a refugee's home state (*i.e.*, the state from which she fled) for human rights violations that may have precipitated the refugee's departure. Third, a refugee might seek redress from her home country on the very basis of her status as a refugee, because she is unable to return home and thus unable to exercise her fundamental human rights. In this section, I examine developments in each of the first

18. ACHR, *supra* note 17, art. 44.

19. Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

20. J.G. Merrills & A.H. Robertson, Human Rights in Europe: A Study of the European Convention on Human Rights 25–27 (4th ed. 2001).

21. Under Article 33 of the ECHR, all contracting states were always subject to claims filed by other states. ECHR, *supra* note 19, art. 33 ("Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.").

22. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* May 11, 1994, Europ. T.S. No. 155 (*entered into force* Nov. 1, 1998). Protocol 11 also abolished the European Commission of Human Rights, allowing applicants to petition the ECtHR directly.

two categories before introducing the third category, which is the focus of the remainder of this note.

Much has already been written on the expansion of refugee protection under regional human rights regimes.[23] Although "there is no right of asylum under the [European] Convention,"[24] several articles in the ECHR can be invoked in order to fight extradition or deportation proceedings, or to protest detention in the country of refuge.[25] For example, the protections against inhuman treatment found in Article 3 of the ECHR can be used as a source of *de facto* asylum status when the applicant might face such treatment as a result of deportation.[26] Likewise, some applicants have been successful in fighting deportation based on claims of infringement of the ECHR's Article 8 right to "family life."[27] In essence, the ECtHR has slowly expanded the protections of *non-refoulement* to the benefit of refugee populations in countries under the Court's jurisdiction. The Court has also situated itself as something of a court of last resort for asylum seekers who have seen their applications denied by domestic or international agencies.[28]

The ACHR's expansion of *non-refoulement* and the right to asylum is more explicit than that of the ECHR. Article 22(8) stipulates that "[in] no case may an alien be deported or returned to a country . . . if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."[29] Furthermore, Article 22(7) guarantees a refugee the "right to seek and be granted asylum . . . in the event he is being pursued for political offenses or related common crimes."[30] While these broadened protections are unquestionably important for refugees, they neither address the root causes of forced migration nor serve as mechanisms of individual recourse against countries that fail to protect those within their territory. In other words, the expansion of *non-refoulement* and *de facto* asylum only helps refugees be refugees, without holding persecuting countries responsible for their actions.

---

23. *See, e.g.*, Terje Einarsen, *The European Convention on Human Rights and the Notion of an Implied Right to* de facto *Asylum*, 2 Int'l J. Refugee L. 361 (1990); Clare Ovey & Robin White, Jacobs and White, The European Convention on Human Rights 82–87 (3d ed. 2002); Merrills & Robertson, *supra* note 20, at 152.

24. Ovey & White, *supra* note 23, at 82.

25. *See id.* at 82–87; Einarsen, *supra* note 23, at 364–82.

26. ECHR, *supra* note 19, art. 3. The leading case in this area is *Soering v. United Kingdom*, App. No. 14038/88, 161 Eur. Ct. H.R. (ser. A) (1989), in which the ECtHR found that the extradition of a German national from the United Kingdom to the United States where he could face the death penalty would constitute a violation of his Article 3 freedom from "torture or . . . inhuman or degrading treatment or punishment." *See* Ovey & White, *supra* note 23, at 82–83.

27. *See* Merrills & Robertson, *supra* note 20, at 152.

28. *See, e.g.*, Jabari v. Turkey, App. No. 40035/98, 2000-VIII Eur. Ct. H.R. 149; D. and Others v. Turkey, App. No. 24245/03 (Eur. Ct. H.R. June 22, 2006) (holding that Turkish orders to deport applicants to Iran, if carried out, would violate the ECHR's Article 3 freedom from inhuman treatment).

29. ACHR, *supra* note 17, art. 22(8).

30. *Id.* art. 22(7).

The second category of cases that refugees might bring at the regional level consists of claims against their home country for specific acts of persecution. For example, a refugee who fled her home in response to religious persecution might file a claim against her home country for the violation of her freedoms of conscience and religion, as enshrined in Article 9 of the ECHR[31] and Article 12 of the ACHR.[32] This allows a refugee the important opportunity to seek restitution for concrete acts of persecution perpetrated by her state of origin. These petitions are also desirable because they hold states directly responsible for the persecutory acts that lead to refugee flows. However, many refugees may have difficulty advancing claims of this type. Many refugees have not actually experienced any specific event of persecution—they are able to flee their countries before actual persecution takes place. Of course, those who flee without having suffered serious physical or emotional harm are still refugees if they have a "well-founded fear of persecution" in their home country that is based on "personal experience *or in other external facts or events*."[33] However, refugees who have not endured such personal experiences may not have a valid claim against their home countries based solely upon their well-founded fear of future persecution.[34] Furthermore, even those refugees who have experienced persecution might still face difficulties filing claims. Both the ECtHR and the IACtHR have jurisdictional requirements that oblige the applicant to show that he or she has exhausted all domestic remedies before filing a claim at the regional level.[35] This may prove difficult in the context of an unexpected or hurried

31. ECHR, *supra* note 19, art. 9(1) ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.").

32. ACHR, *supra* note 17, art. 12(1–2) ("1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private. 2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.").

33. GOODWIN-GILL, *supra* note 12, at 37 (emphasis added). See *supra* note 2 for the definition of "refugee" provided in the 1951 Convention relating to the Status of Refugees and the subsequent 1967 Protocol to that convention.

34. Article 34 of the ECHR states that "[t]he Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto." ECHR, *supra* note 19, art 34. The Court has interpreted the term "victim" liberally to include those against whom no specific action has been taken. *See* Open Door and Dublin Well Woman v. Ireland, App. No. 14234/8815, 246 Eur. Ct. H.R. (ser. A) 3 (1992) (non-pregnant women have standing to bring claim protesting injunction preventing access to information regarding abortions). *See generally* PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 126–29 (2d ed. 2005).

35. *See* ECHR, *supra* note 19, art. 35(1) ("The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."); ACHR, *supra* note 17, art. 46(1)(a) (requiring "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."). I do not argue that regional instruments ought to replace domestic mechanisms. If a refugee can successfully file a claim and obtain redress at the domestic level, this may be the most favorable course of action. Several factors

flight from one's home, in spite of the fact that the exhaustion requirement sometimes may be circumvented if it can be proven that domestic remedies are inadequate, ineffective, or unavailable.[36]

The third possible category of claims that refugees might file against their home countries are those based on a necessary condition of the refugee experience—displacement. The refugee might file a claim against her home country for rendering her a refugee and consequently separating her from her home indefinitely. I explore these claims in the remainder of this note. I have chosen to focus on such claims because they do not require a direct experience of persecution, and they hold states bluntly accountable for creating refugee flows. In claims of this kind, the international law prohibiting the very act of forced displacement is finally brought to bear on offending countries. In the next sections, I explore three areas of rights enshrined in the European and American human rights conventions: freedom from expulsion and the right to return, freedom of movement and residence, and the right to property. As I flesh out the jurisprudence being developed around these fundamental freedoms, the individual corollary to the international prohibition on the creation of refugee flows—the right "not to be made a refugee"—begins to take form. This process foreshadows a new area of conflict between individuals and their home countries, creating a new space for findings of state liability.

II. Constructing the "Right Not to Be Made a Refugee" at the Regional Level

A. Freedom from expulsion and the right to return

My construction of a right "not to be made a refugee" begins with an analysis of the provisions in the regional conventions that protect against expulsion and provide a right to return to one's country of nationality. The freedom from expulsion and the right to return are "essentially . . . guarantee[s] against exile"[37] and, as such, are intrinsically linked to the prohibition against the creation of refugee flows in international law. The relevant clauses in the ECHR and ACHR are both similar to Article 12(4) of the International Covenant on Civil and Political Rights

typically prevent the success of such claims. For one, refugees' access to domestic courts is limited as refugees are, by definition, living outside of their country of nationality. Furthermore, the refugee condition results from a lack of state protection that likely precludes fair or easy access to courts. Finally, the questionable independence of the judiciary in many refugee-producing countries results in a lack of adequate remedies.

36. See Christina Cerna, *The Inter-American Commission on Human Rights: its Organization and Examination of Petitions and Communications*, *in* The Inter-American System of Human Rights 65, 85 (David Harris & Stephen Livingston eds., 1998) for a discussion of the exhaustion requirement at the IACtHR. For a discussion of the ECtHR's interpretation of the exhaustion requirement, see Merrills & Robertson, *supra* note 20, at 302–07.

37. Merrills & Robertson, *supra* note 20, at 256.

("ICCPR"), which stipulates that "no one shall be arbitrarily deprived of the right to enter his own country."[38] The wording here is important—the inclusion of the adverb *arbitrarily* qualifies the extent of the right to return in the ICCPR. A state might argue that its policy of exclusion is not arbitrary but rather is based on some particular criteria. Furthermore, the ICCPR does not include a freedom from expulsion.

In contrast, both the European and American conventions stipulate an unconditioned right to return and add freedom from expulsion to their inventories of fundamental human rights. In the Inter-American system, the relevant provision is Article 22(5) of the ACHR, which provides that "[n]o one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it."[39] Unlike the related clause of the ICCPR, the right to return under the ACHR is "unconditional."[40] The language of the ECHR, which provides that "no one shall be deprived of the right to enter the territory of the State of which he is a national,"[41] similarly allows for no justification for denial of the right to return. On the other hand, the regional conventions both refer explicitly to the state of nationality, rather than using the ICCPR's broader "own country" language, which could be interpreted to include, for example, a country of habitual residence.

Applying the "freedom from expulsion" and the "right to return" to the refugee experience is not without difficulties. First, "expulsion" must be defined. Perhaps the most common connotation of expulsion—a state actively forcing its own nationals outside of its borders—may fit some refugee situations, but it does not capture the many incidents in which refugees flee their homes on their own accord out of fear of persecution. Likewise, it is unclear in the conventions whether the "right to return" is a substantive right allowing individuals to return without being persecuted. In many instances the refugee may not feel that she has a meaningful right to return home because she fears persecution. Meanwhile her home government might maintain that she is free to return in the sense that nobody will stop her from doing so.

In order to construct a right "not to be made a refugee," the competent courts must interpret the "right to return" and "freedom from expulsion" in a substantive fashion. Therefore, I now turn to the courts' specific jurisprudence to determine how they have interpreted these key provisions. The

38. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 85 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].

39. ACHR, *supra* note 17, art. 22(5).

40. Scott Davidson, *Civil and Political Rights Protected in the Inter-American Human Rights System*, *in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 213, 279 (David Harris & Stephen Livingston eds., 1998).

41. Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3(2), *opened for signature* Sept. 16, 1963, Europ. T.S. No. 46 (*entered into force* May 2, 1968) [hereinafter ECHR Protocol No. 4].

case law in this area is underdeveloped. A search of the Inter-American Court's database uncovers only a handful of cases addressing Article 22 of the ACHR and even fewer specifically discussing the expulsion and return clauses. The most important case to date is the 2005 case *Moiwana Village v. Suriname.*[42] Although commentators have explored the relevance of this case to indigenous rights[43] and with respect to the IACtHR's expansion of its temporal jurisdiction,[44] less has been written on its promising precedent for holding states liable for the refugee condition itself.

Moiwana dealt with the aftermath of a massacre of a small village by Suriname's military in 1986. "[O]ver 40 men, women and children" were killed in the event, and the village itself was "razed . . . to the ground."[45] The survivors of the attack "fled into the surrounding forest, and then into exile or internal displacement."[46] At the time of the IACtHR's 2005 judgment, the former residents of Moiwana Village continued to live as internally displaced persons in Suriname or as refugees in neighboring French Guiana.[47]

The IACtHR found numerous violations of the ACHR relating to the massacre and the government's actions in the aftermath.[48] Significantly, the Court held that Suriname was in violation of the Article 22(5) "right to enter" for not having enabled the villagers to return to Moiwana.[49] The Court refused to adopt a literal interpretation of Article 22(5) in which the "right to enter" is violated only when a government denies entry to citizens at the border or is unwilling to issue identity documents to its citizens. Instead, the Court embraced a substantive "right to return" and held that the government's unwillingness to investigate the massacre and to ensure protection to the villagers should they wish to move back to their homes amounted to a deprivation of their right to return.[50]

The Court identified several factors preventing the villagers' return. First, they feared violence similar to that which they experienced in the 1986 massacre; the Moiwana villagers shared a "deep concern that they could once more suffer aggressions as a community if they were to take up residence again in their homeland."[51] The threat of physical attack was not the villagers' only source of fear—their spiritual beliefs also made them

42. Moiwana Village v. Suriname, 2005 Inter-Am. Ct. H.R. (ser. C) No. 145 (June 15, 2005), *available at* http://www.corteidh.or.cr/casos.cfm.

43. *See* Claudia Martin, *The Moiwana Village Case: A New Trend in Approaching the Rights of Ethnic Groups in the Inter-American System*, 19 LEIDEN J. INT'L L. 491, 491–504 (2006).

44. *See* Pablo A. Ormachea, *Moiwana Village: The Inter-American Court and the "Continuing Violation" Doctrine*, 19 HARV. HUM. RTS. J. 283 (2006) (discussing the Court's assertion of jurisdiction based on the doctrine of "continuing violation").

45. *Moiwana*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 145, ¶ 3.

46. *Id.* ¶ 3.

47. *Id.* ¶ 117

48. *Id.* ¶ 233.

49. *See id.* ¶¶ 104–121.

50. *Id.* ¶¶ 119–121.

51. *Id.* ¶ 114.

afraid to return. Having departed the village without performing the proper death rites, the exiled villagers feared "avenging spirits, and affirmed that they could only live in Moiwana Village again if their traditional lands first were purified."[52] Finally, the villagers in exile in French Guiana were reluctant to move back to their home country due to the ill-treatment reported by those who had already been repatriated.[53]

The IACtHR took all of these factors into consideration when it assessed the situation:

> In sum, only when justice is obtained for the events of November 29, 1986 may the Moiwana community members: 1) appease the angry spirits of their deceased family members and purify their traditional land; and 2) no longer fear that further hostilities will be directed toward their community. Those two elements, in turn, are *indispensable for their permanent return* to Moiwana Village, which many—if not all—of the community members wish to accomplish.[54]

This analysis provides the necessary criteria for properly interpreting Article 22's "right to return." The ability to return is not limited to the exiles' legal ability to merely enter their country of nationality. The right is far more substantive: an exile has a right not to *fear* return. As such, past wrongs and future insecurity must be remedied before there can be an expectation of return. The Court held that the government must create conditions allowing for a "permanent return." Later in its judgment, the Court declared that, to comport with its obligations in the ACHR, Suriname must "both establish conditions, as well as provide the means, that would allow the Moiwana community members to return voluntarily, in safety and with dignity, to their traditional lands."[55] Thus, the state's role in guaranteeing a right to return was not a passive one—it had to take active steps to allay the villagers' fears and allow them an amicable return. By failing to take such steps, Suriname had "effectively deprived" the Moiwana villagers of their right to return.[56] This "effective deprivation" definition can be applied to refugee cases where the home government does not take steps to remedy the source of the refugee's well-founded fear. In short, the IACtHR's expansive conception of the right to return bodes well for refugees wishing to hold their countries responsible for rendering them refugees.

Like its Inter-American counterpart, the ECtHR rarely hears cases that involve an appeal to the "freedom from expulsion" or the "right to return"

52. *Id.* ¶ 113.
53. *Id.* ¶ 117.
54. *Id.* ¶ 118 (emphasis added).
55. *Id.* ¶ 120.
56. *Id.* ¶ 120.

contained in the ECHR.[57] The Court has held many claims based on Article 3 of Protocol No. 4 inapplicable due to a strict interpretation of that provision's "nationality" requirement. For example, in *Slivenko v. Latvia*, while the Court asserted that there exists "an absolute and unconditional freedom from expulsion," it reminded the applicants that this freedom applies only to nationals.[58] The Court left discretion to the respondent state to decide exactly who is a national: "'nationality' must be determined, in principle, by reference to the national law."[59] In cases such as *Slivenko*, the slight deviations from the wording of the ICCPR shared by the European and American Conventions become vitally important.

In the ECtHR's 2001 case *Denizci v. Cyprus*, the applicants claimed to have been expelled to the area of Northern Cyprus under Turkish control.[60] Despite the Court's sympathy with the applicants,[61] it avoided the question of expulsion by declaring that the applicants could not have been "expelled" under the meaning of Article 3 of Protocol No. 4 because the Court recognized only one "legitimate government" in Cyprus.[62] Since Northern Cyprus was not, in the Court's view, another "state," the applicants could not appeal to the ECHR's protection from expulsion. The applicants' claims in *Eugenia Michaelidou Developments, Ltd. v. Turkey*[63] might have allowed the Court to elaborate its interpretation of the "right to return," but another hurdle stood in the way. In this case, which involved a Cypriot who was not afforded access to his property by the Turkish military, the Court noted that Turkey had not actually ratified Protocol No. 4 and, therefore, the claim was inadmissible.[64]

The issues discussed above illustrate why the European Court has lagged behind the Inter-American Court in developing criteria for the application of the "freedom from expulsion" and the "right to return" contained in the ECHR. Although there is no equivalent to the *Moiwana* case in European jurisprudence, the next sections illuminate the creative ways in which the ECtHR has addressed refugee-related questions using other provisions in the ECHR.

---

57. A search of all of the judgments *and* admissibility decisions at the ECtHR's official case-law database at http://cmiskp.echr.coe.int/ reveals only twenty-three instances of discussion surrounding Article 3 of Protocol 4.

58. Slivenko v. Latvia, App. No. 48321/99, 2002-II Eur. Ct. H.R. 467, 486 ¶ 77.

59. *Id.*

60. Denizci and Others v. Cyprus, App. nos. 25316-25321/94 & 27207/95, 2001-V Eur. Ct. H.R. 225, 233 ¶ 3.

61. See *infra* note 76 and accompanying text for a discussion of the applicants' claim regarding freedom of movement.

62. *Denizci*, 2001-V Eur. Ct. H.R. at 317 ¶ 410.

63. Eugenia Michaelidou Devs. Ltd. v. Turkey, App. No. 16163/90 (Eur. Ct. H.R. Jul. 31, 2003).

64. *Id.* ¶ 19.

B. Freedom of movement and residence

The right to move about one's country of nationality and choose one's place of residence is enshrined in articles of the ICCPR,[65] as well as the ACHR[66] and the ECHR.[67] At the most basic level, refugees are clearly being denied the opportunity to move about and choose their residence within their own country. However, at first blush, these provisions do not seem especially helpful to the potential refugee litigant; each article applies to persons "lawfully *within* the territory" of the state in question. This exclusionary language is clearly meant to protect a state's right to prevent unlawful residence within its borders. But one reading of this wording might also lead to the conclusion that refugees—as they are not *within* the territory of their country of nationality—cannot bring claims based on their right to freedom of residence in that country. Fortunately for refugee claimants, this is not the reading employed by either the ECtHR or the IACtHR; rather, both courts seem willing to move beyond strict textualism to an interpretation that captures the fundamental intent of these provisions. Although the case law is not fully developed, the courts' flexible approach to the freedom of residence is expanding opportunities for individual claims against offending states.

The IACtHR's interpretation of the ACHR's freedom of movement and residence provisions has developed mostly in response to cases involving the forced displacement of rural villagers throughout Latin America. In several such cases, the Court has found that internal displacement of citizens by government forces, or by paramilitary forces connected to the government, amounts to a deprivation of the Article 22(1) freedom of movement and residence.[68] *Moiwana* contains the Court's most explicit application of the article's "freedom to reside" to the refugee experience of displacement outside of one's country. The Court found that preventing the return of refugees residing outside of their country of nationality deprived them of freedom of residence and movement. The Court reasoned that the villagers' "freedom of movement and residence [had been] circumscribed" by Suri-

65. ICCPR, *supra* note 38, art. 12(1) ("Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.").

66. ACHR, *supra* note 17, art. 22(1) ("Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.").

67. ECHR Protocol No. 4, *supra* note 41, art. 2(1) (This article is taken verbatim from Article 12 of the ICCPR: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.").

68. *See* "Mapiripán Massacre" v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005); Ituango Massacres v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006) ("[U]sing an evolutive interpretation of Article 22 of the Convention that takes into account the applicable interpretation norms, and in keeping with Article 29(b) thereof—which prohibits a restrictive interpretation of rights—the Court has considered that Article 22(1) of the Convention protects the right not to be forcibly displaced within a State Party to the Convention."). Both cases are available at http://www.corteidh.or.cr/casos.cfm.

name's government.[69] The situation preventing their return to Suriname violated the villagers' right to "remain" in their country of nationality,[70] a right that seems composed of both the right to reside and freedom from expulsion. The Court found Suriname in violation of the ACHR in spite of there being no *legal* restriction preventing the villagers from returning to their homeland.[71] It discerned that the villagers were prevented from exercising their Article 22(1) "freedom of movement and residence . . . by a very precise, *de facto* restriction, originating from their well-founded fears."[72] This standard and reasoning could apply to the situation of any refugee recognized under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.[73] Furthermore, although the cases that the IACtHR has decided thus far have involved migrations precipitated by state actions, nothing in the Court's reasoning suggests that the involvement of non-state actors would change refugees' ability to hold their states accountable for a lack of protection. A refugee's fear need not be of the state itself.[74]

The ECtHR has also allowed the utilization of the ECHR's freedom of movement and residence provisions to bolster claims against forced migration. As discussed above, *Denizci v. Cyprus* involved a number of Cypriots of Turkish origin who claimed to have been forcibly expelled to Northern Cyprus under threats to their lives. Although the Court dismissed claims regarding expulsion because of ambiguity regarding the status of Northern Cyprus,[75] it took seriously the question of freedom of movement and residence. The Court found that the claimants' forcible expulsion to Northern Cyprus and the difficulties that kept them from returning to their homes in the Republic of Cyprus amounted to deprivation of their rights under Article 2(1) of Protocol No. 4.[76]

C. The right to property

A litigation strategy based on the right to property is not an immediately obvious choice in the struggle to hold states accountable for creating refugee flows. Unlike the provisions guaranteeing freedom from expulsion and the right to return, the rights to property contained in the ECHR and ACHR are conditional and limited. Many refugees do not own private

69. *Moiwana*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 145, ¶ 119.

70. *Id.* ¶ 120 ("[T]he State has effectively deprived those community members still exiled in French Guiana of their rights to enter their country and to *remain* there.") (emphasis added).

71. Suriname's government asserted that the villagers may "move freely throughout the country." *Id.* ¶ 119.

72. *Id.*

73. *See supra* note 2. *See generally* Goodwin-Gill, *supra* note 12, at 50–52; James C. Hathaway, The Law of Refugee Status 75–80 (1991).

74. Hathaway, *supra* note 73, at 126–127.

75. *See supra* note 62 and accompanying text.

76. *Denizci*, 2001-V Eur. Ct. H.R. at 315–16 ¶¶ 401–406.

property in their country of origin and, therefore, cannot benefit from such a right. Nonetheless, the regional courts are using the right to property to expand opportunities for refugee claims against offending nations. Coupled with a broad definition of "property" that includes communal ownership, this right holds significant promise for future litigation.

Article 17 of the Universal Declaration of Human Rights guarantees "everyone . . . the right to own property alone as well as in association" and declares that "no one shall be arbitrarily deprived of his property."[77] The second provision limits the right to property considerably, allowing for non-arbitrary deprivations. The European and Inter-American property right provisions differ markedly from the Declaration. Article 21(1) of the ACHR grants "everyone . . . the right to the use and enjoyment of his property" but qualifies this right by allowing "the law" to "subordinate such use and enjoyment in the interest of society."[78] More importantly, Article 21(2) prohibits the deprivation of property "except upon payment of just compensation for reasons of public utility or social interest."[79] A refugee who flees his property out of fear of persecution can claim an unwarranted and uncompensated deprivation of property.

Moiwana provides just such an example, despite the fact that the villagers held no official documentation proving that they owned the land that they occupied. Relying on past precedents regarding the status of communal property ownership, the IACtHR reasoned that the Moiwana people owned their village and the surrounding territory. By virtue of their long, continual residence in their village and the fact that "their concept of ownership [of] territory is not centered on the individual, but rather on the community as a whole,"[80] the Court deemed the villagers "legitimate owners of their traditional lands."[81] This reasoning opens the door to refugees who, though they have no individual property claim, can demonstrate a communal claim to the land that they once occupied.

After establishing the Moiwana villagers' ownership of their land, the Court then addressed the question of their deprivation of the right to the "use and enjoyment" of their property. It found that the villagers have been denied that right since the 1986 massacre.[82] The Court's ruling not only rebuked Suriname's handling of the massacre and its aftermath, it also

77. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GOAR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

78. ACHR, *supra* note 17, art. 21(1).

79. ACHR, *supra* note 17, art. 21(2).

80. *Moiwana*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 145, ¶ 133.

81. *Id.* ¶ 134.

82. *Id.* ("[T]he Moiwana community members may be considered the legitimate owners of their traditional lands; as a consequence, they have the right to the use and enjoyment of that territory. The facts demonstrate, nevertheless, that they have been deprived of this right to the present day as a result of the events of November 1986 and the State's subsequent failure to investigate those occurrences adequately.").

established the Moiwana villagers' right to retain their communal property if and when resettlement became a possibility.

Across the Atlantic, the ECtHR has also allowed the right to property to be used as a check against forced displacement. The Court's development in this area serves to offset the relatively slow development of the principles discussed above. The first article of the ECHR's Protocol No. 1 provides that "every . . . person is entitled to the peaceful enjoyment of his possessions" and that "no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."[83] A series of cases involving Turkey's occupation of Cyprus has led to the Court's favorable elaboration of the right to property vis-à-vis forced migration.

Loizidou v. Turkey[84] offered the ECtHR an important opportunity to establish precedent linking the right to property with refugee-like situations.[85] The complainant was Titina Loizidou, a woman who grew up in Northern Cyprus and owned several plots of land there.[86] At the time of her claim, Loizidou lived elsewhere in Cyprus and was prevented from returning to her home and land by the Turkish occupation of Northern Cyprus. In the past she had been forcibly removed from Northern Cyprus after participating in a peaceful demonstration.[87] As noted above, since Turkey has not ratified Protocol No. 4 of the ECHR, Loizidou was unable to bring a claim on the basis of the denial of her freedom from expulsion and right to return.[88] Furthermore, such a claim would have been complicated by the fact that the Turkish Republic of Northern Cyprus ("TRNC") is not considered a separate nation from the Republic of Cyprus.[89]

In spite of these hurdles, Loizidou was not without recourse under the ECHR. She claimed that the Turkish security forces were denying her right to "the peaceful enjoyment of [her] possessions"[90] by preventing her return to her property. The Court agreed, reasoning that keeping Loizidou from her property amounted to a violation of the first protocol of the

83. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, *opened for signature* March 20, 1952, Europ. T.S. No. 9 (*entered into force* May 18, 1954) [hereinafter ECHR, Protocol No. 1].

84. Loizidou v. Turkey, App. No. 15318/89, 1996-VI Eur. Ct. H.R. 2216.

85. I used the term "refugee-like" because of the way in which the Court interprets Turkish occupation of Northern Cyprus. The Court, along with the U.N. Security Council, does not consider occupied Northern Cyprus a separate state. *See Loizidou,* 1996-VI Eur. Ct. H.R. at 2223–24 ¶¶ 19–22; *supra* note 60 and accompanying text.

86. *Id.* ¶¶ 11–12.

87. *Id.* ¶ 12.

88. *See Denizci*, 2001-V Eur. Ct. H.R. at 317 ¶ 410 ("[T]he government of the Republic of Cyprus is the sole legitimate government of Cyprus . . . .").

89. *Id.*

90. ECHR, Protocol No. 1, *supra* note 83, art. 1.

ECHR, which Turkey ratified in 1954.[91] Turkey protested that it was not directly involved in the denial of Loizidou's access; it claimed that any such denial, if it existed, was the responsibility of the local government in the TRNC, which was not under Turkish control.[92] Rejecting this claim, the Court pointed out that "the Turkish Government [has] acknowledged that the applicant's loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops" and that Loizidou was "on several occasions . . . prevented by Turkish troops from gaining access to her property."[93] The Court reasoned that such actions fall within the "'jurisdiction' of Turkey for the purposes" of holding it to its commitments under the ECHR.[94]

Most importantly for the expansion of avenues of recourse for refugees, the Court determined that Loizidou, due to her displacement, "effectively lost all control over, as well as all possibilities to use and enjoy, her property."[95] Such a loss, without justification, cannot be reconciled with one's right to "the peaceful enjoyment of [one's] possessions" and, therefore, the Court sided strongly with Loizidou. This case was not merely a moral victory for Loizidou and other displaced persons: the Court awarded Loizidou 320,000 Cypriot pounds (approximately $740,000, at current exchange rates) in pecuniary and non-pecuniary damages.[96] In *Eugenia Michaelidou Developments, Ltd. v. Turkey*, the ECtHR reaffirmed its reasoning in *Loizidou.*[97] In these cases, the ECtHR circumvented some of the difficulties it encountered in applying freedom from expulsion and the freedom of movement and residence provisions, relying instead on another aspect of many refugees' experience: separation from one's property.

As has been seen in the IACtHR and the ECtHR, the right to property is increasingly being used to hold states accountable for the creation of refugees. Indirectly, this right forms another pillar of the substantive and actionable right "not to be made a refugee" that is taking shape at the regional level.

---

91. *Loizidou,* 1996-VI Eur. Ct. H.R. at 2227 ¶ 32. Turkey only submitted itself to the jurisdiction of the Court in 1990, so the Court limited its examination to the continuing violation of Mrs. Loizidou's rights after that date.

92. *Id.* at 2233–34 ¶ 51.

93. *Id.* at 2235 ¶ 54.

94. *Id.* at 2235–36 ¶ 56.

95. *Id.* at 2237 ¶ 63.

96. Loizidou v. Turkey, Article 50 (Just Satisfaction) Judgment, 1998-IV Eur. Ct. H.R. 1807, 1818–19 ¶¶ 34, 40. The Court also ordered Turkey to pay Loizidou 137,084 Cypriot Pounds for her legal expenses. *Id.* at 1819–20 ¶ 41.

97. Eugenia Michaelidou Devs. Ltd. and Michael Tymvios v. Turkey, App. No. 16163/90 (Eur. Ct. H.R. July 31, 2003). The applicants claimed that the Turkish military presence in Northern Cyprus prevented them from accessing and enjoying their property. In its judgment, the ECtHR "[saw] no reason to depart from its reasoning and conclusions" in the *Loizidou* and *Cyprus v. Turkey* cases. *Id.* ¶ 18.

D. Limitations of the Regional Courts

While the developments discussed above offer hope for refugee litigants, it is important to note some limitations of the regional courts. First, one weakness of a system of refugee redress built around regional courts is the obvious geographical limitation. Fully functioning regional human rights courts exist only in Europe and the Americas.[98] Many of the largest refugee-producing countries fall outside the jurisdictions of the ECtHR and the IACtHR.[99] The nascent African Court offers an important expansion of regional human rights protection in a region with large refugee populations, but it is not yet clear how it will function. It is difficult to predict whether other regions will take up the call for regional human rights mechanisms.

A second consideration in an analysis of the regional courts' efficacy is the availability of remedies. Neither Court has the full range of remedies that are available to domestic courts. Until recently, remedies awarded by the ECtHR were generally limited to public declarations that the offending state had violated the ECHR and monetary awards for legal expenses.[100] Both public declarations and monetary awards are powerful and useful—"[g]overnments violate human rights and do not like to be called to account when they do so."[101] Bad publicity can be a strong motivator for offending countries, while providing vindication for victims. A monetary award can ease the difficulties of the refugee experience and, in a small way, compensate for the refugees' tremendous losses.

Historically, the ECtHR had stopped short of "mak[ing] 'consequential orders' in the form of directions or recommendations to the state to remedy violations."[102] Recent developments at the Court have signaled a movement toward more structural or consequential remedial action. Through

98. A third regional court, the African Court on Human and Peoples' Rights, will soon join the ECtHR and the IACtHR as it begins to accept and process claims. *See* Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *opened for signature* June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (*entered into force* Jan. 25, 2004); African Court on Human and Peoples' Rights, Project on International Courts and Tribunals, http://www.aict-ctia.org/courts_conti/achpr/achpr_home.html (last visited Feb. 5, 2009); Anne Pieter van der Mei, *The New African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism for Africa?*, 18 LEIDEN J. INT'L L. 113 (2005) (analyzing the Protocol establishing the new African court).

99. Of the seven top refugee-producing countries in 2007 (Afghanistan, Iraq, Colombia, Sudan, Somalia, Burundi, and the Democratic Republic of the Congo), only one (Colombia) falls under the jurisdiction of the IACtHR. *See* UNHCR, STATISTICAL YEARBOOK 2007, *supra* note 1, at 27.

100. ECHR, *supra* note 19, art. 41 ("If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."). *See* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 189–200 (2d ed. 2005). Shelton notes that "[b]etween 1972 and 1998, the [ECtHR] awarded one or more of the following remedies in application of Article 41: (a) a declaration that the state had violated the applicant's rights; (b) pecuniary damages; (c) non-pecuniary damages; (d) costs and expenses." *Id.* at 195.

101. SHELTON, *supra* note 100, at 256.

102. *Id.* at 198.

the use of a new "pilot judgment" procedure, the Court has begun to identify "systemic violations" of the ECHR and ask respondent states to take "general measures" to remedy these violations.[103] Throughout its existence, the IACtHR has been more willing to order states to change their behavior to comport with its rulings.[104] Remedies at the IACtHR include pecuniary and non-pecuniary measures.[105] Non-pecuniary measures have ranged from orders to reopen schools and health facilities,[106] to orders to erect monuments to victims of human rights abuses.[107]

Both the European and Inter-American systems have experienced instances of defiance from countries attempting to avoid their obligations toward victims of their human rights abuses. In 1969, Greece withdrew from the Council of Europe (and the ECHR) in response to an unfavorable decision that found it had violated the Article 3 protections from inhuman and degrading treatment.[108] More recently, in 1998, Trinidad and Tobago denounced its obligation to the ACHR[109] as the result of an "order that the

103. The ECtHR was "invited" to develop such a procedure by the Council of Europe's Committee of Ministers. Council of Europe, Committee of Ministers, Resolution of the Committee of Ministers on Judgments Revealing an Underlying Systemic Problem, 114th Sess., Res. (2004) 3 (May 12, 2004), *available at* https://wcd.coe.int/ViewDoc.jsp?id=743257 (noting the large increases of the ECtHR's docket due to repetitive violations of the ECHR and the need to develop effective remedial measures). The Court first implemented the pilot judgment procedure in *Broniowski v. Poland*, App. No. 31443/96, 2004-V Eur. Ct. H.R. 1 (friendly settlement 2005). For a description and analysis of the pilot judgment procedure, see Costas Paraskeva, *Human Rights Protection Begins and Ends at Home: The "Pilot Judgment Procedure" Developed by the European Court of Human Rights*, 3 HUM. RTS. L. COMMENT. (2007), *available at* http://www.nottingham.ac.uk/shared/shared_hrlcpub/Paraskeva.pdf, and Lawrence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights*, 19 EUR. J. INT'L L. 125, 148 (2008).

104. SHELTON, *supra* note 100, at 218.

105. ACHR, *supra* note 17, art. 63(1) ("If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."). *See* SHELTON, *supra* note 100, at 218.

106. Aloeboetoe v. Suriname (Reparations), 1993 Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 96, (Sept. 10, 1993) ("Suriname is under the obligation to reopen the school at Gujaba and staff it with teaching and administrative personnel to enable it to function on a permanent basis as of 1994. In addition, the necessary steps shall be taken for the medical dispensary already in place there to be made operational and reopen that same year."). *See* SHELTON, *supra* note 100, at 286.

107. Goiburú v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 184 (Sept. 22, 2006) ("To comply with this judgment, the State must erect a monument in memory of the victims and must pay the compensation for pecuniary and non-pecuniary damages.").

108. ECHR, *supra* note 19, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."). The case that prompted the Greek departure was *Denmark, Norway, Sweden and the Netherlands v. Greece*, App. Nos. 3321/67, 3322/67, 3323/67 & 3344/67, 1969 Y.B. Eur. Conv. on H.R. 5 (Eur. Comm'n on H.R.). *See* MERRILLS & ROBERTSON, *supra* note 20, at 37. Greece rejoined the fold in 1974. *Id.*

109. *See* Benjamin v. Trinidad and Tobago, 2001 Inter-Am. Ct. H.R. (ser. C) No. 81, ¶ 22 (Sept. 1, 2001) ("On May 26, 1998, Trinidad and Tobago denounced the [ACHR] and pursuant to Article 78 of the same, this denunciation took effect one year later, on May 26, 1999."). Denunciation is governed by ACHR, *supra* note 17, art. 78(1) ("The States Parties may denounce this Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance.").

State suspend the execution of prisoners on death row while the cases were being reviewed."[110] These incidents illustrate the sometimes precarious position of the regional courts.

There are several factors, however, that motivate states to comply with judgments. The European Court's opinions exert indirect political pressure on offending countries.[111] For example, the Council of Europe's Committee of Ministers can exert pressure on its member countries, using sanctions ranging from private opprobrium to threatened expulsion from the Council itself.[112]

Although the Inter-American Human Rights system does not wield the same weighty political and economic carrots as its European counterpart, the Organization of American States ("OAS") General Assembly has the potential to "have a positive influence on State compliance," as it has successfully exerted political pressure in other areas.[113] A final limitation, particular to the IACtHR, is its lack of universality.[114] Approximately two-thirds of the OAS members have ratified the ACHR; the major American powers, the United States and Canada, have yet to do so.[115] The lack of full OAS participation undermines the Court's credibility and legitimacy. Although there is room for improvement in both Europe and the Americas, the regional human rights systems are playing an increasingly important role for refugee claimants.

Conclusion

The two major regional human rights systems have begun to construct a set of individual rights parallel to the arguably strong, but seldom enforced, international obligation against the creation of refugees. The individual petition process allows active and invested claimants to pursue justice

110. Jo M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights 114 (2003).

111. Ovey & White, *supra* note 23, at 432.

112. *Id.* The power to expel is granted in the Statute of the Council of Europe, May 5, 1949, Europ. T.S. No. 1, *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/001.htm. Article 3 of the statute states that "every member of the [Council] must accept the principles of the rule of law and the enjoyment of all persons within its jurisdiction of human rights and fundamental freedoms." Article 8 further provides that:

> [a]ny member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.

113. Pasqualucci, *supra* note 110, at 344–45 (noting the influence of OAS political pressure in the downfall of the Somoza regime in Nicaragua).

114. *Id.* at 340–42.

115. *Id.* at 340. Pasqualucci also notes that varying reservations to the ACHR make its consistent application difficult. *Id.* at 341. *See* Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica," http://www.oas.org/juridico/english/sigs/b-32.html (last visited Feb. 5, 2009).

against offending states, circumventing cumbersome state-versus-state mechanisms. In both regions, a right "not to be made a refugee" is taking shape. In the American system, the IACtHR has focused on freedom from expulsion and the right to return, as well as freedom of residence and movement. While the European Court has also emphasized these rights, barriers preventing their full expression in refugee cases have led the Court to use other human rights protections—most notably, the right to enjoy one's property.

As mentioned above, the regional courts are not without limitations. Their geographical jurisdiction is limited to regions that do not have the largest refugee populations, and their decisions are binding only on those states that have consented to their jurisdiction. With the proper incentives, however, expansion is possible. The European Court has broadened its reach to countries aspiring to greater integration into the European community and, in doing so, has had a norm-setting effect on such countries.[116] As the recently formed African Court grows and develops, it will surely look to the jurisprudence of the ECtHR and the IACtHR for guidance. By constructing stronger avenues for refugee redress, the regional courts lead and help shape the global discourse, acting as incubators for innovative legal protection.

116. *See, e.g.*, Helen Keller and Alec Stone Sweet, *Assessing the Impact of the ECHR on National Legal Systems*, *in* A EUROPE OF RIGHTS 677, 695–706 (Helen Keller and Alec Stone Sweet eds., 2008) (surveying the ECtHR's influence on domestic legal systems).