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Failing the Test: Germany Leads Europe in Dismantling Refugee Protection

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Failing the Test: Germany Leads Europe in Dismantling Refugee Protection

MARYELLEN FULLERTON[†]

"It was in Europe that the institution of refugee protection was born, and it is in Europe today that the adequacy of that system is being tested."
Sadako Ogata, U.N. High Commissioner for Refugees¹

SUMMARY

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[†] Professor of Law, Brooklyn Law School. The author wishes to thank Brooklyn Law School for the grant that supported this research.

1. Madame Sadako Ogata, United Nations High Commissioner, 1991-2000, Statement Marking the Publication in German of UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES: IN SEARCH OF SOLUTIONS (1995), Bonn (June 1994), Refworld CD-ROM.

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I. INTRODUCTION

Prior to 1993 Germany’s constitutional guarantee was elegant in its simplicity: “Persons persecuted on political grounds shall enjoy the right of asylum.”² The difficulty that refugees from the Nazi regime had in obtaining asylum elsewhere was a fresh memory when Germany’s postwar constitution opened German borders to those persecuted around the world. Adopted in the shadow of the death camps, this provision of the Basic Law of the Federal Republic of Germany protected refugees who entered Germany for close to half a century. Pursuant to this constitution, more than a million refugees sought asylum in Germany, a land from which so many fled in the 1930s and 1940s.

The postwar era of refugee protection ended in Germany in July 1993, in large part, because the rest of Europe—particularly the European Union (EU) countries—failed to act. The EU watched the atmosphere of crisis grow as more than two million refugees and asylum-seekers sought protection in Europe during the prior decade. The EU failed to mount any joint efforts to assist member states in coping with asylum-seekers. The fifteen countries of the European Union were content to let one country shoulder the lion’s share of the burden.³

Germany, by itself, had been receiving fifty percent of the applicants for asylum in Europe and the proportion seemed to be growing.⁴ In response, Germany developed an elaborate social structure to house and feed asylum-seekers and a voluminous and sophisticated jurisprudence concerning asylum. Developments in Germany were monitored

2. GRUNDGESETZ [GG] [Constitution] art. 16(2) (F.R.G.).

3. From 1985 through 1999, Western European countries recorded the arrival of 5,000,000 asylum-seekers. See Nicholas Van Hear & Jeff Crisp, *Refugee Protection and Immigration Control: Addressing the Asylum Dilemma*, 17 REFUGEE SURV. Q. 1, 2 (1998).

4. Asylum-seekers arriving in Germany from 1985 through 2000 totaled 2,413,406, while the total in Western Europe was 5,535,839. Comparing the totals for several specific years provides a sense of the magnitude of the asylum process. In 1985, the number of new asylum-seekers reported by western European countries was 165,000, of which Germany received almost 74,000. In 1990, new asylum-seekers in Europe totaled 435,000, of which Germany received 193,000. In 1992, the new asylum in Europe reached 676,000, of which Germany received 438,000. In 1995, the number of new asylum-seekers in Europe and Germany, respectively, totaled approximately 290,000 and 130,000. Bundesamt für die Anerkennung Ausländischer Flüchtlinge, Statistiken, [Federal Office for the Recognition of Foreign Refugees, Statistics], available at http://www.BAFI.de/bafI/template/index_statistiken.html (last visited Mar. 19, 2001) [hereinafter Federal Refugee Office Statistics]. For statistics for Western Europe between 1985 and 1991, see Pro Asyl, Asylum-seekers in Europe (June 19, 1996) (unpublished report, on file with the Texas International Law Journal).

in other European capitals, but EU assistance to Germany was not forthcoming. As the country with the most at stake, Germany decided in 1993 to act unilaterally to halt the flow of refugees and asylum-seekers.

This action by Germany, the bellwether of refugee law and policy in Europe in the last decades of the twentieth century, bodes ill for the institution of asylum throughout Europe. Many of the EU countries are watching Germany's new laws to see which restrictive measures prove effective and can be adapted for use back home. For example, the United Kingdom enacted a new asylum law in early 2000 that patterns social benefits for asylum-seekers on restrictive measures adopted earlier by Germany,⁵ and is currently adopting the German policy of refusing to consider claims submitted by asylum-seekers who crossed other EU countries before they submitted their asylum applications.⁶ In the Netherlands, pending legislation would add to the refugee procedure the German rule that rejects asylum claims from nationals of countries that have ratified the international refugee convention.⁷ Other European countries, mainly to the east, are watching Germany's new laws to see how many asylum-seekers they shift to neighboring countries with less developed infrastructures and legal systems.⁸ Indeed, Ukraine is considering amending its refugee law in 2001 to add the "safe third country" concept so crucial to Germany's post-1993 approach.⁹ The Czech Republic has already done so.¹⁰ It is a safe prediction that major portions of Germany's restrictive asylum practices will be replicated in other European states.

Government officials, advocates, and scholars have long recognized the important role Germany played in late twentieth century asylum law and policy, but there has been relatively little scholarly analysis of German legal developments in English.¹¹ Having focused on refugee developments in Germany over the past fifteen years,¹² my interest intensified in the 1990s as I observed the momentous legal changes to the German asylum system. My field work in Germany before and after unification gave me a greater comprehension of the profound changes taking place in German society in recent years.¹³ As I monitored the constitutional amendment in 1993 and the subsequent legislation, I saw clearly that the asylum law had been fundamentally rewritten. How the new provisions,

5. See Sarah Lyall, *Britain Raises Barriers High Against the Asylum Seekers*, N.Y. TIMES, Apr. 3, 2000, at A1.

6. See Andrea Gerlin, *British Official Seeks Revised Asylum Pact*, PHILADELPHIA INQUIRER, Feb. 7, 2001.

7. *New Aleins Bill Receives Final Approval by the Senate*, MIGRATION NEWS SHEET, Dec. 2000, at 16.

8. See Steven Erlanger, *On New Europe's Rim, Families Fear Ramparts*, N.Y. TIMES, Mar. 7, 2001, at A3.

9. *Law of Ukraine "On Refugees"*, 16 PROCEEDINGS OF THE VERKHOVNA RADA OF UKRAINE 90 (1994) (on file with the Texas International Law Journal).

10. *Zakon 325/1999 Sb. (On Asylum)*, §§ 2(2), 16(1)(e) (Czech. Rep.).

11. There is an extensive literature in German, of course, and there are insightful articles in English. See, e.g., 2 MIGRANTS, REFUGEES, AND FOREIGN POLICY: U.S. AND GERMAN POLICIES TOWARD COUNTRIES OF ORIGIN (Rainer Münz & Myron Weiner eds., 1997); Ryszard Piotrowicz, *Facing Up to Refugees International Apathy and German Self Help*, 10 INT'L J. OF REFUGEE L. 410 (1998).

12. See, e.g., HUMAN RIGHTS WATCH, GERMANY FOR GERMANS: XENOPHOBIA AND RACIST VIOLENCE IN GERMANY (1995); Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 506 (1993); Maryellen Fullerton, *Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany*, 4 GEO. IMMIGR. L.J. 381 (1990); Maryellen Fullerton, *Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights*, 39 VA. J. INT'L L. 35 (1998) [hereinafter Fullerton, *Restricting the Flow*].

13. I spent the 1986–1987 academic year on a Fulbright Research Fellowship studying comparative asylum policy in the Federal Republic of Germany and Belgium. I spent the 1994–1995 academic year on a German Marshall Fund Fellowship studying the impact of German asylum policy on neighboring countries. In addition, I have made multiple research trips to Germany before and after the fellowships.

such as the safe third country principle, the accelerated hearings, and the limitations on the right to appeal, actually affected those on the ground was less clear.

To understand the significance of the legal changes, I went back to Germany to investigate events in the field. I wanted to identify concretely the full impact of the legal measures. I traveled to many cities and states in Germany, both in the east and in the west, talking to asylum-seekers and—whenever possible—visiting them where they live. I spoke to government officials, refugee advocates, religious leaders, judges, and private attorneys. I met with members of non-governmental organizations (NGOs) working at the local, national, and international levels. I visited holding areas at airports, asylum hostels in cities, reception centers in the countryside, asylum accommodations aboard ships, detention facilities in prisons, and many offices and private homes.

What I found is deeply disturbing. Acting under the rubric of *burden-sharing* and *self-help*,¹⁴ Germany stanching the flow of asylum-seekers, but it has done so at the price of violating international human rights norms and refugee law principles. The new German laws restrict access to German territory; they restrict access to the asylum procedure; they restrict the criteria for asylum; they restrict the right to appeal. Although Germany did not invent each of these restrictive mechanisms, Germany is the country that linked them together in the most comprehensive fashion.

My investigation concluded that many of these legal provisions sound rational and even-measured on their own. When voiced by government officials removed from the plight of the individual asylum-seekers uprooted from their homes, the provisions seem sensible. They appear to protect the German asylum system by shifting asylum-seekers to countries they entered before they arrived in Germany and by weeding out those asylum-seekers with bogus claims. However, when observed in combination with each other, and from the perspective of those seeking protection, it is clear that the new legal provisions have created an almost impenetrable asylum system that denies relief to many who need it.

My field work convinced me that the human costs of these new measures are great. They include a rise in clandestine migration, a rise in the number of asylum-seekers turned away without any examination of their claims, and a rise in those denied asylum even though asylum officers believe their claims of persecution.

The legal costs of the new German measures are also great. This article will examine how the German asylum system, as applied, violates the 1951 Convention Relating to the Status of Refugees. Turning away large numbers of asylum-seekers and directing them to less-secure states is a fundamental violation of the 1951 Convention. Germany and other states that ratified the 1951 Convention promised not to send refugees back to places where they will face persecution.

Based on my field work, this article will also show how the restrictive asylum system in Germany violates the European Convention on Human Rights and Fundamental Freedoms. State parties to this convention agree not to subject anyone to inhuman or degrading treatment or torture, and have applied this prohibition to deportation orders that send asylum-seekers back to danger.

Calling on evidence gathered as I witnessed asylum hearings and discussed them with participants, this article demonstrates further how recurrent problems with foreign languages and with gender bias call into question the integrity of the asylum procedure and the reliability of the asylum decisions. My investigation into the growing practice of detaining asylum-seekers in Germany also highlights the International Covenant on Civil and Political Rights and its requirements concerning detention.

14. For an analysis of self-help justifications for restrictions on asylum-seekers, see generally Piotrowicz, *supra* note 11.

The information I gathered leads me to conclude that current German practice violates multiple international legal norms. My research regarding the pertinent legal instruments and my research in the field lead to the conclusion that the new German approach to asylum poses a thoroughgoing and fundamental threat to the institution of refugee protection. It exacts great human and legal costs. It affects an entire region. If other EU countries follow the German example, Europe will fail the test regarding the system of refugee protection that, as the U.N. High Commissioner for Refugees pointed out, is currently underway.

II. BACKGROUND

This story of substantial refugee flows to post-World War II Europe begins in the 1980s, when asylum-seekers began to come in steady numbers from countries in Africa, Asia, and the Middle East. Earlier decades witnessed refugee movements in Europe, of course, in the wake of the 1956 Hungarian revolt, the 1968 Prague Spring uprising, and the 1975 denouement of the Vietnam War.¹⁵ The first three decades following World War II saw relatively few spontaneous refugees, although resettlement programs organized the movement of many of these individuals to Europe.¹⁶

This changed dramatically in the 1980s as air travel increased accessibility around the globe and other transcontinental travel networks developed. The Cold War had a significant impact, as proxy wars between client states in Africa and Asia created turmoil and displacement in many regions. Close to home, a last gasp of Iron Curtain politics in the mid-1980s delivered many asylum-seekers to the heart of western Europe. The German Democratic Republic issued transit visas to all those who could pay the state-owned airline in hard currency and then pointed the way to Checkpoint Charlie where asylum-seekers could enter West Berlin.¹⁷

The post-war economic boom had slowed, leaving EU countries—including Germany—coping with stagnant economies. As unemployment persisted in the 1980s, Germany and other EU countries enacted legislation to discourage asylum-seekers.¹⁸ If these measures were successful, it was difficult to discern. The numbers of asylum-seekers continued to rise.¹⁹

The demolition of the Berlin Wall in 1989 and the subsequent disintegration of the communist governments that ruled Eastern Europe and the Soviet Union triggered fear in EU countries of a gigantic flood of asylum-seekers from the east. This fear did not materialize, but large numbers of refugees did arrive from many parts of the globe. New waves arrived in the early 1990s, mainly from the south. War broke out in the former Yugoslavia; ethnic cleansing and mortar fire sent hundreds of thousands of refugees on the road.

15. Other refugees, such as Chileans fleeing after Pinochet's coup against Allende, also arrived in the 1970s, but there were far fewer spontaneous refugees who entered Europe then. *See* Van Hear & Crisp, *supra* note 3, at 3.

16. *See id.*

17. This was possible because the Federal Republic of Germany viewed all of Berlin as one German municipality and did not require passports for entry from other sectors of the city. For a discussion of the Berlin Gap, see Fullerton, *Restricting the Flow*, *supra* note 12, at 67–69.

18. For a discussion of restrictive legal measures undertaken in the 1980s in Europe, see generally *id.*

19. There was a decline in asylum applications from 1986 (195,000 in Europe; 100,000 in Germany) to 1987 (172,000 in Europe; 57,000 in Germany), but the numbers then rose steadily in 1988 (220,000 in Europe; 103,000 in Germany), 1989 (313,000 in Europe; 121,000 in Germany) and afterward. *Pro Asyl*, *supra* note 4.

Germany experienced exponential increases in the numbers of asylum-seekers. There were 121,000 new arrivals in 1989; 193,000 in 1990; and 256,000 in 1991.²⁰ In 1992, more than 438,000 new asylum-seekers entered Germany, constituting over sixty percent of the asylum applications filed in the EU.²¹

Throughout these years, Germany, with more than half of the refugees and asylum-seekers in the EU, enthusiastically embraced multilateral efforts to regulate migration and asylum. Germany was a founding member of the Schengen group,²² a small contingent of EU countries that agreed in 1985 to begin abolition of passport controls at their common borders. Germany ratified the Dublin Convention,²³ an effort by EU states to develop standards for determining which state is responsible for deciding asylum applications when asylum-seekers have connections to more than one state. Germany was an insistent voice for joint EU action concerning asylum-seekers and war refugees.

The EU turned a deaf ear to Germany's exhortations. While professing the desirability of joint action and the equity of a more even distribution of asylum-seekers, the EU temporized. There were endless studies and multiple working groups. Responsibility sharing was debated, but burden-sharing proposals never moved beyond the draft stage.²⁴

In the early 1990s, close to 600,000 Bosnians fled to EU countries.²⁵ Sixty percent—over 340,000—went to Germany.²⁶ German society was severely taxed, fiscally and psychologically, by the unification process that began in 1990. In addition, Germany already sheltered over 200,000 others who had been granted refugee status, 130,000 family members of refugees, 650,000 de facto refugees, and 285,000 asylum-seekers.²⁷ Desperate for a more even distribution of the asylum-seekers and war refugees in Europe, Germany consulted with sister EU states. There were EU resolutions calling on member states to share the burden of sheltering displaced persons²⁸ and proposals for joint action to offer temporary protection to war refugees,²⁹ but in the end, these were only exhortatory.³⁰

20. Federal Refugee Office Statistics, *supra* note 4.

21. *Id.*

22. Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and the Convention Applying the Agreement, *done* June 19, 1990, 30 I.L.M. 68, 69, 73, 84 [in four parts] [hereinafter Schengen Convention]. The Schengen Agreement concluded June 14, 1985; Schengen Convention concluded June 19, 1990. Additional EU states have since joined the five original members of the Schengen group. See Jay Niessen, *The European Union's Migration and Asylum Policies, Introduction* to ELSPETH GUILD, *THE DEVELOPING IMMIGRATION AND ASYLUM POLICIES OF THE EUROPEAN UNION* 3, 27 (1996).

23. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 30 I.L.M. 425 [hereinafter Dublin Convention].

24. For a discussion of the painfully slow EU reaction during the past eight years, which still has not culminated in a joint plan for temporarily displaced persons, see generally Karoline Kerber, *Temporary Protection in the European Union: A Chronology*, 14 GEO. IMMIGR. L. J. 35 (1999).

25. Khalid Koser et al., *Temporary Protection and the Assisted Return of Refugees from the European Union*, 10 INT'L J. REFUGEE L. 444, 446 (1998).

26. *Id.*

27. Office of the United Nations High Commissioner for Refugees, Populations of Concern to UNHCR: A Statistical Overview (1995), available at <http://www.unhcr.ch/refworld/refbib/refstat/1995/95intro.htm> (last visited Feb. 27, 2001).

28. See Council Resolution of 25 September 1995 on Burden Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis, 1995 O.J. (C 262) 1.

29. See Proposal to the Council for Joint Action Based on Article K 3(2)(b) of the Treaty on European Union Concerning Temporary Protection of Displaced Persons, 1997 O.J. (C 106) 13.

30. Even today, with television images of a massive exodus of Kosovar Albanians still fresh in European news, the EU response lacks any sense of urgency. Meeting in Tampere, Finland in October 1999, EU leaders consigned asylum and migration issues to an agenda item for a meeting in December 2001, more than two years in the future, and ordered working groups to undertake further study of the topics. See Antonio Cruz, *Tampere Summit: Flimsy Results Disappoint Great Expectations*, MIGRATION NEWS SHEET, Nov. 1999, at 1.

Finally, Germany acted on its own. In 1993, Germany amended its constitution and passed restrictive asylum legislation. It excluded asylum-seekers who had crossed safe third countries from eligibility for asylum. It truncated asylum proceedings in a wide variety of circumstances. It limited judicial review. In taking these steps, Germany hoped to protect its own borders from future asylum-seekers and to force some of the neighboring states to shoulder more responsibility for refugees in Europe. It hoped to reduce the time and effort spent on asylum applications filed in Germany.

The results of Germany's self-help have been stark. From more than 435,000 asylum-seekers in 1992, the asylum applications fell to 127,000 in 1994.³¹ By 2000, the number of new asylum-seekers had fallen to 78,500.³² During these years the percentage of asylum-seekers recognized as refugees plummeted. The Federal Refugee Office³³ recognized 7.3% of the asylum-seekers as refugees in 1994.³⁴ By 1997, the recognition rate decreased to 4.9%.³⁵ In 1998, it fell further to 3.9%.³⁶ It has continued its downward trend, dropping to 3% in 1999, and 2.9% in 2000.³⁷

The numbers vividly portray how drastic the changes have been in Germany. What they do not signal are the unmeasurable costs. Thousands of asylum-seekers have been turned away by Germany to an uncertain fate elsewhere. Thousands more have now become clandestine immigrants in Germany. Additional thousands exist above ground in a legal limbo, neither regularized in status nor deported. The vulnerability of the those without legal status needs no emphasis. The human toll on those who face a continuing uncertain future is more hidden.

Other western European countries face similar pressures from asylum-seekers. Although their asylum system statistics may be lower than those in Germany, many EU states also perceive themselves as magnets for asylum-seekers and for economic migrants, both of whom they fear. They are watching Germany's efforts to shift the refugee protection burden elsewhere. If Germany, with its elaborate asylum social structure and its multilayered asylum jurisprudence, can achieve this goal, other EU states will be eager to adopt the restrictions pioneered in Germany. Whether Germany and other EU states can change their treatment of asylum-seekers and simultaneously comply with international law is another story.

III. THE INTERNATIONAL LEGAL STANDARDS

When the High Commissioner for Refugees spoke about the birth of the institution of refugee protection in Europe, she was referring to the 1951 Refugee Convention Relating to the Status of Refugees.³⁸ Adopted in Geneva in the aftermath of World War II, the 1951

31. Federal Refugee Office Statistics, *supra* note 4.

32. *Id.*

33. The Federal Refugee Office (*Bundesamt für die Anerkennung ausländischer Flüchtlinge*) is the national government agency charged with deciding asylum claims. See *infra* text accompanying notes 132–134, 153–164.

34. Federal Refugee Office Statistics, *supra* note 4.

35. *Id.*

36. *Id.*

37. *Id.*

38. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention]. Germany signed the Convention on Nov. 19, 1951 and ratified it on Dec. 1, 1953. Convention Relating to the Status of Refugees, *opened for signature* July 18, 1951, Multilateral Treaties Deposited with the Secretary General, U.N. Doc. ST/LEG/SER.E/6, at 181 (1987). The 1967 Protocol expanded the Convention to apply to persons who became refugees due to

Refugee Convention is the most widely adopted legal instrument regarding refugees. More than 135 states are parties,³⁹ and there is such widespread consensus concerning some of the convention's terms that they have developed into customary international law.⁴⁰ The 1951 Refugee Convention adopts a generous and inclusive refugee definition:

[A refugee is] any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.⁴¹

Much of the Convention focuses on the rights that states must provide to those recognized as refugees, but does not impose duties concerning asylum-seekers.⁴² The most crucial provision of the Convention applies to both, although its express language refers to refugees: "No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."⁴³

There is no derogation from this *non-refoulement* provision. It is the centerpiece of the Refugee Convention—states that become parties do not commit themselves to providing asylum or permanent residence to refugees,⁴⁴ but they expressly agree that they will not return a refugee to persecution. This obligation applies to all refugees, not just to those provided permanent residence. Accordingly, states may not turn away asylum-seekers at their borders without running afoul of the *non-refoulement* provision because some of those asylum-seekers may satisfy the 1951 Refugee Convention definition of refugee. In effect, states must treat all asylum-seekers as presumptive refugees until there has been a determination that they are not.

The European Convention for the Protection of Human Rights and Fundamental Freedoms⁴⁵ also imposes obligations on states in dealings with asylum-seekers and refugees. The Convention states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."⁴⁶

The European Court of Human Rights has forcefully applied this convention to state action that returns those seeking protection to situations that threaten their life and safety.⁴⁷

events that occurred after 1951. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

39. See *International Instruments*, 18 REFUGEE SURV. Q. 208 (1999).

40. See generally Guy S. Goodwin-Gill, *Non-refoulement and the New Asylum Seekers*, 26 VA. J. INT'L L. 897 (1986); Robert C. Sexton, *Political Refugees, Non-refoulement and State Practice: A Comparative Study*, 18 VAND. J. TRANSN'T'L. L. 731 (1985). But see Kay Hailbronner, *Non-refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking?*, 26 VA. J. INT'L. L. 857 (1986).

41. 1951 Refugee Convention, *supra* note 38, art. 1(A)(2).

42. I use the term "refugee" in this article to denote those who satisfy the 1951 Refugee Convention definition and the term "asylum-seeker" to denote all those who request protection from persecution or similar harm. Refugees are a subset of asylum-seekers.

43. 1951 Refugee Convention, *supra* note 38, art. 33.

44. In fact, many states have adopted the 1951 Refugee Convention definition of refugee in their municipal law as a basis for asylum, but this is not a Convention requirement.

45. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Human Rights Convention].

46. *Id.* art. 3.

47. See, e.g., *Sarialtun v. Germany*, App. No. 37534/97 (2000) (concerning deportation of rejected Kurdish asylum-seeker to Turkey where he faced potential violence targeted at him would violate art. 3); *Chahal v. United Kingdom*, App. No. 2241/93, 23 Eur. H.R. Rep. 413 (1997) (concerning deportation of Sikh activist to India would violate art. 3); *Ahmed v. Austria*, App. No. 25964/94, 24 Eur. H.R. Rep. 278 (1997) (concerning

Germany and all the other EU states have ratified the European Human Rights Convention, and their actions are limited by its provisions and its developing jurisprudence.⁴⁸

Other sources of international law apply to refugees and asylum-seekers. The International Covenant on Civil and Political Rights (ICCPR) limits the conditions that can be imposed on them during the examination of their claims.⁴⁹ It specifically addresses detention, and emphasizes the fundamental distinction states must observe between the treatment of those convicted of crimes and those detained without criminal charge or merely accused of illegal activity: "Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons."⁵⁰ The growing practice of detaining rejected asylum-seekers often runs afoul of this provision.

IV. THE LEGAL FRAMEWORK IN GERMANY

Prior to 1993, Germany saw its obligations to refugees as a function of both the German Constitution, which guaranteed asylum to all those persecuted on political grounds, and the 1951 Refugee Convention, which defined as refugees those who fear persecution based on their race, religion, nationality, social group, or political opinion. An extensive jurisprudence developed, exploring the differences, as well as the congruences, between these two perspectives. Much of the German jurisprudence focused on the constitutional provision because it was considered broader in many respects and because the German courts were familiar with interpreting and applying the German Constitution.

The 1993 amendment to the German Constitution ostensibly preserves the institution of asylum in Germany. It retains the prior constitutional language, which states: "Those persecuted on political grounds have the right to asylum."⁵¹

The amendment then adds several provisions that sharply reduce the number of individuals eligible to rely on this constitutional protection. First, those who pass through safe third countries on their way to Germany may not invoke the right to asylum.⁵² Second, those who come from safe countries of origin may not invoke the right to asylum, unless they can present evidence to overcome the presumption that persecution does not exist.⁵³

deportation of Somali who had lost his refugee status to Somalia where he risked serious mistreatment would violate art. 3); *Altun v. Federal Republic of Germany*, App. No. 10308/83, 36 Eur. Comm'n H.R. Dec. & Rep. 209 (1984) (concerning deportation of student rights activist with pending asylum application to Turkey where he might face torture would violate art. 3); *Amekrane v. United Kingdom*, 1973 Y.B. EUR. CONV. ON H.R. 356, 370-72, 376-78, 382-88 (Eur. Comm'n on H.R.) (concerning deportation from Gibraltar to Morocco of asylum-seeker accused of participating in failed coup d'état in Morocco violated art. 3).

48. Germany signed the European Human Rights Convention on Nov. 4, 1950 and ratified the Convention on Dec. 5, 1952. European Human Rights Convention, *supra* note 45, at 222.

49. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 1710 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

50. *Id.* art. 10(2)(a).

51. GRUNDGESETZ [GG] [Constitution] art. 16(a), para. 1 (F.R.G.).

52. *Id.* art. 16(a), para. 2. Paragraph 1 may not be invoked by anybody who enters the country from a member state of the European Community or another third country where the application of the Convention relating to the Status of Refugees and the Convention for the Protection of Human Rights and European Convention is assured. Countries outside the European Community which fulfill the conditions of the first sentence of this paragraph shall be specified by legislation requiring the consent of the Bundesrat. In cases covered by the first sentence, measures terminating a person's sojourn may be carried out irrespective of any remedy sought by that person.

53. *Id.* art. 16(a), para. 3. Legislation requiring the consent of the Bundesrat may be introduced to specify countries where the legal situation, the application of the law, and the general political circumstances justify the assumption that neither political persecution nor inhumane or degrading punishment or treatment takes place

Third, those whose claims are deemed manifestly unfounded and those from safe countries of origin have limited procedural rights.⁵⁴ They can challenge a negative administrative decision in court only in extremely limited circumstances. In addition, their challenges do not stay the execution of deportation orders, which allows the authorities to deport asylum-seekers while they pursue their limited right to appeal.

These constitutional changes, when combined and added to the restrictive measures already in place, drastically altered the asylum system in Germany. The separate provisions of German law have been interwoven in a largely successful attempt to limit asylum-seekers in Germany. They have begun to accomplish a primary objective, which is to prevent asylum-seekers from reaching Germany. They have substantially accomplished an additional objective, which is to restrict access to the German asylum procedure even for those who manage to evade the obstacles to entry and arrive on German soil. They have made significant progress toward a third objective, which is to reduce the substantive and procedural rights of those who manage to find their way through the various barriers to access and enter the asylum procedure. The criteria for refugee status are exceedingly strict. The time deadlines are short, and the avenues for appeal are very limited.

To understand the impact these restrictions have on asylum-seekers and the ways in which the system results in individual decisions that violate international law, this article will examine the German legal measures in the order that most asylum-seekers face them.

V. RESTRICTIONS ON ACCESS TO THE TERRITORY

Not surprisingly, the first German laws that most asylum-seekers encounter are provisions that restrict access to Germany. Germany erected the first barrier to asylum-seekers in places far from German soil. Indeed, this barrier is generally outside Europe. It has two components—visa requirements and carrier sanctions—that combine to keep asylum-seekers from ever reaching German territory. The restrictions on access to territory are so effective that most asylum-seekers never get to Germany to tell their story. Although this means that I did not meet them during my field work in Germany, a little imagination will allow us to understand the impact of these restrictive laws on the lives of individuals fleeing from persecution. Consider, as you read the legal provisions below, the case of dissidents from Sierra Leone who manage to reach Senegal and to scrape together enough money for airfare to Germany.

A. *Visa Policies*

An elaborate network of visa restrictions aims to halt asylum-seekers before they even begin their trip to Germany or to other EU countries. The Federal Republic of Germany established visa requirements well before 1993, as did other European states. The number of states whose nationals require a visa to enter Germany has continued to grow. Germany now extends a visa requirement to all major refugee-producing countries.

there. A foreigner from such a country shall not be considered subject to persecution on political grounds unless he presents facts showing that, contrary to this assumption, he is subjected to political persecution.

54. *Id.* art. 16(a), para. 4. The implementation of measures terminating a person's sojourn shall, in the cases referred in paragraph 3 and in other cases that are clearly unjustified or considered to be clearly unjustified, be suspended by the court only where serious doubt exists as to the legality of the measure; the scope of the investigation may be restricted and objections submitted after the prescribed time limit may be disregarded. Details shall be the subject of a law.

In this respect, Germany and the EU are in accord. Although they have not adopted a joint approach to dealing with asylum-seekers, the EU states have reached consensus concerning those countries whose nationals must possess a visa in order to enter EU territory.⁵⁵ Currently, the EU has listed over 100 countries whose citizens need a visa to cross into EU member states, and there are plans to expand the visa requirement to thirty more countries.⁵⁶ In addition, EU member states retain the right to require visas from nationals of countries that do not appear on the EU list.

Citizens of those countries for which either Germany or the EU has imposed a visa requirement, such as Sierra Leone, must obtain advance permission from German consulates or embassies abroad before they can enter Germany. This is impossible in most cases. Fearing persecution in one's homeland is not a basis for receiving a German visa. All those who lack visas, Sierra Leonean asylum-seekers as well as others, are legally prohibited from entering Germany. This visa policy precludes almost all the refugees in the world from entering Germany legally.

B. *Carrier Sanctions*

Enforcement of the visa requirement occurs in two stages: first, by airline employees, then, by border guards. In 1987, Germany enacted legislation that imposes on air, sea, and other carriers a fine of DM 2000 for each foreigner transported to Germany who lacks a residence permit or a required visa.⁵⁷ In addition, the law requires the carrier to pay all public expenditures incurred due to the arrival of the unauthorized individuals, as well as to bear the cost of transporting them away from Germany.⁵⁸

For asylum-seekers, the sanctions on carriers have created a practically impenetrable barrier to reaching Germany and many other developed countries. Airline employees know that the airline company will be subject to serious fines if it carries passengers to Germany who lack the required travel documents. Therefore, the airline workers will protect their employer against possible financial penalties and forbid those without visas from boarding.

Suppose the political dissidents from Sierra Leone were able to flee to Senegal and to purchase airplane tickets from Dakar to Frankfurt. When the Sierra Leoneans appear at the airport in Dakar and produce valid passports but cannot produce German visas, the airline employees refuse to allow them to board the plane. Pleas of persecution suffered in Sierra Leone, even evidence of torture such as amputated limbs, will be to no avail. At best, if the airline employees are sympathetic to the plight of the Sierra Leoneans, they may direct them to seek visas from the German embassy in Dakar or to seek protection in Senegal itself. That the German consular officials would not provide visas in this situation and that Senegal might be unable or unwilling to provide protection to Sierra Leoneans would be irrelevant to the decisions of the airline employees.

55. See Council Regulation 574/99, 1999 O.J. (L 72) 2 (determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States).

56. The European Commission proposed a regulation on January 25, 2000 creating two visa lists. The first lists countries whose nationals require entry visas to cross the external borders of the EU. The second lists countries whose nationals can enter the EU without visas. The Commission has proposed increasing the number of countries on the required visa list from 101 to 134. The Commission has proposed forty-nine countries for the no-visa list. See *European Commission Proposes New Lists on Visas*, MIGRATION NEWS SHEET, Feb. 2000, at 2.

57. Gesetz zur Änderung asylverfahrensrechtlicher, arbeitslaubnisrechtlicher und ausländerrechtlicher Vorschriften (uslandergesetz), v. 6.1.1987 (BGB1. I S.92) [Amendment of January 6, 1987 to Laws of Asylum, Work Permits, and Aliens].

58. *Id.* § 4.

The same scenario applies to Tamils from Sri Lanka who manage to travel to Bombay where they can buy airplane tickets to Frankfurt and to women fleeing the Taliban in Afghanistan who arrive in Istanbul with airfare to Germany. It applies to all asylum-seekers from all the major refugee-producing countries. Unless the asylum-seekers obtain prior official approval to enter Germany, as evidenced by visas issued by a German consular officer, the airline employees prevent the asylum-seekers from boarding the plane.

During the last decade the carrier sanctions and the visa requirement have had a major impact on asylum-seekers. In combination, they have effectively moved the border from German soil to airports in countries far away from Germany.⁵⁹ Airline employees, untrained in international refugee law or human rights law and motivated only by their employer's business interest in avoiding sanctions, prevent the great majority of asylum-seekers who lack visas from a chance to come to Germany to lodge an asylum request. The private employees act to enforce German law. Their actions turn away thousands of individuals who may face threats to their life or freedom due to their political views, nationality, religion, race, or social group. These efforts to enforce German law run counter to the *non-refoulement* provision of the 1951 Refugee Convention.

Since 1993 these preventive measures focused on air travel have assumed vast new significance because the constitutional amendment has changed the ground rules for asylum-seekers arriving in Germany by land. If the Sierra Leoneans, Tamils, or Afghans travel overland to Germany rather than attempt to enter Germany by air, they will face German border guards rather than airline employees. The border guards will also demand that those who wish to enter Germany produce valid German visas, of course, but prior to 1993 those physically present at the border had the possibility of overcoming the visa requirement. Those who requested asylum at the border were entitled to enter Germany and file an asylum application, even if they lacked a valid visa. The adoption of the safe third country principle in 1993 eliminated the possibility of seeking asylum at the border. The land barriers now are as impenetrable to asylum-seekers as those erected at airports overseas.

VI. RESTRICTION TO ACCESS TO THE ASYLUM PROCEDURE

Asylum-seekers who somehow cross the border and enter Germany are, in general, still out of luck. New legal measures, the heart of the 1993 constitutional amendment, create major restrictions to access to the asylum procedure even for those physically present in Germany. In examining them, consider the case of an Armenian woman who sought asylum in Germany in October 1993. She had been an officer in the Soviet army and faced persecution in newly independent Armenia for what some said was unforgivable collaboration with the Soviet occupying forces.⁶⁰ Her precise travel route was unclear; a typical journey from Armenia would have passed first through Russia, then through Ukraine and Poland before arriving in Germany.

59. In a related development, the British have recently begun posting airline liaison officers at the Prague airport in the Czech Republic in order to prevent airline passengers from flying to the United Kingdom and seeking asylum there. *British Airline Liaison Officers to be Posted at Prague Airport*, MIGRATION NEWS SHEET, Dec. 2000, at 16.

60. Interview with asylum-seeker at the office of Annette Koppinger-Rashid, Ausländerbeauftragte (Foreign Representative) for the city of Schwerin, in Schwerin, Mecklenburg-Vorpommern (June 20, 1994).

A. *Safe Third Country Principle*

The major instrument of the new German asylum regime is the safe third country principle. In effect, it is Germany's second line of defense. It is applied both at and inside the German border to deny asylum-seekers—at least, the subset of asylum-seekers who somehow overcome the visa requirements and the carrier sanctions and manage to arrive in Germany—access to the asylum procedure. It operates on the premise that asylum-seekers who travel through safe countries before they reach Germany should apply for asylum in the transit countries.

The safe third country policy adopted by Germany may sound like a neutral policy based on a common sense approach to the travel routes of many asylum-seekers. It is not. It is a cynical approach to the thousands of asylum-seekers who request—and sometimes desperately need—protection from persecution. It is an evasion of the international legal requirement that forbids nations from turning away from their borders refugees in need of protection.

Since 1993, the safe third country principle dominated asylum policy in Germany, yet there is nothing in international refugee law that justifies this approach. It effectively bars access to asylum and significantly heightens the chances that *refoulement*, or return to persecution, will occur. This is not merely a theoretical problem. Many practical consequences of the safe third country rule exist, and they are often dire. Those arriving at the German border from a safe third country will not be allowed to present their asylum claims, no matter how compelling. Instead, they will be immediately returned to the third country. The German approach does not presume that the asylum-seekers lack a well-founded fear of persecution or are unworthy of protection. Rather, the German law insists that asylum-seekers seek protection in another country that they happened to pass through. Theoretically, they will be allowed to present their asylum claims in those third countries, but in reality, this often does not happen.⁶¹

The 1993 constitutional amendment unequivocally states that those who enter Germany from one of the European Union member states are ineligible for asylum in Germany because the EU countries are all safe. This rule applies no matter what country the asylum-seekers originally fled, nor what persecution they fear, nor what family members may already reside in Germany.

In addition, the amendment states that those who enter Germany after traveling through non-EU countries are ineligible for asylum if those countries are safe. Safe third countries are defined as those that guarantee the application of the 1951 Refugee Convention and the European Convention on Human Rights and have been designated as safe by Parliament. In 1993, acting pursuant to the constitutional amendment, Parliament named the Czech Republic, Norway, Poland, and Switzerland as safe countries. Together, the fifteen European Union states and the additional countries designated as safe form a zone that completely surrounds Germany.⁶² By creating this all-encompassing *cordon*

61. See DANISH REFUGEE COUNCIL, *SAFE THIRD COUNTRY POLICIES IN EUROPEAN COUNTRIES* (1997). See also THE EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE), *SAFE THIRD COUNTRIES: MYTHS AND REALITIES* app. B, Case Histories (1995), available at <http://www.ecre.org/archive/s3c.pdf> (last visited Mar. 1, 2001) [hereinafter *SAFE THIRD COUNTRIES*]; U.S. COMMITTEE FOR REFUGEES, *AT FORTRESS EUROPE'S MOAT: THE SAFE THIRD COUNTRY CONCEPT* (1997).

62. Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, and the United Kingdom comprised the European Community, as it was then known, at the time of the 1993 constitutional amendment. The Law of Asylum Procedure lists the following safe countries: Finland, Norway, Austria, Poland, Sweden, Switzerland, and the Czech Republic. Since this law was enacted in 1993, Austria, Finland, and Sweden have joined the European Union. Asylverfahrensgesetz § 26a, v. 27.07.93 (BGBl. I S.1361)

sanitaire, Germany effectively eliminated access to the grant of asylum still nominally enshrined in its constitution.

The safe third country principle applies to all asylum-seekers in Germany, whether they come by land, air, or sea. Those who come by land are immediately turned back at the border based on the safe third country rule. In 1997, the Federal Administrative Court upheld this rule even for asylum-seekers who have been locked inside a vehicle as they passed through the safe third country, absolutely unable to apply for asylum there.⁶³ Asylum-seekers who reach Germany are presumed to have come by land—and accordingly to have passed through safe countries, thus making them ineligible for asylum—unless they can prove they arrived by air or sea without passing through a safe country while in transit.⁶⁴

As discussed earlier, asylum-seekers who attempt to travel to Germany by air are generally turned back at the point of embarkation by airline employees. If they manage to obtain some form of visa and board an airplane that touches down in a safe country en route, they will be turned away from Germany without any examination of their asylum claim. If the plane did not land in a safe country before arriving in Germany, they will be allowed to enter to face an extremely accelerated asylum procedure at the airport.

It is generally easy for the German authorities to identify whether airplane flights have landed or re-fueled in a safe third country before arriving in Germany. All air passengers on those flights are precluded from applying for asylum and are returned immediately to the third country.⁶⁵ These departures occur so promptly that the Border Guard does not consider them deportations. The Border Guard denominates them *returns*, and does not record them in deportation statistics.⁶⁶

In contrast, it is more difficult for German authorities to determine the route of asylum-seekers who enter clandestinely by land or sea. Many of these asylum-seekers attempt to forestall their return to a third country by destroying or concealing all evidence of the countries through which they traveled. A lack of evidence connecting the asylum-seeker to one of the safe third countries does not allow asylum-seekers to escape the safe third country principle. Since all asylum-seekers who entered by land must have passed through a safe third country, the German authorities have concluded that the 1993 constitutional amendment renders these asylum-seekers ineligible for asylum whether or not they can be linked to a particular safe third country. All asylum-seekers without documents at the

[Law on Asylum Procedure]. The safe third country rule was endorsed at the EU level in a 1992 resolution and has been implemented throughout the Union with serious implications for refugee protection in Europe. Resolution on a Harmonized Approach to Questions Concerning Host Third Countries, Dec. 1, 1992, Doc. 4464/1/95 CIREA 3.

63. *No Asylum if Arrival by Land Route*, MIGRATION NEWS SHEET, Oct. 1997, at 8 (citing the Federal Administrative Court (BVerwGE) decision of September 2, 1997). Traveling through a safe third country rendered them ineligible for asylum, even though they risked persecution in their homeland. Because the applicants in the case did not know which countries they had traveled through, however, they could not be returned to a safe third country. Accordingly, they could seek a lesser form of protection in Germany, but not asylum.

64. *Asylum-seekers Who Claim to Have Arrived by Air Must be Able to Provide Proof of This*, MIGRATION NEWS SHEET, July 1999, at 11 (citing the Federal Administrative Court (BVerwGE) decision of June 29, 1999).

65. See Asylverfahrensgesetz §§ 18a(1), 18(2)(1), v. 27.07.93 (BGB1.I S.1361) [Law on Asylum Procedure]. This, of course, can only be accomplished if the German Border Guard has evidence that the asylum-seekers came through a particular safe third country. If the asylum-seekers have not yet left an airplane arriving from a safe third country, the Border Guard has crucial evidence. If the asylum-seekers have left their airplanes and have lost or destroyed information showing which flight brought them to Germany, the Border Guard lacks evidence of their route and cannot return them. Even if the Border Guard can show that the asylum-seeker must have come to Germany through a third country (e.g., the asylum-seeker arrived on one of three airplanes, all of which originated in a safe third country), none of the third countries will allow the asylum-seekers to enter unless there is proof that they traveled to Germany through that particular third country.

66. Interview with Herr Ludwig Rippert, Federal Border Guard, in Frankfurt/Main (June 20, 1996).

border or within the expanded border zone are presumed to have crossed a safe third country. Unless the asylum-seekers can prove they entered by air or sea without having passed through a safe third country, they are not allowed to apply for asylum.⁶⁷

The Armenian asylum-seeker mentioned earlier falls into this category. If she had presented herself to a border post and requested asylum, German officials would have immediately returned her to Poland, with no examination of her asylum claim. The same would occur even if she had crossed the border clandestinely and then been stopped twenty kilometers inside German territory. If she had tickets or documents indicating she had traveled through Poland, German authorities would have turned her over to the Polish border guards at once. If she had destroyed all evidence that she had passed through Poland, German officials could not return her to Poland. She would face a presumption, though, that she had crossed some safe country and, accordingly, would be ineligible to apply for asylum.

This approach prevents almost all asylum-seekers from obtaining asylum in Germany, but it fails to solve the practical problem of sending them away. Countries bordering Germany generally refuse to admit asylum-seekers without proof that they entered Germany from their particular territory. Consequently, asylum-seekers have a great incentive to lose all evidence concerning the travel route to Germany and to repress all distinct memory of the journey. They will not obtain asylum, but they may prevent immediate expulsion to another country. If they are lucky, they may, as discussed below, gain temporary residence in Germany.

The importance that travel documents assume leads to a major hidden cost of the safe third country principle in Germany: the corrosive atmosphere of deceit and mistrust that has been created in the asylum system. Asylum-seekers who have managed to cross the border have an exceedingly powerful incentive to lie about their travel route. They often view the truth as an instantaneous expulsion order. German authorities know that many asylum-seekers lie about their journeys to Germany. Although the basis for the fear of persecution is logically distinct from the details of the journey, the officials begin to question the truth of the other details of the asylum claims that begin with major misstatements or bald-faced lies about the travel route. These asylum-seekers know that the authorities know that they are lying, but the consequences for telling the truth about the travel route are too severe.

Due to the centrality of the safe third country rule and the resulting ineligibility for asylum of those who have transgressed it, the determination of the asylum-seeker's transit route becomes critical in many cases. Though so much rests on this decision, there are no safeguards surrounding it. Three elements of the safe third country practice combine to create serious legal problems: the unreviewable decisionmaking at the border, the expanded border zone, and the difficulties of obtaining access to the asylum procedure in third countries.

1. Decision-making at the Borders

There are no procedural safeguards and there is no transparency surrounding the decisions to return asylum-seekers to safe third countries. The potential consequences of the safe third country principle can be exceedingly harsh. The overwhelming majority of asylum-seekers who come to Germany run afoul of this provision. It is, therefore, crucial

67. See *supra* note 64 and accompanying text. Entry by air, of course, is difficult due to the previously discussed visa requirement and carrier sanctions. Those who do manage to enter by air face the limitations of the accelerated airport procedure, which will be discussed later.

that the conclusion that an asylum-seeker traveled through certain countries is well-founded and accurate.

In fact, though, a guard at the border checkpoint makes this critical decision. There is no appeal. There is no opportunity to seek administrative reconsideration. There is no chance to obtain judicial review before the border guard acts. The individual border guard has absolute authority.

Concerns about fair and accurate decision-making in this setting are intensified by the difficulties in establishing sustained monitoring of the border guards' decision-making. The border area is closely guarded, and the inner workings of the border guard stations are not visible to the ordinary public. By and large, border guards exercise their absolute authority outside the public view. Decisions of such great importance to human life and liberty should not be consigned to unreviewable government action.

2. Expanded Border Zone

Concerns about the integrity of decisions at the border assume even greater importance because they apply to many decisions that are made a significant distance from the border. An expanded border zone stretching thirty kilometers from the border is treated as the functional equivalent of the border.⁶⁸ Anyone stopped within this sizable, expanded border zone is deemed to be at the border. The procedural protections that apply to government decisions made in other circumstances within Germany do not apply. Border guards can stop asylum-seekers anywhere in this large area, decide they came through a safe third country, and return them immediately to that country. Again, there is no appeal. The practice within the expanded border zone magnifies concerns about the potential for abuse.

3. Safety in Third Countries

Most fundamentally, the safe third country rule can lead to terrible consequences because it is based on a flawed premise. German law presumes asylum-seekers will be able to present their asylum claims in a legitimate and well-functioning asylum procedure when they are returned to the safe country. This presumption allows Germany to turn away asylum-seekers who have passed through safe third countries no matter how compelling their fears of persecution. As a practical matter, this presumption is often incorrect. Despite the possibilities of mistreatment that may accompany the return, the German authorities do not determine whether individual asylum-seekers will be admitted to the asylum process in the safe third country; they simply return them to that country. Although German government officials say that asylum-seekers returned to third countries are provided with written documentation that informs them they must apply for asylum in the third country and that notifies third country officials that asylum-seekers have not received full consideration of their asylum claims in Germany,⁶⁹ refugee advocates in Germany assert that, in practice, this does not occur.⁷⁰

68. See *Checks by Border Police Inside the Country*, MIGRATION NEWS SHEET, July 1998, at 2. In July 1998 the Parliament approved legislation authorizing the German Border Police to stop and interrogate for any reason whatsoever any person within the 30 kilometer border zone.

69. Interview with Jürgen Haberland, Ministry of Interior, in Bonn (Sept. 29, 1998). The Committee of Ministers of the Council of Europe has adopted recommended guidelines advising member states, including Germany and all the other EU states, to ensure before returning an asylum-seeker to a third state that the asylum-seeker will have the opportunity to request asylum in the third state and that the third state will be informed that the merits of the asylum case have not been examined in the returning state. GUIDELINES ON THE APPLICATION OF

The situations in Poland and the Czech Republic, Germany's eastern neighbors and designated safe third countries, raise particular concern. Newly emerging from communist rule and struggling to transform themselves into market economies, Poland and the Czech Republic receive many of the asylum-seekers returned by Germany due to the safe third country rule. Only recently has either country even begun to receive and recognize refugees officially. Poland did not accede to the 1951 Refugee Convention until the last week of 1991. The Czech Republic acceded to the Convention one month earlier. This was only eighteen months before Germany amended its constitution to exclude from asylum all those who had passed through a safe third country—including Poland and the Czech Republic—prior to entering Germany.

The recent accessions to the 1951 Refugee Convention are emblematic of the newly developing refugee policy in Poland and the Czech Republic. A little more than a decade ago, when both countries were still ruled by communist regimes, there was no need for refugee policy and refugee law. Few asylum-seekers sought refuge in those societies. During the past decade the early beginnings of a refugee policy have become visible, but there has been insufficient time and support for a mature refugee system with substantial legal protection to develop.

For example, the Ministry of Interior in Poland established an Office for Immigration and Refugee Affairs in 1993.⁷¹ Until the last week of 1997, there was no Polish legislation setting forth the framework for a refugee system and delineating the legal protections provided to refugees.⁷² The Office was forced to rely on the general Administrative Code⁷³ and the thirty year old Aliens Law.⁷⁴ The new law, while an improvement over the past, has been described by experts in Poland as unclear and easily misconstrued.⁷⁵ In late 1999, concerns about the safety of asylum-seekers, particularly unaccompanied minor asylum-seekers, returned to Poland from third countries, led the UNHCR to call for a halt in returns until the situation in Poland could be substantially improved.⁷⁶ It is fair to say that the Polish refugee policy is in a preliminary stage and these beginning efforts are seriously underfunded.

Until 2000, the legislation specifically addressed to refugees in the Czech Republic was a relatively rudimentary law. Enacted as a quick response to burgeoning numbers of refugees, the refugee law went into effect in 1991.⁷⁷ A short amendment went into effect in

THE SAFE THIRD COUNTRY CONCEPT, RECOMMENDATION NO. R (97) 22 AND EXPLANATORY MEMORANDUM (1998).

70. Interview with Herbert Leuninger, Pro Asyl, in Frankfurt/Main (June 19, 1996); Interview with Tina Raedel, Advocate, Forschungsgesellschaft Flucht und Migration [Research Center on Refugees and Migration] in Berlin (June 25, 1996); Interview with Peter Rauschenberg, Advocate, Flüchtlingsrat Leipzig [Leipzig Refugee Council], in Leipzig (June 26, 1996).

71. See Tomasz Kuba Kozłowski, *Poland: Between Transit, Asylum Seeking and Immigration*, HEARING ON THE SITUATION OF REFUGEES AND ASYLUM SEEKERS IN CENTRAL AND EASTERN EUROPE 9-10 (Office for Migration and Refugee Affairs, 1994).

72. Ustawa o cudzoziemcach [Aliens Law] o 25.06.97 (Pol.).

73. KODEKS POST POWANIA ADMINISTRACYJNEGO [CODE OF ADMINISTRATIVE PROCEDURE] o 14.06.60 (Pol.).

74. Ustawa o cudzoziemcach [Aliens Law] o 29.02.63 (Pol.).

75. Jack Chleby & Wojciech Trojan, *The Refugee Status Determination Procedure in Poland*, 12 INT'L J. OF REFUGEE L. 212, 219 (2000).

76. UNITED NATIONS HIGH COMMISSIONER OF REFUGEES, BACKGROUND INFORMATION ON THE SITUATION IN THE REPUBLIC OF POLAND IN THE CONTEXT OF THE RETURN OF ASYLUM SEEKERS (Dec. 1999).

77. Zákon 498/1990 Sb. (Concerning Refugees) (Czech Rep.).

1994.⁷⁸ These early legislative efforts were supplemented by more thorough statutory development in the asylum law that took effect at the beginning of 2000.⁷⁹

Although the details differ, the overall picture for refugees in Poland and the Czech Republic is similar. In both countries the infrastructure is underdeveloped, and refugee law and policy are nascent. Each country now can only provide housing to a few thousand refugees and asylum-seekers, far fewer than the tens of thousands sent back by Germany each year. Furthermore, both countries have devoted a substantial portion of their refugee resources to temporarily protected persons who have fled wars in the Balkans. While this is clearly admirable, asylum-seekers from elsewhere get lost in the shuffle.

Thus, despite the minimal legal framework for refugees and the paucity of resources available for asylum-seekers, Germany returns many thousands of individuals to Poland and the Czech Republic each year. Statistics provided by the German Border Guard for a recent year are representative.⁸⁰ In 1997, German authorities arrested 35,205 undocumented individuals at their borders. Of these, 23,089 were arrested at Germany's eastern borders: 8,699 at the Polish border and 14,390 at the Czech border. In addition, the German Border Guard refused entry to 16,080 at the Polish border and 16,730 at the Czech border.⁸¹ Further, German authorities stopped 5,589 individuals inside Germany and returned them to Poland within forty-eight hours pursuant to the German-Polish readmission agreement. The number stopped inside Germany and promptly sent to the Czech Republic for readmission reached 10,254. The Border Guard reported that they arrested 40,201 foreigners at the borders for illegal entry in 1998. Of these, more than 19,000 were arrested at the Czech border and approximately 5,000 at the Polish border. In addition, the Border Guard turned back 60,000 foreigners at the borders.⁸² The number of illegal border crossings reported in 1999 decreased to 37,789.⁸³ Approximately 13,000 were apprehended at the German-Czech border and roughly 3,000 were arrested at the German-Polish border.⁸⁴

The Border Guard statistics do not separate asylum-seekers from other would-be migrants, so it is impossible to know the precise percentage of asylum-seekers in these figures. It is obvious, though, that many asylum-seekers must be included in the tens of thousands whom Germany turns back to Poland and the Czech Republic each year because many asylum-seekers pass through these countries each year en route to Germany. In a real sense, the safe third country principle in Germany obliterates legal protection for asylum-seekers and treats them like all other migrants.

The situation for asylum-seekers returned to Poland is particularly worrisome. The legal provisions protecting asylum-seekers are even sparser than in the Czech Republic, and the infrastructure is minimal. Moreover, because there are accommodations for only a tiny percentage of those applying for asylum in Poland, almost all those returned by Germany must rely on their survival skills to find food and shelter during the asylum process.

78. Zákon 317/1993 Sb. (Amending and Supplementing Zákon 317/1990 Sb. (Concerning Refugees)) (Czech Rep.).

79. Zákon 325/1999 Sb. (on Asylum) (Czech Rep.). This legislation includes all three of the restrictive concepts adopted by the 1993 German constitutional amendment: safe third country, § 2(2); safe country of origin, § 2(1); and accelerated review procedures in cases deemed manifestly unfounded, § 29.

80. See E-mail from Forschungsgesellschaft Flucht und Migration [Research Center on Refugees and Migration] to Maryellen Fullerton (Nov. 9, 1998, 16:55 EST) (providing statistics of the Federal Border Guard (Bundesgrenzschutz)) (on file with the Texas International Law Journal).

81. See *id.* These individuals were turned away, but not arrested.

82. *More Arrests for Illegal Entry*, MIGRATION NEWS SHEET, Sept. 1993, at 3.

83. efms Migration Report (Jan. 2000), available at http://www.uni-bamberg.de/%7eba6ef3/dokz00_d.htm (last visited Mar.27, 2001).

84. *Number of Persons Caught for Illegal Entry in 1999 Fell by 6%*, MIGRATION NEWS SHEET, Apr. 2000, at 7.

More troubling, though, are reports that asylum-seekers turned back to Poland from Germany are effectively prevented from applying for asylum in Poland. German government officials assert that they see no indication that asylum-seekers returned to Poland are denied access to the asylum procedure there.⁸⁵ Nonetheless, credible reports give cause for concern. For example, the Research Center on Refugees and Migration notes that the German Border Guard arrested 14,000 foreigners within the thirty kilometer expanded border zone along the Polish border in 1995.⁸⁶ Of these, 7000 were citizens of Romania. They were flown from Germany to Romania.⁸⁷ The other 7000 individuals were detained in German Border Guard camps for up to forty-eight hours and then delivered to Polish officials, who detained them for up to another forty-eight hours.⁸⁸ The Polish Border Guard transported 2000 or more by bus to Ukraine, which signed a readmission agreement with Poland. These individuals had no access to the asylum process in Poland. Indeed, they had no access to lawyers, judges, doctors, or other advocates while detained in Germany, and no access to representatives of government organizations while detained in Poland.⁸⁹

The story of the former Soviet army officer from Armenia illustrates the bleak situation awaiting asylum-seekers returned to Poland. After entering Germany and requesting asylum, she was assigned to an asylum shelter in the eastern region of Mecklenberg-Western Pomerania. While waiting for a decision on her asylum application, she was awakened one night.⁹⁰

At 3:00 a.m. on January 3, 1994, police came to my room. They unlocked my door and told me I had five minutes to get ready to leave. They told me to sign a paper, but I refused because I couldn't read it. They yelled at me in German. They wouldn't let me borrow a coat. I only had light clothes. They put me into a car and we drove a long time. I begged them to stop to let me relieve myself, but they wouldn't. They drove me to the border. They made me stand outside in the cold for forty minutes while they talked to the Polish border guards. Then they left.

The Polish border guards gave me a pass to remain for three days. I asked what I should do without food, warm clothes, or money. The Polish border guards told me that was my problem. They said I could stay in the reception area for three days and then would have to leave Poland. They said I could not file an asylum application in Poland.

While I was in the Polish camp, I saw Polish ladies go back and forth across the border every day to buy and sell things. I had some plastic bags with me, and I pretended they were for shopping. On January 6, I managed to cross the border back into Germany. I stood in a crowd of Polish ladies and walked with them across the border into Germany. I went to the police in the border town and

85. See Interview with Jürgen Haberland, *supra* note 69.

86. See Helmut Dietrich, *Export des deutschen Abschiebesystems nach Osteuropa (FFM)*, VORTR. GE DER FORSCHUNGSGESELLSCHAFT FLUCHT UND MIGRATION [*Export of the German Deportation System to Eastern Europe*, TALKS GIVEN BY THE RESEARCH CENTER ON REFUGEES AND MIGRATION] (May 25, 1996) (on file with the Texas International Law Journal).

87. See *id.*

88. See *id.*

89. See *id.*

90. This sequence of events does not appear to be typical. I mention it not to suggest that this is what generally happens, but because it vividly portrays one asylum-seeker's experience in Poland after being sent back from Germany.

spoke to them in Russian and broken German. I told them there had been a mistake. I said I needed to return to the asylum center. I asked for a lawyer.⁹¹

Although it did not happen to this asylum-seeker, there are reports that Poland has begun detaining as illegal immigrants many of those turned back from Germany and that detention in Poland is sometimes accompanied by criminal prosecution for violating border controls. Reliable information on the fate of those returned to other countries is notoriously difficult to obtain. If some of these reports are true, however, this is particularly troubling treatment for those precluded from seeking asylum in Germany based on the premise that they could request asylum in Poland.

B. Readmission Agreements

The pernicious effect of the safe country rule is compounded by the multitude of readmission agreements that Germany and other European states have entered. Germany has negotiated readmission agreements with more than twenty countries, including Algeria, Bosnia, Bulgaria, Croatia, Georgia, Latvia, Romania, Vietnam, and the Federal Republic of Yugoslavia, as well as Poland and the Czech Republic.⁹² In addition, many of these countries have negotiated readmission agreements with other nations. For example, Poland has readmission agreements with many countries to its east and south, including Ukraine, the Slovak Republic, Hungary, and Moldova, with which Germany has not concluded readmission agreements.⁹³ This elaborate and interlocking network of agreements, combined with the safe third country principle and the accelerated procedures applied to claims deemed manifestly unfounded,⁹⁴ heightens the risk that asylum-seekers may be sent back to conditions of danger without ever undergoing a thorough examination of their claims.

The provisions of these agreements vary, but they generally permit the receiving state to send asylum-seekers and others back to another state that they either fled or passed through en route to the receiving state. The receiving state sends all those without authorization to be in the receiving state back to the readmitting country. If the individuals are asylum-seekers, the receiving state generally refuses to hear the asylum claims, but rather, sends the asylum-seekers to the readmitting country for any determination as to whether there are well-founded claims for asylum. The conditions in some of the countries that signed readmission agreements with Germany and its eastern neighbors are extremely unstable. In others, the human rights situation is tenuous, and the asylum policy, for all practical purposes, is non-existent. As a consequence, these readmission agreements raise serious concerns for the ultimate safety of asylum-seekers turned away without a thorough hearing of their asylum claims: those rejected without a hearing due to the safe third country rule or those rejected in short-circuited proceedings because their claims were perceived to be manifestly unfounded.

91. Interview with asylum-seeker, *supra* note 60.

92. See *Overview of Existing Readmission Agreement/Arrangements*, MIGRATION NEWS SHEET, Nov. 1997, at 8-9 (reporting also that Germany has an ad hoc readmission agreement with the United Kingdom, plus full-fledged readmission agreements with Algeria, Austria, Belgium, Bosnia, Bulgaria, Croatia, the Czech Republic, Denmark, France, Georgia, Italy, Latvia, Morocco, the Netherlands, Norway, Portugal, Romania, Sweden, Switzerland, Vietnam, and Yugoslavia).

93. See *id.* Poland has readmission agreements with Bulgaria, Croatia, the Czech Republic, Hungary, Moldova, Romania, the Slovak Republic, and Ukraine in Central Europe, and Belgium, France, Germany, Greece, Italy, Luxemburg, the Netherlands, Spain, Sweden, and Switzerland in Western Europe. A draft readmission agreement with Canada also exists.

94. See *Manifestly Unfounded Applications and Accelerated Procedures*, *infra* part VII.

Because there are multiple layers of readmission agreements, the first invocation of a readmission agreement may have far-reaching and unforeseen consequences. Although German law only permits German border guards to return asylum-seekers to safe third countries that adhere to the 1951 Refugee Convention and the European Human Rights Convention, German law is silent regarding the standards that other countries may later apply to asylum-seekers rejected at Germany's borders. Some German government officials have said that they annually scrutinize the safe third country policies of countries that Germany treats as safe third countries, to ensure that they protect returned asylum-seekers from *refoulement*, or eventual return to the country where they fear persecution. This review does not apply to EU member states, which are deemed categorically safe under the German constitution.⁹⁵

In practice, the countries Germany treats as safe third countries may well have readmission agreements with countries that have not put into effect the Refugee Convention and the European Convention on Human Rights, and thus would not be considered safe under German law. By ignoring the reality of the web of readmission agreements that bind its neighbors, Germany is complicit in a flawed process. With no examination of the merits of their claims, asylum-seekers are shunted from Germany to safe third countries, then from safe third countries to countries that may not be and that Germany may not view as safe.

Returning for a moment to the case of the Soviet military officer from Armenia, if the German authorities had evidence that she passed through Poland, they would have refused to provide her any asylum hearing whatsoever. German law designates Poland, a country that has ratified the Refugee Convention and the European Human Rights Convention, as a safe third country, so the German Border Guard would have returned her directly to the Polish authorities. If Polish officials had learned that the Armenian asylum-seeker had entered Poland via Ukraine, they would have relied on the readmission agreement to return her promptly to Ukraine. Denied access to the asylum process in both Germany and Poland, the Armenian asylum-seeker would theoretically be able to seek refuge in Ukraine, but Ukraine is not a party to the 1951 Refugee Convention. The refugee legislation enacted in 1993 is relatively untested. The thrust of Ukrainian refugee policy is directed toward Afghanistan. Roughly seventy-six percent of the 3,000 recognized refugees are Afghans.⁹⁶ Ukrainian authorities have not provided housing for refugees; asylum-seekers must fend for themselves.⁹⁷ The economic crisis in Ukraine severely undercuts even minimal refugee protection and assistance efforts.

Perhaps Ukraine would seek to push the asylum-seeker back to another country, such as Russia, an earlier stop on her journey. Whether Russia, the fourth country in the chain, or a subsequent fifth country, has a functioning asylum process and the ability to extend protection to those fleeing persecution would be questionable. For example, although Russia became a party to the 1951 Refugee Convention in 1993, it had no international refugee law during most of the 1990s.⁹⁸ Refugee legislation was enacted in 1993, but it applied only to those fleeing violence within the former Soviet territory.⁹⁹ A decree on political asylum was adopted in 1995, but it was never put into effect.¹⁰⁰ More recently, in

95. See Interview with Jürgen Haberland, *supra* note 69.

96. See DANISH REFUGEE COUNCIL: UKRAINE 10 (1998) (on file with the Texas International Law Journal).

97. See *id.* at 12.

98. See Adriano Silvestri & Olga Tchernishova, *The Legal Framework Regulating Asylum in the Russian Federation*, 10 INT'L J. REFUGEE L. 184 (1998).

99. See *id.* at 184–85.

100. *Id.* at 187.

mid-1997, new refugee legislation was enacted; this law is short, has internally contradictory provisions, and leaves large areas to administrative discretion.¹⁰¹

Moreover, even if a functioning asylum procedure is in place, many reports indicate that government officials who receive asylum-seekers already rejected by several other countries conclude that their case lacks substance. Officials in these receiving countries often ignore the distinction between refusals to allow access to the asylum process based on the safe third country principle or readmission agreements and rejection of the merits of the asylum claim.¹⁰²

As a result of the spiderweb of readmission agreements, many asylum-seekers rejected by Germany on the theory they should apply for asylum in a country that they had passed through earlier may find themselves caught in a chain of events that allows neither escape nor an asylum hearing. Often, countries later in the chain lack an effective refugee policy and have not fully implemented the 1951 Refugee Convention and international human rights treaties.

The actual treatment of a Kosovar Albanian family in 1998 furnishes another powerful demonstration of the actual danger inherent in the safe third country rule and the system of readmission agreements.¹⁰³ A man and his family had fled Kosovo because he took part in a hunger strike of miners; he had been hiding from the Serb police since then. When the family arrived in Germany, they were immediately sent back to Austria, the safe third country they crossed to come to Germany. Austria expelled them to Hungary, and the Hungarian authorities accompanied them to the Yugoslav border. Back in Yugoslavia, the entire family was seriously mistreated by the police. They then fled a second time to Germany, where they received a negative decision on their asylum claim. The head of the family then tried to flee alone to Sweden but was caught by the police and brought back to Germany and imprisoned for more than thirty days while awaiting deportation. On April 29, 1998, he was deported for a second time to Kosovo, where he says Serb police interrogated and beat him upon arrival. His family remains illegally in Germany, where his children are in special therapy for trauma cases and victims of torture.

The responsibility for such cases lies heavily—although not solely—on Germany. The safe third country list promulgated by Germany and other EU member states has encouraged other countries to formulate similar lists of countries asylum-seekers may have crossed earlier on their journey.¹⁰⁴ The resulting chain deportation process pushes asylum-seekers closer and closer to the land they fled. The possibility that they might be returned to persecution is real. Although each state claims it is only responsible for the sole decision it makes, all the states are implicated in the final result because they know that returning asylum-seekers to a neighboring state is likely to be only one step in a long process. Germany and other states that begin the chain of deportation orders cannot escape responsibility for the ultimate fate of asylum-seekers they turn away at their borders.

Indeed, the German Constitutional Court has recognized that international law prohibits both direct and indirect return to the country where persecution is feared.¹⁰⁵ It remains for German officials to take this ruling to heart. They must consider seriously the possibility that the deportation or “return” under consideration may be the first link in a dangerous chain. They must limit application of the safe third country concept to those

101. See *id.* at 192.

102. See SAFE THIRD COUNTRIES, *supra* note 61, at app. B, Case Histories Nos. 1–2, 4, 7–8, 10, 13–14.

103. See Interviews by Fred Abramson, Human Rights Watch, in Kosovo (June 1998).

104. For example, as noted earlier, see *supra* notes 5–11 and accompanying text, the Czech Republic has amended its refugee law to include passage through a safe third country as a basis for denial of asylum, and Ukraine is considering adding a similar provision in 2001.

105. See BVerfGE 94, 49.

cases in which there has been an individualized determination that the state to which the asylum-seeker will be readmitted has a full asylum procedure comporting with UNHCR standards.¹⁰⁶

The readmission agreements significantly exacerbate the safe third country rule that Germany has adopted. They also heighten the difficulties created by curtailed procedures applied to claims deemed manifestly unfounded. As explained below at greater length, the streamlined procedures for these disfavored claims significantly limit the opportunities for judicial review. As a consequence, asylum-seekers whose claims are rejected as manifestly unfounded are more likely to be deported quickly. If they fall within the scope of one of the more than twenty readmission agreements Germany has negotiated, they may be sent back to a country with tenuous human rights policies, which may rely in turn on readmission agreements it has negotiated with other states and send them back to another state with even fewer established protections of human rights. Their ultimate *refoulement* is a major concern. This system sends asylum-seekers to situations where they face danger due to their nationality, religion, race, social group, or political opinion. In doing so, it violates both the 1951 Refugee Convention and the European Human Rights Convention.

VII. MANIFESTLY UNFOUNDED APPLICATIONS AND ACCELERATED PROCEDURES

The visa policy and carrier sanctions prevent asylum-seekers from reaching Germany. Those who somehow arrive at the German borders face the safe third country principle, which, coupled with the extensive network of readmission agreements, prevents many asylum-seekers from gaining access to the asylum procedure. The relatively few who do enter the asylum system may face substantially truncated and accelerated procedures. The constitutional restrictions adopted in 1993 expressly reduce procedural protections formerly accorded asylum-seekers. The lack of safeguards in the system that renders decisions about applicants' fear of persecution increases the odds that the international law forbidding *refoulement* will be violated.

The case of an Algerian asylum-seeker who arrived in Germany in October 1995 highlights some of the difficulties caused by the streamlined procedures. This asylum-seeker reported that the Algerian military forces, thinking that he supported Islamic fundamentalist groups in Algeria, administered electric shocks to torture him.¹⁰⁷ His need for protection collided with the new German asylum law.

A. Manifestly Unfounded Applications

The 1993 amendment to the Constitution refers to asylum requests that are clearly unjustified. The amendment states that deportation shall generally not be suspended pending appeal in these manifestly unfounded cases. It also limits the scope of judicial review available for these claims. The constitutional amendment does not, however, define the operative term.¹⁰⁸

106. See GUIDELINES ON THE APPLICATION OF THE SAFE THIRD COUNTRY CONCEPT, *supra* note 69.

107. Details of this case are reported in *Administrative Court Ordered to Verify Claims of Torture by an Algerian Asylum-Seeker*, MIGRATION NEWS SHEET, Sept. 1997, at 9 (citing FRANKFURTER RUNDSCHAU, Aug. 7, 1997).

108. See GRUNDGESETZ [GG] [Constitution] art. 16a(4) (F.R.G.).

Earlier legislation indicated that an extremely broad range of circumstances would lead an asylum application to be deemed "manifestly unfounded."¹⁰⁹ For example, the statutory term includes an asylum application based on flight from war or based on a general emergency situation.¹¹⁰ It also includes an asylum application contradictory in several important respects or one deemed to be inconsistent with well-known facts.¹¹¹ German courts appear to be grafting the expansive statutory definition onto the constitutional restriction. This has resulted in substantially fewer procedural protections for a large number of asylum applicants.¹¹² Because the Algerian asylum-seeker arrived in Germany at a time when there were outbursts of violence in certain areas in Algeria, refugee authorities in Germany viewed him as someone fleeing from warfare or an emergency situation in parts of his homeland. They did not believe his allegations of torture, so his case was deemed manifestly unfounded.

Legislation implementing the constitutional amendment provides that asylum-seekers whose claims have been rejected as manifestly unfounded must leave Germany within one week.¹¹³ They may challenge the government decision by filing a notice of appeal with the Administrative Court within one week of the decision.¹¹⁴ This is a significant acceleration of the standard four-week period in which German litigants are generally allowed to prepare their appeals.¹¹⁵

Moreover, in contrast to the ordinary appellate practice in Germany, filing a notice of appeal does not provide an automatic stay of deportation in manifestly unfounded cases.¹¹⁶ In order to suspend the effect of the deportation order, asylum-seekers must file two separate applications with the court: an appeal on the merits of the asylum claim and a request for a stay of the deportation order pending the appeal. Only those who obtain a court order specifically delaying their deportation are permitted to remain.¹¹⁷ Many asylum-seekers are baffled by this procedure, fail to file two separate applications, and are unable to achieve the stay of deportation that the law, in theory, provides.

109. Section 30 of the Law on Asylum Procedure illustrates a variety of circumstances in which an asylum application would be deemed manifestly unfounded. These include applications:

- (1) in which the requirements for asylum under German law are obviously not present;
- (2) by those who obviously came only for economic reasons or who flee war or a general emergency situation;
- (3)(1) which are contradictory or insubstantial in important respects, which do not correspond to well-known facts, or which are based on falsified evidence;
- (3)(2) in which the applicant disguises his identity or citizenship;
- (3)(3) by applicants who have submitted another asylum claim using other personal data; or
- (3)(4) which are submitted to forestall the threatened expiration of permission to remain in Germany.

Asylverfahrensgesetz § 30, v. 27.07.1993 (BGB1. I S.1361) [Law on Asylum Procedure].

In its judgment of October 12, 1994, the Federal Constitutional Court has stated that the courts must provide the legal definition of "manifestly unfounded" applications. BVerfGE 91, 226 (228).

110. Asylverfahrensgesetz § 30(2), v. 27.07.93 (BGB1. I S.1361) [Law on Asylum Procedure].

111. *Id.* § 30(3)(1).

112. For this sizable number of asylum-seekers affected, see *infra* text accompanying note 121.

113. Asylverfahrensgesetz § 36(1).

114. *Id.* § 74(1).

115. Generally, the applicant seeking review of the decision denying asylum has two weeks after service of the decision to file an appeal, and has up to one month after the service of the decision to detail the grounds for the appeal. *Id.* §§ 74(1), 74(2).

116. *Id.* § 75 (providing suspensive effect only for appeals from applications denied but not ruled manifestly unfounded or inadmissible).

117. *Id.* §§ 36, 37. These asylum-seekers may challenge the negative decision with its one-week time limit to leave Germany by relying on § 80(5) of the Administrative Court Code. If the Court rules in their favor they are allowed to remain in Germany until one month after the final judicial decision in their asylum case. Interview with Frau Krug Ritter, Supervisor, Federal Refugee Office, in Nürnberg/Zirndorf (June 18, 1996).

Those who file the correct documents within one week of being rejected as manifestly unfounded receive a hearing based solely on the written record. In reviewing challenges to claims rejected as manifestly unfounded, the Administrative Court considers first the accompanying request for suspensive effect. If the Court decides that there are no "serious doubts as to the legality" of the negative decision, it will deny suspensive effect.¹¹⁸ The Court has one week to render its decision on suspensive effect.¹¹⁹ If the Court denies suspensive effect, it will no longer consider the case, and no further appeals are possible. If the Court concludes that the request may be simply unfounded rather than "manifestly unfounded," it will grant suspensive effect.¹²⁰ It will then consider the merits of the case at a later time.

The strictures on claims rejected as manifestly unfounded affect a large number of asylum-seekers, approximately 26,000 applications in 1995; 25,000 in 1996; 27,000 in 1997; close to 25,000 in 1998; 22,000 in 1999; and more than 18,000 in 2000.¹²¹ Because the route to judicial review is complicated and the chances of success limited, most asylum-seekers rejected for having "manifestly unfounded" claims fail to appeal. Thus, tens of thousands of asylum-seekers are turned away each year without any serious oversight by the courts.

It is not only the large numbers that are troubling. Because the German definition of manifestly unfounded claims includes those fleeing civil war or situations of general violence,¹²² many claims are rejected as manifestly unfounded even though the authorities concede that the asylum-seekers might face serious generalized violence if they return to their homes. In practice, this means that asylum-seekers from regions suffering horrifying violence, war, and persecution, such as Algeria in 1995 or Sierra Leone in 2000, can be summarily rejected for presenting claims deemed manifestly unfounded. If they traveled through countries that have readmission agreements with Germany, they may soon find themselves sent to countries whose human rights and asylum policies are uncertain or worse. Under the German approach to manifestly unfounded claims, many individuals will be returned to situations of danger in violation of international law.

B. *Accelerated Airport Procedure*

In addition to disfavoring manifestly unfounded claims, the 1993 constitutional amendment mandates an accelerated asylum procedure for those viewed as fleeing a safe homeland.¹²³ This aspect of the new legal restrictions tends to come into play at the international airports in Germany where arriving asylum-seekers may face an asylum procedure even more accelerated than the quick pace prescribed for manifestly unfounded claims.¹²⁴ Asylum-seekers who arrive at Germany's airports and who traveled through safe third countries, originated from safe countries of origin, or lack valid travel documents are

118. Asylverfahrensgesetz § 36(4).

119. *Id.* § 36(3).

120. *Id.* §§ 38, 75.

121. Federal Refugee Office Statistics, *supra* note 4.

122. Asylverfahrensgesetz § 30(2).

123. GRUNDGESETZ [GG] [Constitution] art. 16a(3), (4) (F.R.G.).

124. Asylverfahrensgesetz § 18a. Frankfurt/Main airport receives by far the largest number of asylum-seekers, but other international airports such as those at Berlin-Schönefeld, Düsseldorf, Hamburg, and Munich also receive considerable numbers of asylum-seekers. Fax from Pro Asyl to Maryellen Fullerton (Aug. 19, 1998) (on file with the Texas International Law Journal).

subject to an expedited procedure at the airport.¹²⁵ The nature of the accelerated procedure varies depending on which of these factors triggers the procedure for the asylum-seeker.

The 1993 constitutional amendment authorizes Parliament to certify countries where persecution generally does not occur.¹²⁶ Parliament acted promptly to create a list of "safe countries of origin": Bulgaria, the Czech Republic, Gambia, Ghana, Hungary, Poland, Romania, Senegal, and the Slovak Republic.¹²⁷ Those who arrive at the airport from a designated safe country of origin are granted access to the accelerated proceeding, but they face a presumption that they are not fleeing persecution. There is only a negligible chance that asylum-seekers from the lands considered safe countries of origin will be able to rebut the presumption.¹²⁸

Those who arrive without a valid passport or other travel document also face the accelerated airport procedure. This group is largely composed of individuals apprehended at passport control by officials who suspect they are using passports that have been counterfeited or altered in some way. In some instances those possessing invalid passports obtained them in a desperate attempt to escape persecution; in others they acquired them to facilitate a trip motivated by reasons unrelated to persecution. All are subject to the expedited airport procedure.¹²⁹

As soon as a member of the Border Guard identifies asylum-seekers who come from a safe country of origin or lack a valid passport,¹³⁰ the Border Guard detains them at the airport and questions them. The Border Guard interviews often take place on the day of arrival when asylum-seekers may be seriously disoriented. Scenes are common of recently arrived asylum-seekers sound asleep in broad daylight in noisy rooms while other asylum-seekers who arrived within the past twenty-four hours mill around waiting for instructions from the Border Guard staff.¹³¹ The interviews by the Border Guard focus on the identities of the asylum-seekers and the routes by which they entered Germany, but often also include information relevant to the asylum claim.

Employees of the Federal Office for the Recognition of Foreign Refugees (Federal Refugee Office) stationed at the airport review the Border Guard files and then conduct a second interview focused on the request for asylum. Contradictions with statements made to the Border Guard upon arrival, when disoriented and perhaps frightened, may be used to

125. Those whom airport officials identify as having traveled through identifiable safe third countries are returned there immediately without any hearing. *See supra* text accompanying note 63.

126. GRUNDGESETZ [GG] [Constitution] art. 16a(3) (F.R.G.). The Upper House of Parliament has the power to ratify a list specifying countries where the legal instruments, the law as applied, and the general political conditions indicate that persecution and inhuman and degrading treatment do not occur.

127. Asylverfahrensgesetz § 29a, Anlage II.

128. German law permits the federal government to remove a country from the list of safe countries of origin. If the government concludes that the legal or political conditions have changed so that a country can no longer be presumed safe, the government may remove a country from the list without seeking the approval of Parliament. Asylverfahrensgesetz § 29a(3). If the government concludes the situation has improved, the government can then reinstate the country on the list, again without the consent of Parliament. For example, Senegal was on the safe country of origin list until March 1996, when the government temporarily removed it based on the occurrence there of inhuman and humiliating punishment. In November 1996, the German Ministry of the Interior and Ministry of Foreign Affairs reinstated Senegal on the list of safe countries. *See Senegal is Again a Safe Country*, MIGRATION NEWS SHEET, Dec. 1996, at 12 (citing FRANKFURTER RUNDSCHAU, Nov. 14, 1996).

129. Interview with Herr Ludwig Rippert, *supra* note 66.

130. Asylum-seekers who have a valid passport and/or equivalent travel document and have not come through a safe third country or a safe country of origin are allowed to enter Germany. They are transported to the nearby initial reception center for asylum-seekers. Thereafter they file their official requests for asylum and their cases work their way through the regular asylum process. *Id.*

131. Author's visits to Frankfurt/Main airport detention center and interviews with staff (June 6, 1994, June 19, 1996).

discredit the applicants.¹³² The Federal Refugee Office staff then must reach a decision on the merits of the asylum claim within two days of the application for asylum.¹³³ Under these circumstances it seems unwise to rely on interviews of tired and disoriented individuals to make what may be life and death decisions.

The few asylum-seekers whose applications receive a favorable decision may leave the airport promptly. Those who are neither granted refugee status at the airport nor viewed as having manifestly unfounded claims are taken to an initial reception center where they are eligible to seek asylum pursuant to the standard asylum process.¹³⁴

Those whose applications are denied as manifestly unfounded must remain in the locked facility at the airport.¹³⁵ They have three days in which to file a petition with the court to overturn the agency decision.¹³⁶ Within four more days they must provide the court with their reasons for seeking a reversal of the decision. The court must review the petition and accompanying file and issue a decision within two weeks, during which time the asylum-seeker must remain in airport detention.¹³⁷

This is the precise situation the Algerian asylum-seeker faced. Arriving at the Frankfurt airport in October 1995, he immediately applied for asylum based on the torture he had suffered from the government military forces that had viewed him as a political opponent. The Federal Refugee Office interviewed him in the accelerated airport procedure and rejected his claim, as did the Frankfurt Administrative Court. Only after the administrative decision and the first level of judicial review were over, which together took less than two weeks, was the asylum-seeker able to obtain medical evidence that he had been tortured. Subsequent applications to the Frankfurt Administrative Court were nonetheless denied. Finally, a refugee organization agreed to represent him and filed a claim with the Federal Constitutional Court, which overruled the lower court and ordered a reexamination of the case.¹³⁸ After more than one year in the airport holding area, he was allowed to leave the airport for a refugee center.¹³⁹

The accelerated procedure at the airport has, to date, precluded effective counseling or legal assistance in almost all cases. There is not enough time to locate attorneys competent in asylum law,¹⁴⁰ nor enough time for attorneys to interview asylum-seekers and prepare substantial asylum applications or court petitions.¹⁴¹ Moreover, the problems that generally hinder asylum-seekers from preparing a compelling presentation of their cases on short notice—such as the difficulty of recounting a fully fleshed out description of the

132. The Federal Constitutional Court has stated that the main source of information for deciding asylum requests must be the Federal Refugee Office interview, rather than the Border Guard interview. BVerfGE 94, 49.

133. If the decision cannot be reached within two days the asylum-seeker shall be released from the airport proceedings and transferred to the regular procedure. Asylverfahrensgesetz § 18a(6)(2).

134. *Id.* § 18a(1).

135. According to the Federal Border Guard, the accelerated procedure typically results in ten percent denials as manifestly unfounded, some of which are overturned by the court. According to those figures, therefore, close to ninety percent enter Germany without staying in the airport for more than three or four days. See Interview with Herr Ludwig Rippert, *supra* note 66.

136. Asylverfahrensgesetz § 18a(4). This deadline is even shorter than the one week deadline for filing appeals of claims rejected as manifestly unfounded in proceedings outside the airport context. In contrast to the procedure regulating manifestly unfounded claims decided outside the airport, however, the appeals petition in the accelerated airport procedure has suspensive effect.

137. *Id.* § 18a(6)(3).

138. *Administrative Court Ordered to Verify Claims of Torture by an Algerian Asylum-Seeker, supra* note 107 (citing the Federal Constitutional Court (BVerfGE) decision of August 6, 1997).

139. *Id.* (citing FRANKFURTER RUNDSCHAU, Aug. 7, 1997).

140. See Interview with Frau Richter-Koç, Social Services, in Frankfurt am Main Airport (June 19, 1996).

141. Interview with Hubert Heinhold, refugee advocate and attorney, in Munich (June 17, 1996).

circumstances that impelled the flight and the near impossibility of obtaining corroborating medical evidence—are intensified by the accelerated pace of the special airport procedure.

Even if the attorney could intervene in a timely manner, generally there are no funds to pay the attorney. Recently, the Federal Ministry of the Interior agreed that the German Federation of Lawyers could provide legal counseling for asylum-seekers at five international airports.¹⁴² The state-subsidized legal counseling is limited to those asylum-seekers in the accelerated airport procedure whose applications have been rejected as manifestly unfounded. This legal counseling is not available before and during the first hearing with the Federal Refugee Office staff members at the airport.¹⁴³

While this is a step in the right direction, it is still inadequate. Without effective legal counseling for those in the accelerated airport procedure, thousands of asylum applicants there each year are doomed. Even with much greater support for legal counseling, the extremely short deadlines will continue to impose an enormous burden on those preparing asylum applications.

The Algerian asylum-seeker's detention for over a year in locked facilities at the airport with minimal opportunities for exercise was itself a grim ordeal.¹⁴⁴ Much grimmer is the fate of all those others who have a well-founded fear of persecution back home, but who lack the resources to obtain a lawyer and to gather corroborating evidence in two days or two weeks. The vast majority of asylum-seekers in the accelerated airport procedure and in the truncated procedure applied to manifestly unfounded claims at the reception centers are unable to attract organizational backing for their asylum requests.¹⁴⁵ They obtain limited or no legal assistance and the expedited process makes it almost impossible to gather medical reports or other evidence crucial to their asylum claims. The opportunities for errors are great in the accelerated procedures, and the consequences are severe.

Without confidence in the ability of the system to determine accurately those who fear threats to their life and freedom, it is impossible to conclude that Germany is adhering to its obligations under international law. If the German authorities do not take steps to make this procedure one in which asylum-seekers have the time to tell their story in a comprehensible manner and to develop corroborating evidence, the threat of incorrect decisions increases. Erroneous decisions will result in asylum-seekers being returned to danger in violation of the 1951 Refugee Convention and the European Human Rights Convention. The pace and the circumstances of the expedited processing threaten Germany's ability to comply with its international law obligations.

This is not a small concern. Substantial numbers of asylum-seekers' claims are heard in the accelerated airport procedure. In 1994, close to 2600 asylum-seekers passed through this procedure, and the numbers increased in 1995 to almost 4600.¹⁴⁶ In 1996 there were 4300 asylum-seekers in the accelerated airport procedure,¹⁴⁷ including 290 unaccompanied

142. *Still No Independent Legal Advisors at Airports Despite Release of E.U. Funds*, MIGRATION NEWS SHEET, June 1998, at 10 (citing FRANKFURTER RUNDSCHAU, May 23, 1998).

143. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the German Government on the Visit to Frankfurt am Main Airport Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 to 27 May 1998 (May 27, 1999), available at <http://www.cpt.coe.int/en/reports/inf9910en1.htm> (last visited Mar. 24, 2001).

144. *Administrative Court Ordered to Verify Claims of Torture by an Algerian Asylum-Seeker*, *supra* note 107, at 9.

145. *See id.*

146. Federal Refugee Office Statistics, *supra* note 4.

147. *Id.*

minors.¹⁴⁸ In 1997 approximately 2300 asylum-seekers faced the accelerated airport procedure, followed by 1700 in 1998, 1300 in 1999, and almost 1100 in 2000.¹⁴⁹

VIII. THE REGULAR ASYLUM PROCEDURE

The constitutional changes mandating the accelerated proceedings, the presumptions against safe countries of origin, and the safe third country rule all build upon and affect the basic asylum procedure that has developed in Germany over the past few decades. Certain non-constitutional aspects of the basic asylum procedure raise further questions about the accuracy and the reliability of the decisionmaking. It is important, therefore, to examine the basic asylum system. Doing so in light of the application of a woman from the Democratic Republic of the Congo (formerly Zaïre) whose asylum claim involved accusations of rape by government soldiers will highlight some of the troublesome issues.¹⁵⁰

A. *The Federal Refugee Office Hearing*

Most asylum-seekers who actually enter Germany do so by crossing the border clandestinely, thus escaping immediate deportation on safe third country grounds. When they request asylum, they enter the standard asylum procedure. The system first distributes asylum-seekers among the states in Germany according to a statutory formula,¹⁵¹ and transports them to one of the initial reception centers located in each state. Asylum-seekers have no say in their assigned location. Asylum-seekers with relatives residing in Germany are directed to reception centers based on a centralized database concerning available beds, irrespective of the location of their relatives. Similarly, asylum-seekers who may have resided in Germany in the past are assigned to states without consideration of their place of former residence.¹⁵²

1. Insufficient Preparation Time

Once the asylum-seekers arrive at their initial reception center, they promptly have an asylum hearing before the Federal Refugee Office, the agency that decides which asylum-seekers are entitled to protection under German law. The Federal Refugee Office has branch outposts at each of the initial reception centers. The branches typically schedule asylum hearings within four days of the asylum-seekers' arrival.¹⁵³

Scheduling the major assessment of the asylum claim in such a short time makes it practically impossible for asylum-seekers to seek counsel or to prepare themselves mentally

148. See *Inventory on Readmission Agreements*, *supra* note 92, at 9 (citing to government answers provided on Aug. 22, 1997 in response to written parliamentary questions).

149. Federal Refugee Office Statistics, *supra* note 4.

150. I have combined here for purposes of illustration the personal details that two separate women who had filed asylum claims confided in me.

151. Asylverfahrensgesetz § 45, v. 27.07.93 (BGBI.I S.1361) [Law on Asylum Procedure]. The percentages for each state, decided according to population, geographical size, resources, and so on, vary significantly: Baden-Württemberg 12.2%, Bavaria 14%, Berlin 2.2%, Brandenburg 3.5%, Bremen 1%, Hamburg 2.6%, Hesse 7.4%, Meckleberg-Western Pomerania 2.7%, Lower Saxony 9.3%, North-Rhine/Westphalia 22.4%, Rhineland-Palatinate 4.7%, Saarland 1.4%, Saxony 6.5%, Saxony-Anhalt 4%, Schleswig-Holstein 2.8%, Thuringia 3.3%. *Id.*

152. See *id.*

153. Interview with Supervisor Frau Krug Ritter, *supra* note 117.

and physically for their hearings. Preparation is crucial because the hearing is the only opportunity for asylum-seekers to describe the basis of their claim. Asylum-seekers can, in theory, present additional testimony at a subsequent judicial hearing, but contradictions or inconsistencies will reflect badly on the asylum-seeker's credibility, a factor that is crucial in asylum cases.¹⁵⁴

The quick pace of the asylum procedure makes it difficult to obtain on such short notice medical testimony concerning evidence of past persecution or torture. The Congolese asylum-seeker mentioned earlier might have relevant hospital records in Lubumbashi, Democratic Republic of the Congo. It is unlikely, though, that she could obtain either hospital or police reports within a few days.¹⁵⁵ In addition to the difficulties of obtaining corroboration, the swift pace has a particularly negative impact on victims of rape or torture; many find it impossible to discuss their harrowing experiences so soon, before psychological rehabilitation has taken place.¹⁵⁶

Although asylum claims should be decided expeditiously, the German system proceeds so quickly that evidentiary support for the asylum claim may not be developed. This throws into question the adequacy of the decisions reached concerning asylum. The more inadequate the fact-finding, the more likely that some refugees will not be recognized and granted protection in Germany. Their deportation will violate international law.

2. Inadequate Interpreters

Scheduling hearings on such short notice also has a negative impact on obtaining competent legal counseling and qualified interpreters. The law provides that interpreters shall be provided by the government when needed; asylum-seekers may select interpreters of their own choice so long as they bear the expense.¹⁵⁷ The law also provides that the asylum-seeker's legal representative may appear, as well as a representative from the UNHCR, and others permitted by the Federal Refugee Office.¹⁵⁸ In practice, only three people are present at most asylum hearings: the hearing officer, the interpreter, and the asylum-seeker.¹⁵⁹ Most of the questions and responses are relayed through the interpreter, who often becomes a key participant in the hearing. As a consequence, the interpreter's skill is crucial.

Questions have been raised about the qualifications and competence of the interpreters. Many asylum-seekers bring their own interpreter to the hearing; these interpreters most frequently are other asylum-seekers who happen to live in the reception center. Our Congolese asylum-seeker might or might not speak French in addition to her native Lingala (one of the more than 400 Sudanese and Bantu languages spoken in the Democratic Republic of the Congo). If she does, it is likely that she might appear for her

154. While a reasonable explanation for inconsistencies might be that the asylum-seeker did not have the opportunity to obtain legal assistance before the initial hearing and did have the opportunity to do so before the court hearing, many judges have been skeptical of this explanation.

155. Indeed, the difficulties the Algerian torture victim faced in obtaining timely corroborating evidence in the accelerated airport procedure would also have occurred in the standard asylum process. See *supra* text accompanying note 129.

156. For a discussion of the lengthy process necessary for many female torture victims to come to terms with their traumatic experiences and the need to allow them to provide details later in the asylum process, see PSYCHOSOZIALES ZENTRUM, TRAUMA BILDER [PSYCHOSOCIAL CENTER, IMAGES OF TRAUMA] 10-15, 20-25, 30-31 (1997).

157. Asylverfahrensgesetz § 17, v. 27.07.93 (BGB1.I.S.1361) [Law on Asylum Procedure].

158. See *id.* § 25(6).

159. See Interview with Supervisor Frau Krug Ritter, *supra* note 117; author's observations, Nürnberg/Zirndorf, June 18, 1996.

hearing with a French speaker as her interpreter, because Lingala is not commonly spoken among asylum-seekers in Germany. The degree to which her French dialect might diverge from that of an asylum-seeker from a different country could be substantial.

The Federal Refugee Office obtains interpreters if the asylum-seeker does not provide one. Arranging for competent interpreters in many different languages is a difficult task and is exacerbated by the speedy schedule. The asylum-seekers' ability to assess the competence of their interpreters, whether selected by the asylum-seekers themselves or by the Federal Refugee Office, is questionable. Lack of competent interpreters substantially undermines the ability of the asylum-seekers to set forth a compelling account of the circumstances that impelled them to flee to Germany.

The speed with which the hearings are scheduled is exceeded only by the speed with which the decisions are made. In the agency branch office in Nürnberg, decisions on an asylum-seeker's application are often reached on the same day as the hearing.¹⁶⁰ Written decisions are generally delivered soon thereafter. The decisions are in German; neither translations nor interpreters are provided to explain the contents of the decisions. While asylum-seekers quickly understand the results, they often fail to understand the reasoning behind the decisions. Their lack of comprehension of the rationales for negative decisions poses serious impediments to preparing successful appeals. Under international law, asylum-seekers should receive decisions in writing and in a language they understand. The failure to provide written decisions that asylum-seekers can read and understand violates the applicable legal standard.¹⁶¹

3. Insensitivity to Female Asylum-seekers

Language barriers are not the only substantial obstacle to asylum-seekers being able to convey accurately and fully their claims. The hearings often pose special difficulties for female asylum-seekers when the hearing officer is a man. Cultural traditions that circumscribe meetings and conversations that women may have with men who are not members of the women's families can be a serious impediment.¹⁶² These problems are, of course, compounded when the fear of persecution involves rape or sexual abuse. It is notoriously difficult for women from many cultures to discuss with men incidents of sexual assault, a common persecution tactic, as the wars in the Balkans and elsewhere have demonstrated.¹⁶³

160. The formal processing, printing, and delivery of the decisions to the asylum-seekers typically occurs within two weeks of the hearing. Interview with Frau Krug Ritter, *supra* note 117.

161. For example, the European Human Rights Convention requires that those charged with an offense (such as entering Germany without the legal right to do so) be informed promptly of the charge against them in a language that they understand. European Human Rights Convention, *supra* note 45, art. 5. Decisions that may result in expulsion of asylum-seekers to lands where they face the risk of persecution implicate rights as serious as those raised by accusations of a criminal offense. Moreover, the European Human Rights Convention also requires that state parties provide an effective remedy before a national authority to those whose rights are violated, and that the rights and freedoms set forth in the Convention be secured without discrimination based on language. *Id.* art. 13. Delivering decisions in languages they cannot understand deprives asylum-seekers of the ability to seek an effective remedy and may, in itself, constitute discrimination based on language.

162. See Interview with Helmut Frenz, Refugee Advocate, in Hamburg (June 21, 1996).

163. The United Nations International Criminal Tribunal for the Former Yugoslavia recently concluded criminal proceedings involving sexual violence, sexual enslavement, rape, and torture of women in Bosnia, which led to the conviction of three military and paramilitary commanders accused of using sexual assaults as a tactic in the warfare in Bosnia. Marlise Simons, *Three Serbs Convicted in Wartime Rapes*, N.Y. TIMES, Feb. 23, 2001, at A1.

There is no uniform practice concerning Federal Refugee Office hearings of female asylum-seekers. At least one branch office has indicated that it tries to provide a female decision maker when a female asylum-seeker requests one. This office does not routinely inquire whether a woman applicant would prefer to describe her case to a female decision-maker; only those women assertive enough to make a special request will benefit from the office's sensitivity to women asylum-seekers. Many women may be very uncomfortable in a hearing conducted by a man, but too overwhelmed and intimidated by the process to ask for a female interviewer. Sporadic, well-meaning gestures, such as allowing husbands to accompany their wives to hearings, have sometimes inadvertently made the situation worse.¹⁶⁴

The UNHCR has had long experience with female refugees and asylum-seekers and has observed some of the special difficulties that they face. Reflecting this experience, UNHCR has written guidelines for decision makers assigned to interview refugee women and asylum-seekers who request protection.

Women face special problems in making their case to the authorities, particularly when they have had experiences which are difficult and painful to describe. Persecution of women often takes the form of sexual assault

The female victim of such sexual torture obviously may be reluctant or find it very difficult to speak about it, particularly to a male interviewer. Rape, even in the context of torture, is seen in some cultures as a failure on the part of the woman to preserve her virginity or marital dignity. She may be shunned by her family and isolated from other members of the community. Discussing her experience becomes a further source of alienation.¹⁶⁵

Sometimes, women who arrive as part of a family unit are not interviewed or are cursorily interviewed about their experiences, even when it is possible that they, rather than their husband, have been the targets of persecution. Their male relatives may not raise the relevant issues because they are unaware of the details or are ashamed to report them.¹⁶⁶

Many of the concerns raised by the UNHCR guidelines concerning refugee women appear to be exacerbated by the German asylum procedure. The dizzying pace of the Federal Refugee Office hearings and decisions as well as the unevenness of the interpreters

164. This is one powerful example of the unintended consequences of attempts to assist women asylum-seekers when the hearing officers are men. Interview with Helmut Frenz, *supra* note 162.

165. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN para. 58-60, U.N. Doc. EC/SCP/67 (1991), available at <http://www.unhcr.ch/refword/refworld/legal/refpol/womguide.pdf> (last visited Mar. 29, 2001).

166. *Id.* para. 57. Additional portions of the Guidelines are also relevant to the German asylum procedure.

A second problem arises when women are interviewed about the claims to refugee status made by male relatives. A wife may be interviewed primarily to corroborate the stories told by her husband; if she is unaware of the details of her husband's experiences (for example, the number of her husband's military unit), the entire testimony may be discounted as lacking in credibility. Yet, in many cultures, husbands do not share many details about military or political activities with their wives.

A further legal problem affecting refugee women is the actual status they are granted by a country of asylum [A] number of countries grant family members a residency status that provides less protection against deportation than does refugee status. Should the family break up, the wife (who is more often the person to be joining the one granted refugee status) may find herself without any protection from forced return. Yet, her own claim to refugee status may be as strong as her husband's [but due to] lapse in time since the events . . . [she may] be unable to make the case convincingly for being granted her own refugee status.

pressed into service likely compound the cultural dislocation experienced by many women who have suffered persecution in other parts of the world when they try to obtain asylum in Germany. The lack of support necessary to transcend logistical, language, and other cultural barriers is a problem for refugee women in particular. These types of problems undermine the reliability of the decisions reached by the government refugee officials.

B. *Judicial Review*

The German asylum procedure provides for judicial review of both positive and negative decisions. Negative decisions on asylum are accompanied by orders to leave Germany within one month.¹⁶⁷ They are also accompanied by notices that the rejected asylum-seekers have two weeks in which to seek judicial review.¹⁶⁸ All those denied asylum—roughly ninety-five percent—have the right to challenge the decision in court.¹⁶⁹

The Administrative Court reviews both the law and the facts. Appeals from the Administrative Court to the Administrative Court of Appeals are permitted only if the challenge raises fundamental questions of law, the appeal specifies serious procedural errors, or the first judicial decision is in conflict with the jurisprudence of the Administrative Court of Appeals.¹⁷⁰

Ironically, the ability to seek correction of errors by the Federal Refugee Office furnishes the government with another tool to restrict the grant of asylum. The asylum law permits a government official, the Federal Commissioner for Asylum Affairs, to appeal Federal Refugee Office decisions granting asylum.¹⁷¹ The Commissioner does so frequently and is quite successful. For example, the Federal Refugee Office granted asylum or lesser forms of protection to approximately 21,000 asylum-seekers in 1997. The Federal Commissioner for Asylum Affairs challenged close to 4000 of those decisions in court and prevailed in roughly seventy percent of the challenges.¹⁷² Recent proposals to amend the regulation to permit the Federal Commissioner to challenge negative decisions by the

167. See *Asylverfahrensgesetz* § 38(1), v. 27.07.93 (BGB1. I S.1361) [Law on Asylum Procedure].

168. See *id.* § 74(1) (filing a notice of appeal with the Administrative Court automatically stays deportation), §74(2) (applicants have one month from the service of the decision to submit the grounds for the appeal). See also Interview with Frau Krug Ritter, *supra* note 117 (courts may allow details added later).

169. See *supra* notes 34–37 and accompanying text. The Federal Refugee Office recognized less than 3% of the applications as refugees in 2000, down from 3% in 1999, 3.9% in 1998, and 4.9% in 1997, and markedly lower than the 7.4% in 1996. See Federal Refugee Office Statistics, *supra* note 4. Some of the 95% denied refugee status are granted lesser forms of protection as indicated in the text accompanying notes 184–197.

170. The same limitations apply to appeals from the Administrative Court of Appeals to the Federal Administrative Court. After exhausting all available remedies, cases that raise a constitutional claim may be appealed from the Federal Administrative Court to the Federal Constitutional Court. *Asylverfahrensgesetz* § 78(3).

171. *Id.* § 6.

172. See Letter from the Office of the Federal Commissioner of Asylum Affairs to Frau Dähning (Aug. 19, 1998) (stating that in 1997 the Federal Refugee Office recognized 8,443 applicants as refugees and granted 12,547 applicants protection pursuant to §§ 51 or 53 of the Aliens Law. The Federal Commissioner filed judicial challenges in 3,772 of these cases. Official statistics on the success rate of the Federal Commissioner's court petitions were not available, but spot checks by the Federal Commissioner's Office indicated that petitions were approved and protection accordingly refused to asylum-seekers in approximately seventy percent of the cases. The statistics for the first six months of 1998 included 3248 recognized as refugees, 4509 granted protection pursuant to §§ 51 and 53 of the Aliens Law, and 1583 challenges filed by the Federal Commissioner of Asylum Affairs).

Federal Refugee Office have been opposed by the Federal Refugee Office. They have not been enacted.¹⁷³

There is no doubt that Germany has devoted significant resources to creating and staffing an elaborate asylum procedure that includes a possibility of judicial review. Nonetheless, three features of the system—the speed with which the initial decisions are made, the lack of reliable interpreters, and the lack of state-subsidized legal counsel—combine to cast serious doubt on the accuracy of the decisions and on the likelihood that the courts will provide significant oversight of most of the agency's decisions. Moreover, the language barriers are often only one aspect of more profound cultural differences, such as the inhibitions on conversations between unrelated men and women, which raise further questions about the ability of the Federal Refugee Office's asylum procedures to recognize adequately which applicants are fleeing persecution. In addition, the failure to provide the agency decisions in languages the asylum-seekers understand seriously undercuts their ability to seek effective corrective measures via judicial review.

Germany faces many cases in which individuals who do not satisfy the legal requirements apply for asylum. The skepticism this produces seems to create a negative presumption in practice, though not in theory. When added to the flaws described earlier, this leads to overwhelming numbers of negative decisions. Many refusals to provide protection may be warranted. The risks to those asylum-seekers who receive an unwarranted rejection of their asylum claim is so great, however, that it raises concern. Germany's international law obligation to refrain from returning a refugee to persecution is compromised by the combined weaknesses in the system.

IX. CRITERIA FOR ASYLUM

A. *Constitutional Guarantee of Asylum*

In addition to restricting access to Germany and access to the basic asylum procedure, Germany applies very restrictive substantive law to the relatively few asylum-seekers who manage to enter the procedure. These restrictive interpretations run counter to the purpose behind international refugee law and disqualify many asylum-seekers who fear stark persecution.

1. State-sponsored Persecution

The German courts have generally required that all asylum-seekers demonstrate that they fear persecution by the state.¹⁷⁴ On its face, this requirement seems reasonable, even unexceptional. In practice, it means that persecution by powerful insurrectionary groups has been disregarded if state authority still exists. If the Algerian asylum-seeker had been tortured in Algeria not by the military, but by the Armed Islamic Group because he is a Christian, it is unlikely he would have been granted asylum in Germany so long as the government controlled a portion of Algeria. Even if the government had effectively ceded

173. See *Criticisms Against the Role of the Federal Commissioner for Asylum Matters Who Appeals Only Against Positive Decisions*, MIGRATION NEWS SHEET, Mar. 2000, at 11. The Deputy Director of the Federal Refugee Office has opposed this proposal on the grounds that rejected asylum-seekers may appeal on their own behalf. *Id.* Calls for the Federal Commissioner to seek judicial review of the decisions denying asylum as well as decisions granting asylum continue to be hotly debated. *Is the Claim of Germany's Liberal Asylum Law Merely a Myth?*, MIGRATION NEWS SHEET, Dec. 2000, at 14.

174. See, e.g., BVerwGE 104, 254.

control of the region where the asylum-seeker lived to the Armed Islamic Group, the asylum-seeker would have been ineligible for asylum.

This is a narrow approach in the face of the 1951 Refugee Convention, which defines refugees as those who have a well-founded fear of persecution based on race, religion, nationality, political opinion, or social group.¹⁷⁵ It conflicted simultaneously with the European Human Rights Convention's prohibition against sending individuals to countries where they will face torture or inhuman or degrading treatment.¹⁷⁶ It ignored the reality that internal armed conflict within a state has been a major source of persecution and human rights violations in the last decades of the twentieth century. As current news reports from Sierra Leone have continued to depict ferocious and mutilating persecution inflicted by rebel forces who control substantial portions of the country¹⁷⁷, it has been worse than ironic that persecution by non-state actors has been excluded from the types of persecution that entitle victims to asylum in Germany.

Recently, the German Constitutional Court indicated that this interpretation has been too narrow.¹⁷⁸ The Constitutional Court instructed lower courts to give more weight to the acts that constitute the persecution and to focus less on the nature of the agent of persecution. It concluded that in some circumstances, a non-state actor could engage in political persecution if it effectively controlled a significant portion of territory. Although the Constitutional Court did not rule that the Afghani asylum-seekers before it have established political persecution, instead remanding the case to the lower courts to define those circumstances that give rise to political persecution, this ruling may affect many Afghani, Somali, and Sri Lankan asylum-seekers whose asylum claims have been previously rejected.¹⁷⁹

Regrettably, the Constitutional Court affirmed the earlier judicial ruling that those fleeing persecution by one of several rival groups, none of which controls the country, are not entitled to asylum under German law.¹⁸⁰ In essence, Germany denies asylum to those who flee persecution if there is too much of it! No matter how credible the reports of persecution, if there are multiple sources of persecution and the situation is too anarchic, German courts will conclude that state authority has disintegrated and that, as a consequence, the asylum-seekers are ineligible for asylum.¹⁸¹

This interpretation is unnecessarily restrictive. It has been criticized by the UNHCR and other refugee advocates as an incorrect interpretation of the 1951 Refugee Convention.¹⁸² It defies reason to deny asylum to those who face persecution because they oppose the political stance of one or more warring groups that has not yet consolidated control over substantial portions of the territory. It violates international law to turn these asylum-seekers back to face threats to their life and liberty.

175. See *supra* note 38 and accompanying text.

176. See *supra* note 45 and accompanying text.

177. See generally Barbara Crossette, *Zambian Criticizes Leadership of Sierra Leone Peacekeepers*, N.Y. TIMES, May 7, 2000, at A16.; Norimitsu Onishi, *Fighting Resumes Near the Capital of Sierra Leone*, N.Y. TIMES, May 8, 2000, at A1; Norimitsu Onishi, *Guinea in Crisis as Arca's Refugees Pour In*, N.Y. TIMES, Feb. 24, 2001, at A1.

178. *People Fleeing Persecution in Civil War Situations are Also Entitled to the Constitutional Right of Asylum*, MIGRATION NEWS SHEET, Sept. 2000, at 11 (citing the Federal Constitutional Court, 2 BVerfGE 260, 2 BVerfGE 1353).

179. *Id.*

180. BVerwGE 105, 322.

181. *People Fleeing Persecution in Civil War Situations are Also Entitled to the Constitutional Right of Asylum*, *supra* note 178.

182. See, e.g., Van Hear & Crisp, *supra* note 3, at 6.

2. Internal Flight Alternative

German asylum law includes another unwarranted restrictive notion, the “internal flight alternative,” which disqualifies asylum-seekers from protection in Germany if there is a safe area in their homeland to which they might have fled. On the surface, again, it may appear eminently reasonable to suggest that asylum-seekers first attempt to find a safe haven in their homeland before they flee to another country. The reality, though, is that many times it is more difficult to reach a safe area in the same country than it is to leave the country altogether. In other situations asylum-seekers might be able to reach safe regions in their homeland but are unable to speak the predominant language. In some circumstances, asylum-seekers can speak the language but find it impossible to obtain work in the safe area; without family or other support networks, life becomes impossible. In these and other situations, the practical need to survive contradicts the theoretical availability of internal flight alternatives. These legalistic approaches to the refugee definition thwart the very purpose of the 1951 Refugee Convention.¹⁸³

B. Statutory Protection Against Persecution

1. “Lesser” Asylum

Implicitly acknowledging the unacceptability of denying asylum to those who face persecution but do not meet the narrow standards enunciated by the courts, German law provides several avenues of lesser protection. Section 51 of the Aliens Law forbids deportation to states where asylum-seekers’ lives or freedom would be threatened on account of their race, religion, nationality, political opinion, or membership in a particular social group.¹⁸⁴ Colloquially known as “lesser asylum,” this legal provision prevents *refoulement* but does not provide the asylum-seeker with refugee status.

In practice, it provides a degree of protection, less than that accorded to those granted asylum, to two groups of asylum-seekers. It protects those who prove they fear persecution from groups acting without state authority. For example, the Algerian fearing persecution from the Armed Islamic Group on account of his political opinion would be eligible for “lesser asylum.” Similarly, before the Taliban consolidated its control over vast portions of Afghanistan, an Afghani who feared persecution in a land where no state authority existed would have been eligible for “lesser asylum.”

“Lesser asylum” also protects asylum-seekers who satisfy German authorities that they have a well-founded fear of persecution, but no longer have evidence of their particular travel route. German authorities presume these asylum-seekers came by land, passed through a safe third country, and consequently are ineligible for asylum.¹⁸⁵ German officials cannot send asylum-seekers back to unidentified safe third countries, however, so they stay in Germany, but without refugee status.

The former Soviet military officer with a well-founded fear of persecution in Armenia would at most be eligible for “lesser asylum” if she had no travel documents or other

183. Relying on this restrictive definition of persecution, the Federal Refugee Office granted asylum under the German Constitution and the 1951 Refugee Convention in less than 3% of the asylum cases decided in 2000. Federal Refugee Office Statistics, *supra* note 4.

184. Ausländergesetz § 51, v. 9.7.1990 (BGB1. I S.1354, 1356), zuletzt geändert durch Art. 3 Gesetz, v. 15.07.93 (BGB1. II S.1010) [Aliens Law of July 9, 1990 as amended].

185. Essentially, the only asylum-seekers exempt from this presumption are those with proof they entered by air or sea without crossing a safe third country. *See supra* note 64 and accompanying text.

evidence of her route to Germany. The Congolese asylum-seeker and rape victim who entered Germany without travel documents would be in the same situation. Despite undisputed claims of persecution by government authorities, they would not be eligible for asylum in Germany and would not be guaranteed the protections afforded refugees under the 1951 Refugee Convention. They would instead be granted renewable two-year residence permits and work permits.

The Federal Refugee Office granted "lesser asylum" in 5.73% of the cases it decided in 1997.¹⁸⁶ In 1998, only 3.69% of the applicants received "lesser asylum," but the number of cases awarding "lesser asylum" increased to 4.54% in 1999 and to 7.88% in 2000.¹⁸⁷ "Lesser asylum" offers asylum-seekers a measure of protection from persecution. It is a mechanism by which Germany can comply with its *non-refoulement* obligation. At the same time, it is a mechanism by which Germany avoids affording refugees all the rights that the 1951 Refugee Convention mandates for recognized refugees. Since all those granted "lesser asylum" must demonstrate the well-founded fear of persecution required by the Convention, they should be accorded the benefits of its terms. Only the restrictive German interpretations of state persecution and the safe third country rule prevent those in "lesser asylum" status from the full protection of international law.

2. Prohibition Against Deportation

Those denied asylum and denied "lesser asylum" may apply for a less desirable status under Section 53 of the Aliens Law.¹⁸⁸ If deportation would subject them to torture,¹⁸⁹ lead to serious threats to physical safety, life, or liberty,¹⁹⁰ or otherwise violate the European Convention on Human Rights,¹⁹¹ they may qualify for yet another form of protection against *refoulement*. They may fall into the category known as "prohibition of deportation." Those who satisfy the criteria for this protection, nevertheless, receive official deportation orders. Although deportation to their homeland is prohibited, Germany can theoretically deport them to any other country. As a practical matter, no other country will admit them, so the deportation order will not be enforced.

If the Congolese asylum-seeker mentioned earlier were denied "lesser asylum" because she presented insufficient proof that she would be singled out for persecution in the future, she might still seek an order prohibiting her deportation to the Democratic Republic of the Congo. If the German authorities concluded that the violence in her homeland is so widespread that she would face serious threats to her physical safety there, they might order this lesser degree of protection.

The German authorities typically grant asylum-seekers whose deportation is prohibited "tolerated" residence permits, known as *Duldung*. These permits allow them to stay in Germany for up to six months. At the end of the term, government officials may extend the permits for another short period if the conditions in the homeland have not changed. The Federal Refugee Office granted protection under this provision in 1.6% of the decisions in

186. Federal Refugee Office Statistics, *supra* note 4.

187. *Id.*

188. Titled *Abscheidungshindernisse* [Obstacles to Deportation], § 53 of the Aliens Law is often referred to as "C Status". This is in contrast to § 51, which is known as "B Status" and Article 16a of the Constitution, which provides the greatest protection or "A Status." *Ausländergesetz* §§ 53, 51.

189. *Id.* § 53(1).

190. *Id.* § 53(6).

191. *Id.* § 53(4).

1997 and 1.7% of the decisions in 1998. The numbers dropped further in 1999 and 2000 to 1.55% and 1.51%, respectively.¹⁹²

3. Rejected Asylum-seekers Who Cannot Be Deported

Many asylum-seekers denied asylum, "lesser asylum," and protection from deportation under Section 53 of the Aliens Law nonetheless remain in Germany because there is no practical way to deport them. For example, over 100,000 Albanians from the province of Kosovo in Yugoslavia sought asylum in Germany in the early 1990s.¹⁹³ Most had applied for asylum and had been rejected. Until 1996 the Federal Republic of Yugoslavia refused to take them back, so they remained in Germany. In late 1996 Yugoslavia agreed to readmit Yugoslav citizens according to detailed procedures.¹⁹⁴ The repatriation moved very slowly and then stopped in the summer of 1998 due to the flight ban imposed by the EU on the Yugoslav national airline in response to violence in Kosovo.¹⁹⁵ The Kosovar Albanians remained in Germany.

This situation is not unique to Kosovar Albanians. Smaller numbers of asylum-seekers from other countries are in the same situation. The mayor of Hamburg, for example, has complained about the inability to return approximately 3,000 foreigners to various African nations.¹⁹⁶

These rejected asylum-seekers who cannot be repatriated remain in Germany. They generally receive "tolerated" residence permits, or *Duldung*, which need to be renewed every few months.¹⁹⁷

192. Federal Refugee Office Statistics, *supra* note 4.

193. News reports in the mid-1990s stated that there were 135,000 deportable Yugoslav citizens in Germany. Roughly 120,000 were rejected asylum-seekers, and most of these were Kosovar Albanians. *See Readmission Accord with Belgrade*, MIGRATION NEWS SHEET, Nov. 1996, at 9 (citing SÜDDEUTSCHE ZEITUNG, Oct. 15, 1996).

194. Germany and the Federal Republic of Yugoslavia signed a readmission agreement on October 10, 1996. The readmission agreement specifies that deportations to Yugoslavia must be carried out by the Yugoslav national airline. *See A Human Rights Crisis in Kosovo Province, The Protection of Kosovo's Displaced and Refugees*, at <http://www.amnesty.org/> (last visited Mar. 29, 2001).

195. As the crisis in Kosovo continued to worsen in the spring and summer of 1998, with no efforts by Milosevic to curb increasing atrocities against Kosovar Albanians, the EU imposed a ban on flights between the territory of all EU members states and the Federal Republic of Yugoslavia. Council Regulation 2151/1999, 1999 O.J. (L 264) 3. In light of the Sept. 24, 2000 election of a new president of Yugoslavia and additional actions toward increasing democratic government, this flight ban was repealed on Oct. 9, 2000 by EC Council Regulation No. 2227/2000. Council Regulation 2227/2000, 2000 O.J. (L 255) 2.

196. *See Hamburg Also Wants Quicker Expulsion of Foreigners*, MIGRATION NEWS SHEET, Sept. 1997, at 3-4 (citing SÜDDEUTSCHE ZEITUNG, Aug. 28, 1997).

197. The wars in the Balkans have created additional groups of temporarily protected persons in Germany. Section 54 of the Aliens Law provides that state authorities can delay the deportation of designated groups of foreigners for periods up to six months. This short-term protection is not limited to war-like situations, and can encompass humanitarian grounds. *See Ausländergesetz § 54*, v. 9.7.1990 (BGB1. I S.1354, 1356), zuletzt geändert durch Art. 3 Gesetz, v. 15.07.93 (BGB1. II S.1010) [Aliens Law of July 9, 1990 as amended].

Pursuant to the provision, Germany sheltered roughly 340,000 Bosnians, more than all the rest of western Europe combined. Viewing Bosnians as civil war refugees, the German Government granted them short-term permits, extended in six-month increments. Since the Dayton Accords were signed in late 1995, there has been great pressure on Bosnians to leave Germany and return to Bosnia. By the end of 1998, approximately 250,000 Bosnians had gone back to Bosnia. *See Westendorp Accused of Concentrating Efforts in Return of Bosnians to Areas Where They Would be in a Minority*, MIGRATION NEWS SHEET, Feb. 1999, at 10 (citing SÜDDEUTSCHE ZEITUNG, Jan. 30, 1999).

4. The *Duldung* Dilemma

The situation of those granted short-term *Duldung* residence permits—both those whose outstanding deportation orders cannot be enforced because they would face serious threats to their life if returned to their homeland, and those whose countries will not readmit them—is dismal. They are allowed to work,¹⁹⁸ but few employers will hire workers with short-term residence permission and uncertain prospects of extension.¹⁹⁹ Even if an employer is willing to take a chance, the asylum-seeker can obtain a job permit only if the job has already been offered to and rejected by German citizens and citizens from the European Union countries.²⁰⁰ In practice, these asylum-seekers can remain in Germany for renewable six-month intervals but cannot obtain legal employment.

Employment obstacles exacerbate a difficult situation. The law permits those granted protection to move from reception centers for asylum-seekers into private accommodations.²⁰¹ They can rarely do so, however, because they cannot find work that would allow them to pay the rent. Ironically, the system prevents them from supporting and housing themselves and their families. The irony is compounded by the fact that there are trained engineers and other skilled workers in this category, but they remain idle rather than use their skills to contribute to German society.²⁰²

The obstacles to becoming self-supporting undercut a central premise of the refugee system in Germany: the asylum-seekers granted protection are supposed to move from state-supported accommodations into private housing where they can support themselves and live without social assistance. The inability to obtain legal work turns this seemingly reasonable requirement into an almost insurmountable barrier.

There is no government support for efforts to integrate this group of asylum-seekers into the local community. There are no funds for language training and no funds for job training.²⁰³ They wait in limbo.

The short-term permission extended to those protected against deportation renders them very insecure. Many who qualify for this minimal form of protection face severe danger at home. In Germany they simultaneously face a major psychological burden, worrying about imminent deportation, and a difficult financial situation. Prevented from working and supporting themselves, keeping their skills up-to-date, and carrying out the routine tasks of living, these asylum-seekers and their families tend to remain in refugee shelters. Many become increasingly dysfunctional.²⁰⁴ Mostly, they sit and wait. The temporary nature of the protection contributes to widespread difficulties experienced by this group. Their stay in Germany is very tenuous and their situation bleak.

198. The de facto ban on employment for asylum-seekers who entered Germany after May 1997 will be removed, effective Jan. 2001. Those asylum-seekers whose asylum requests have been pending for one year or more will be permitted to work. See *Employment Ban to be Partially Lifted*, MIGRATION NEWS SHEET, Nov. 2000, at 11.

199. See interview with Rudolf Klever, Refugee Advocate and National Coordinator for Germany, European Legal Network on Asylum (ELENA), in Hamburg (June 22, 1996).

200. Karsten Lütke, *Asylum in Germany*, 57 ZDWF-SCHRIFTENREIHE 17 (1994).

201. Asylverfahrensgesetz § 53, v. 27.07.93 (BGB1.I.S.1361) [Law on Asylum Procedure].

202. See generally interviews with asylum-seekers in Leipzig and with refugee advocates, Refugee Assistance Group, in Leipzig (June 26, 1996).

203. *Id.*

204. Interviews with staff members at refugee housing, Wohncontainers, in Leipzig (June 26, 1996).

X. DETENTION

Detention of asylum-seekers has become an increasingly common practice in Germany. In general, asylum-seekers are not detained during the asylum procedure.²⁰⁵ Once asylum claims are rejected and appeals are exhausted, deportation orders are entered and asylum-seekers frequently face detention at that point. International legal standards that mandate separate accommodations for persons not convicted of a crime are often ignored.²⁰⁶ The requirement that there be “separate treatment appropriate to [the] status of unconvicted persons”²⁰⁷ is even less evident.

A. Detention Pending Deportation

The conditions of detention of asylum-seekers vary considerably from state to state. Separate detention facilities for foreigners pending deportation exist in only three of the states.²⁰⁸ In North Rhine-Westphalia, the government has built a large number of detention facilities which provide the capacity to detain more than 1200 foreigners.²⁰⁹ Not surprisingly, detention of unsuccessful asylum applicants is common. Similarly, Berlin has constructed a large new detention center that can house close to 400 awaiting deportation.²¹⁰ In contrast, Baden-Württemberg maintains a capacity for only 150 deportation detainees.²¹¹ Bavaria, a state generally conservative on social policy issues, has not developed a large number of detention centers and infrequently detains rejected asylum-seekers.²¹²

German law provides few legal protections to those detained pending deportation. Ironically, German criminal law sets minimum conditions for incarceration of those convicted of criminal offenses, but these legal provisions do not protect non-criminals in detention. As a consequence, asylum-seekers accused of no crime can be housed in worse conditions than convicted criminals.²¹³

The circumstances of detention vary widely, as do the physical conditions of the facilities. For example, in Berlin, those under deportation orders are housed in a special deportation detention center.²¹⁴ In many other states, such as Saxony, those detained pending deportation are held in separate wings of prisons for people convicted of serious criminal offenses.²¹⁵ Sometimes, as in Hamburg, the deportation detainees are housed with other prisoners;²¹⁶ more commonly, they are segregated from convicted criminals.²¹⁷

205. As asylum-seekers enter Germany, they are typically housed at initial reception centers for a short time while the original processing takes place. After a few weeks or in some cases a few months, asylum-seekers often are assigned to smaller housing units set aside for asylum applicants. See *supra* text accompanying notes 151–153, Lüthke, *supra* note 200, at 7–8. While they live in the initial reception center and in the subsequent accommodations, they are free to travel within the local area. *Id.* at 8.

206. ICCPR Article 10(2)(a), *supra* note 49 and accompanying text.

207. *Id.* art. 10(2)(a).

208. For details on detention pending deportation in each of the German states, see Hubert Heinhold, *Abschiebungshaft in Deutschland—eine Situationsbeschreibung [Deportation Detention in Germany: A Study]* (Mar. 1997), available at <http://www.proasyl.de/ab-haft0.htm> (last visited Mar. 2, 2001).

209. *Id.* at 2.10.

210. *Id.* at 2.3.

211. *Id.* at 2.1.

212. *Id.* at 2.2.

213. German civil law does not address conditions of incarceration as it does not anticipate that civil proceedings will result in detention.

214. Interview with Father Bernd Günter, in Berlin (June 25, 1996).

215. Interview with members of the Deportation Task Force of the Refugee Assistance Group, in Leipzig (June 26, 1996).

216. Interview with Helmut Frenz, *supra* note 162.

217. See UNHRC, *Detention of Asylum-Seekers in Europe*, 4 EUROPEAN SERIES 121, 130–131 (1995).

Most deportation detention occurs in old, overcrowded prisons. In nine of the states, rejected asylum-seekers and other foreigners held for deportation are locked into ordinary prison cells and receive the same treatment as convicted criminals. They are rarely allowed outside to exercise, are restricted to one hour per month for visitors, are limited in receiving amenities, and their mail is censored.²¹⁸ The poor conditions are compounded by the language barrier, which often restricts communication among deportation detainees as well as between them and the staff. Detention in these circumstances is extremely isolating and bleak.²¹⁹

German law permits detention only in limited circumstances, but legal challenges to detention are nonetheless rare. A complex legal system, featuring bifurcated legal proceedings, poses insuperable obstacles for most asylum-seekers. Protests against the detention must be directed to the ordinary Civil Courts, whereas protests of the decision to deny asylum must be directed to the Administrative Courts. Efforts to protest the detention to the Administrative Court reviewing the asylum case meet with total failure. On the other hand, evidence that the detained asylum-seeker has a right to remain in Germany falls on deaf ears in Civil Courts reviewing the detention decision.²²⁰ This strict division not only baffles asylum-seekers, it often confuses German lawyers who address their arguments in asylum cases to the incorrect court.²²¹ Accordingly, there are few effective judicial challenges to detention of asylum-seekers.²²²

Furthermore, there are many barriers to seeking judicial review of detention. Those detained pending deportation are typically asylum-seekers whose applications have been rejected. They do not understand the German legal system and often they do not even know why they have been imprisoned. Most do not speak German. As rejected asylum-seekers they do not fall under UNHCR's jurisdiction, so this avenue of protection is unavailable.

Access to legal counsel is practically nonexistent. Detained asylum-seekers do not have the money to obtain legal assistance, nor do they know lawyers who could help them. There are few German lawyers who are equipped to help asylum-seekers challenge detention.²²³ There is no public support for legal services for the poor. As a result, there is no cadre of lawyers who have learned the law that is pertinent to indigent asylum-seekers. The relatively few private lawyers competent to deal with issues of asylum law and detention focus their practice on other clients because they cannot support themselves adequately by representing indigent detained asylum-seekers.²²⁴

Pro bono efforts to provide assistance to detained asylum-seekers and other migrants have often been thwarted. In Saxony, those detained pending deportation are incarcerated in six or seven different prisons located throughout the state. Most of those detained pending deportation do not understand the legal system and do not speak enough German to make sense of what has happened to them. Because there are no local lawyers who provide legal representation to the penniless aliens in prison, members of a local volunteer group have tried to provide a range of assistance and practical advice to the detainees. In response, the local prosecutor has accused them of engaging in the unauthorized practice of law and a judge of the Administrative Court has warned them of the large monetary fines

218. Heinhold, *supra* note 208.

219. Interview with Hubert Heinhold, *supra* note 141; Interview with Rudolph Klever, *supra* note 199.

220. Challenges concerning the merits of the asylum claim are viewed as challenges to the decisions of an administrative agency, the Federal Refugee Office, and must be filed in the system of Administrative Courts. Asylverfahrensgesetz § 74, v. 27.07.93 (BGB1.I S.1361) [Law on Asylum Procedure].

221. Interview with Rudolf Klever, *supra* note 199.

222. *Id.*

223. *Id.*

224. Interview with Hubert Heinhold, *supra* note 141.

that can be imposed for such a violation.²²⁵ These accusations have intimidated the volunteers.

Blocked in their attempt to assist deportation detainees, some of the volunteers in Saxony seized upon another approach. They have tried to furnish practical help by utilizing a provision in German law that recognizes a quasi-guardian status known as a "person in trust."²²⁶ Under this provision prisoners in deportation detention have designated certain volunteers as their "person in trust." The designated volunteers have made telephone calls and taken certain other actions on behalf of the detainees. When the volunteer "persons in trust" sought to review the court files in order to inform the detainees of the contents of their files, which would enable the detainees to decide whether to formulate legal challenges, the court refused all access to the files because the "persons in trust" were not the detainees' attorneys. As a consequence, those in deportation detention could not learn the contents of their own court files. The volunteers assisting those in detention were first threatened for acting like lawyers and then berated for not being lawyers. There was no one else to help the detainees.

Another example of significant restrictions on access to counseling for those in deportation detention can be seen in Berlin where Father Bernd Günter is a chaplain at the detention center for those awaiting deportation. Extremely knowledgeable about asylum law and about the Aliens Law in Germany, Günter provides spiritual counsel and practical advice to those imprisoned in the detention center. The prison authorities circumscribe Günter's work by allowing him to speak only to those detainees who specifically request a meeting with him in the chaplain's office. They do not allow him to visit the detainees in their living areas, nor to speak spontaneously to detainees who have not asked to see him.²²⁷ As a result, many inmates who might find it useful to speak to him do not know he exists. The prison grapevine that might ordinarily rectify this situation is less likely to be effective in a deportation detention center where the inmates speak many different languages and often cannot understand their fellow inmates very well.

The Armenian woman who sought asylum in Germany based on her persecution as a former member of the Soviet military conveys some sense of the isolation and hardship that foreigners face in detention.²²⁸ While her application was still pending, she had been returned to Poland. She slipped back into Germany and went to the police to tell them she belonged in the asylum center.²²⁹

They took me to the police station and kept me there all day and night. I slept on a hard bench. The next day they took me to court. There was an interpreter who spoke broken Russian. I never got a lawyer. The court sentenced me to eighteen weeks in prison for illegally entering Germany.

I was immediately taken to a prison in Dresden, where I arrived late in the evening of January 7. I asked for food and water, but they told me it was too late

225. Interview with members of the Deportation Task Force of the Refugee Assistance Group, *supra* note 215.

226. The individual designated a "person in trust" does not have the powers of a legal guardian, but can take certain actions on behalf of another. § 80 BGB (BÜRGERLICHES GESETZBUCH) [CIVIL CODE].

227. Interview with Father Bernd Günter, *supra* note 214.

228. The detention of this asylum-seeker occurred in unusual circumstances. In contrast to the typical scenario in which asylum-seekers are detained, she was neither detained pending deportation nor detained at the airport. She was incorrectly sent to Poland during her asylum process and detained as an illegal alien when she crossed back into Germany to press her asylum claim. While the circumstances of detention are atypical, the sense of isolation and hardship she experienced as a non-German speaker in detention echo the descriptions offered by many other detained asylum-seekers.

229. See *supra* discussion in text accompanying notes 90-91.

in the evening. The next day I got my first meal in forty-eight hours. I was put in solitary confinement. I asked for an attorney, but was told it was impossible to get one if I could not pay. In protest, I started a hunger strike.

I started bleeding. I asked for a doctor but there never was one. I was sick and my cell smelled of garbage. I wanted to kill myself. The only thing that kept me alive was another prisoner I never saw. Once or twice a day I could hear him singing in Russian. Somehow that made me feel like living. After six days I was moved to a cell with five other women. After twenty days of bleeding, a doctor finally came and gave me medicine, but it did not help. They took me in handcuffs to the city hospital where a gynecologist treated me and I got better.

After two months in prison in Dresden, I was transferred to another prison where the conditions were better. Books and radios were permitted. Writing paper was provided. Clergy visited the prisoners. I kept requesting a lawyer, but to no avail. Finally, on May 10, 1994, I was released from prison and sent back to the asylum center outside Sternberg.²³⁰

Technically, this asylum-seeker may have been, in terms of the International Covenant of Civil and Political Rights, a convicted person. That conclusion is debatable, as she "illegally" re-entered Germany only after she had been erroneously expelled before receiving a decision on her claim. Her particular status is irrelevant, however, to the larger point. Many rejected asylum-seekers are detained in facilities that mainly house individuals who have been convicted of crimes. Some are housed in prison wings separate from criminals; others are not. Almost all the detained asylum-seekers appear to live under the same penal conditions as those convicted of crimes. Those detained pending deportation have not been convicted of crimes. International law requires they receive treatment appropriate to their unconvicted status. The German detention system does not provide appropriate treatment. The growing use of detention pending the deportation of rejected asylum-seekers, particularly the practice of housing them in prisons holding convicted criminals, is a growing violation of international law.

B. Detention at the Airport

In contrast to the general practice, almost all asylum-seekers who arrive at the international airports in Germany face immediate detention in locked facilities. They are detained prior to a decision on the merits of their asylum claim, before they have been ordered deported. During this period they are held in several spartan rooms, with very limited opportunity for fresh air or exercise.

The accelerated airport procedure aims to expel unsuccessful asylum-seekers from Germany within a matter of days; the anticipated length of the entire procedure is less than three weeks. On numerous occasions, though, asylum-seekers remain in the locked airport facility for an extended time. In 1996, approximately 200 asylum-seekers, including twenty children, were detained more than three weeks at the airports.²³¹ In 1997, 322 individuals,

230. Interview with asylum-seeker, *supra* note 60.

231. Letter from Kirchliche Dienste am Flughafen [Airport Ecclesiastical Services] to Bernd Mesovic, *Pro Asyl* (Aug. 21, 1998) (on file with the Texas International Law Journal); *Accelerated "Airport Procedure"*, MIGRATION NEWS SHEET, Sept. 9, at 9.

including fifty-three children, spent twenty or more days in airport detention.²³² In the first half of 1998, 210 asylum-seekers were detained at the airport for lengthy periods.²³³ At least one individual, the Algerian torture victim, was held at Frankfurt/Main airport for more than a year during protracted legal proceedings.

More frequently, extended detention at the airport occurs after a final negative decision has been issued and is caused by consular delays in the issuance of travel documents to asylum-seekers rejected by the German government. Asylum-seekers can be confined to the locked areas at the airport for many months pending deportation while consular officers investigate whether the rejected asylum-seekers are nationals of their country. The consular investigations can be slow and the obligatory travel documents may never be finalized.²³⁴ Sometimes no country will acknowledge the rejected asylum-seeker as its national.²³⁵ Denied admission to Germany and denied re-entry to their homelands, these asylum-seekers remain locked in detention at the airport. Only after eighteen months of detention must they be released.²³⁶ These individuals, though rejected as refugees by Germany, have not been convicted of a crime. International law obliges Germany to treat them in accordance with their status as unconvicted persons. Detaining them when there is no hope of deporting them and no finding that they pose a danger is unlawful.

XI. CONCLUSION

Germany amended its Constitution in 1993 to restrict the legal standards concerning asylum-seekers. Subsequent legislation and judicial rulings have also developed in a restrictive direction. Germany has limited access to its territory and access to its asylum process to such an extent that many who have a bona fide fear of persecution never have their asylum claims examined on the merits in Germany or in any other country they later reach. Those who do enter the asylum procedure face negative presumptions and an ever more restrictive jurisprudence regarding Germany's obligations under the 1951 Refugee Convention, the European Human Rights Convention, the International Covenant on Civil and Political Rights, and German law.

As the level of protection falls lower and lower, the refugees and asylum-seekers become more vulnerable and exploited. Those allowed to stay, but restricted to short-term residence permits, become more dysfunctional while they remain in Germany and more likely to face difficulties when they return home. Growing numbers spend substantial periods confined in prisons. Those in detention rarely have an opportunity to challenge procedural or substantive errors in the decisions on their claims.

232. Letter from Kirchliche Dienste am Flughafen [Airport Ecclesiastical Services] to Bernd Mesovic, *Pro Asyl*, *supra* note 231.

233. *Id.*

234. Interview with Frau Richter-Koç, *supra* note 140.

235. There have been reports that certain African states that depend on development aid from Germany tend to accept asylum-seekers whose nationality has been denied by other consulates in Germany. German officials have threatened to terminate development aid to countries that refuse to readmit their nationals. *No Development Aid for Countries Refusing to Take Back Their Nationals*, MIGRATION NEWS SHEET, June 1998, at 5 (citing FRANKFURTER RUNDSCHAU, May 19, 1998).

236. To accomplish deportation, authorities can detain aliens for a term of six months, which can be extended by a maximum of twelve months, see *Ausländergesetz* § 57(3), v. 9.7.1990 (BGB1. I S.1354, 1356), zuletzt geändert durch Art. 3 Gesetz, v. 15.07.93 (BGB1. II S.1010) [Aliens Law of July 9, 1990 as amended]. So long as a country does not directly refuse to readmit the asylum-seekers, the asylum-seekers remain locked in detention. They wait months and months and sometimes readmission never occurs. If, in contrast, the countries in question directly refuse to prepare travel documents for these asylum-seekers, the asylum-seekers would have to be released from detention. If it is impossible to deport them, the legal basis for their detention—to carry out deportation—ceases to exist and they must be released.

Germany, which mid-way through the twentieth century saw so many of its citizens denied refuge in the face of certain doom, has effectively shut its doors to refugees. Other European nations, now as then, have neglected to devise an equitable system to respond to those fleeing persecution and war. Instead, EU states watch as Germany refines the safe third country rule and related concepts that it relies upon to push asylum-seekers back to countries with shaky economies and undeveloped refugee protection systems. Germany and others may justify the restrictive German approach to asylum as a self-help measure that forces other states to share some of the burdens generated by growing numbers of asylum-seekers. In reality, the post-1993 German asylum policy is truly a failure of protection in the name of burden-sharing.

The last decade of the twentieth century saw Germany dismantle much of its generous post-World War II refugee system. Other EU states have been monitoring the impacts of the recent restrictions imposed by Germany. If they follow Germany's lead, the institution of refugee protection in Europe will clearly become inadequate to respond to the twenty-first century's needs.

