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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

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MARYELLEN FULLERTON*

INTRODUCTION

The decade of the 1980's has been a decade of refugees. Millions of people have fled their homelands as a result of oppression, strife, natural disaster, and poverty.¹ Most refugees have remained in Asia and Africa, in countries neighboring their homelands.² Some refugees,

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1. John McCallin, Washington Representative of the United Nations High Commissioner of Refugees (UNHCR) estimates there are 12 to 13 million refugees in the world. Interview with John McCallin, Monday (weekly newsletter on refugee and immigration issues), Sept. 5, 1988, at 3. See also Zarjevski, France: Right-of-asylum Campaign Inaugurated, Refugees (official publication of the United Nations High Commissioner for Refugees (UNHCR)), Mar. 1986, at 13 (noting that 12 million refugees are currently registered in the world); W. Smyser, Refugees: Extended Exile 1 (1987) (estimating that there are up to 10 to 12 million refugees in the world).

2. Zarjevski, *supra* note 1, at 13. There are approximately 2.9 million refugees from Afghanistan in Pakistan. UNHCR Activities Financed by Voluntary Funds: Report for 1986-87 and Proposed Programmes and Budget for 1988, U.N. Doc. A/AC.96/693 (Part V), at 21, ¶ 5.6.1 [hereinafter UNHCR Report]; UNHCR Fact Sheet: Pakistan, Oct. 1987, ¶ 1. In

however, fled from Africa and Asia to Europe and sought asylum there. During the first half of the decade the number of Third World asylum-seekers in northern Europe increased substantially.³ This significant upsurge in asylum-seekers created logistical problems. The numbers of arrivals outstripped the accommodations provided for refugees and sometimes overwhelmed the refugee determination process, creating long delays in the resolution of cases. The increase in asylum-seekers also had a more pernicious effect. Governments, overwhelmed by the number of asylum-seekers and fearing a never-ending flow of refugees, began to apply more restrictive administrative measures to asylum-seekers in their countries. In addition, many governments began considering legislation that would more directly deter individuals from seeking asylum in their countries. A "bandwagon" effect occurred. Sponsors of legislative change in one country would point out that other countries appeared to be adopting more restrictive refugee policies and that a failure to follow with similar restrictions would result in a deluge of asylum-seekers turned away by neighboring countries.

This argument and others prevailed in a number of the northern European countries. The center-right coalition governments in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands were receptive to initiatives to limit the influx of asylum-seekers by acting in concert with neighboring countries.⁴ As a result, in 1986 and 1987 a variety of legislative measures aimed at stemming

addition, there are reportedly 2.2 million Afghani refugees in Iran, UNHCR Report, *supra*, at 10, ¶ 5.4.1, 975,000 refugees in the Sudan, UNHCR Fact Sheet: Sudan, Oct. 1987, ¶ 1, and 840,000 refugees in Somalia. UNHCR Fact Sheet: Somalia, Oct. 1987, ¶ 1.

3. Between 1981 and 1985 the yearly applications for asylum increased from 2,445 to 5,357 in Belgium, from 203 to 8,698 in Denmark, from 754 to 5,644 in the Netherlands, and from 49,391 to 73,832 in the Federal Republic of Germany. Report on the Right to Asylum drawn up on behalf of the Committee on Legal Affairs and Citizens' Rights (The Vetter Report to the European Parliament), Eur. Parl. Doc. A2-227/86/B, Feb. 23, 1987 at 7. Although the figures demonstrate a major change in the number of refugees seeking asylum in northern Europe, they are still small compared to the numbers of refugees remaining in the Third World. Approximately 850,000 asylum-seekers came to Europe between 1975 and 1985. Estimates are that 5% of the world's current refugees have attempted to enter the industrialized countries while 95% of the refugees remain in underdeveloped countries. Kjaerum, *The Danish Procedure of Denial of Entry into Denmark*, in *Current Asylum Policy and Humanitarian Principles* 3, 8-9 (1988).

4. The situation was similar in other European countries also. For example, in 1985 France, Luxembourg, Belgium, the Federal Republic of Germany, and the Netherlands entered into the Schengen agreement which, in part, attempted to coordinate refugee policies of the signatory nations. Dutch Treaty Series 1985, nr. 102. See Meijers, *Possibilities for Guaranteeing Transport to Refugees*, in *The Role of Airline Companies in the Asylum Procedure* 16, 18-19 (1988). Earlier, the Council of Europe, comprised of 21 European nations, established an Ad Hoc Committee on Refugees and Asylum (CAHAR) to study the

the flow of refugees were enacted in Europe.⁵ A common theme of deterrence, in particular, restriction of entry at the border, runs through the new laws. Additionally, two significant provisions frequently recur: the grant of broad authority to border police to deny admission summarily to individuals falling into certain disfavored categories; and the imposition of large fines and other financial penalties on air carriers that transport undocumented asylum-seekers to a country. Each measure may sound unobjectionable — or only slightly objectionable — on its own; applied together, however, these provisions enable authorities to prevent thousands of asylum-seekers from ever entering a country to seek refuge. As a result, most asylum-seekers are excluded from the refugee determination process. Consequently, they have little opportunity to present fully their claims for refugee status and cannot seek administrative or judicial review of incorrect decisions.

Due to these newly enacted measures, many individuals with well-founded fears of persecution will be turned back from the borders of Belgium, Denmark, the Federal Republic of Germany, and the Netherlands.⁶ The rejection of bona fide refugees is not only unwise social policy and objectionable on moral grounds, but is also questionable as a matter of law. All four of the countries surveyed are signatories of the Geneva Convention Relating to the Status of Refugees⁷ and

problem and propose joint solutions to the continuing flow of refugees. Uipobuu, *What Rights for Refugees?*, Forum [Council of Europe publication], Feb. 1983, at XIX.

5. This was, in fact, the second round of refugee legislation. The early 1980's had also seen a flurry of legal measures regarding refugees. See, e.g., Law of Dec. 15, 1980, on access to the territory, sojourn, establishment and removal of aliens (Belgium); Ordinance of May 23, 1980 concerning the entry and sojourn of aliens in Denmark (Denmark); Law of July 16, 1982 on Asylum Procedure (Federal Republic of Germany); Alien's Circular of Oct. 26, 1982 (Netherlands).

6. Although these four countries are the focus of this article, similar treatment is likely to occur in other European countries. For example, in April 1987 Switzerland passed legislation restricting border crossings by asylum-seekers, *Netter, Swiss Vote to Tighten Refugee Law*, *Int'l Herald Tribune*, Apr. 6, 1987 at 1, and the United Kingdom enacted legislation to fine airlines £1000. per passenger without proper travel documents. *Refugees*, Apr. 1987, at 22. In addition, the Council of Ministers of the European Economic Community held several meetings to coordinate methods of reducing the flow of asylum-seekers into the 12 European Community countries. In May, 1987 the Ministers agreed on the advisability of sanctions on airline carriers, *Street, Ministers Get Tough on Refugees*, *The Bulletin*, May 7, 1987, at 16; in December 1987 the Ministers agreed that nationals of 50 countries would be required to obtain visas for entry into the European Community countries. *Feller, Transport Carriers and Refugee Protection, in The Role of Airline Companies in the Asylum Procedure* 6 (1988).

7. Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention]. The scope of protection of the Geneva Convention was considerably broadened by the Protocol of 1967 Relating to the Status of Refugees, see *infra* note 299. Most of the signatories

of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁸ Article 33 of the 1951 Refugee Convention prohibits the return of refugees to countries in which their lives or freedom would be threatened.⁹ Article 3 of the Human Rights Convention forbids torture or inhuman or degrading treatment.¹⁰ Returning individuals to a particular country in which they might be endangered has been acknowledged in certain circumstances as inhuman treatment within the meaning of Article 3.¹¹

This Article undertakes a country-by-country examination of the recent legal developments restricting entry of asylum-seekers at the border. It next analyzes the newly-enacted measures and details the shortcomings that many of them share. The Article then evaluates the new provisions in light of the legal duties imposed on signatories of the 1951 Refugee Convention and the European Convention on Human Rights. It concludes by suggesting that the current wave of restrictive legislation,¹² especially the provisions authorizing summary rejection of asylum-seekers at the border, violates both the 1951 Refugee Convention and the European Human Rights Convention.

to the 1951 Convention, including Belgium, Denmark, the Federal Republic of Germany, and the Netherlands, are also signatories to the Protocol.

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

9. Article 33 of the 1951 Refugee Convention, *supra* note 7, provides in pertinent part:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Id.

10. Article 3 of the Human Rights Convention, *supra* note 8, provides:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Id.

11. *Amekrane v. The United Kingdom*, 1973 Y.B. Eur. Conv. on Hum. Rts. 356 (Eur. Comm'n on Hum. Rts.).

12. Ironically, some of these legislative changes appear to adopt policies long followed by the U.S. government. For example, all aliens must have a valid visa to enter the United States. INA § 212(a)(20), (26)(B), 8 U.S.C. § 1182(a)(20), (26)(B) (1982 & Supp. IV 1986). In addition, the United States authorizes fines on carriers that bring aliens without proper documents to the United States. INA § 273, 8 U.S.C. § 1323. The provisions adopted in Europe in 1986 and 1987 may to some extent constitute an "Americanization" of European asylum law; however, U.S. law contains far more procedural protection than the new summary border procedures adopted in Europe. For example, asylum-seekers stopped at the borders of the United States are guaranteed hearings before immigration judges, INA § 236, 8 U.S.C. § 1226(a), and full administrative and judicial review, INA § 106(b), 8 U.S.C. §§ 1226(b), 1105a(b).

I. RECENT LEGAL DEVELOPMENTS RESTRICTING ENTRY OF ASYLUM-SEEKERS AT THE BORDER

A. *Belgium*

1. *Entry for Asylum-Seekers*

Prior to 1987 the Belgian law¹³ setting forth the rights of refugees and asylum-seekers¹⁴ was quite generous. The law permitted any non-Belgian who arrived at the border and stated that he was a refugee to enter the country and petition for recognition as a refugee.¹⁵ It also provided that any alien who had entered Belgium lawfully in a non-refugee status could seek recognition as a refugee during the time he was lawfully present.¹⁶ In addition, aliens who had entered Belgium unlawfully, without appropriate documents, had 15 days within which to request refugee status.¹⁷ Whether aliens requested refugee status at the border or after entry, the law allowed them to remain in the country while their refugee claims were processed.¹⁸

Even more unusual than these liberal entry requirements was the refugee recognition procedure. Alone in Europe,¹⁹ the government of Belgium granted to the Representative of the United Nations High Commissioner for Refugees (UNHCR) the ultimate power to decide

13. Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers [Law of Dec. 15, 1980 on Access to the Territory, Sojourn, Establishment, and Removal of Aliens], 1980 *Moniteur Belge* 14,584.

14. The Belgian legislation does not refer to asylum. Rather, it speaks in terms of access to and sojourn in the territory of Belgium. *Id.* 1980 *Moniteur Belge* 14,584. An authorization to sojourn is equivalent to the grant of asylum.

15. European Consultation on Refugees and Exiles, *Asylum in Europe* 68, ¶ 13 (1983) [hereinafter *Asylum in Europe*].

16. *Id.* For example, aliens who entered as tourists or students could seek refugee status at any time before their tourist or student visas expired. Law of Dec. 15, 1980, art. 51, 1980 *Moniteur Belge* at 14,598. See *Asylum in Europe*, supra note 15, at 69, ¶ 20.

17. Law of Dec. 15, 1980, art. 50, 1980 *Moniteur Belge* at 14,597. See description *infra*, note 39. See also *Asylum in Europe*, supra note 15, at 70, ¶ 27. Belgium does not require tourist visas of visitors from certain countries, such as the United States, so long as they remain in Belgium for no longer than three months. *Id.* art. 6, 1982 *Moniteur Belge* at 14,586. An individual who entered Belgium under this provision generally could request refugee status at any time during those three months. *Asylum in Europe*, supra note 15, at 69, para. 20.

18. A 1983 report notes that refugees in Belgium enjoy "a status very close to that of Belgian nationals." *Asylum in Europe*, supra note 15, at 82, ¶ 104. Individuals in Belgium seeking those rights are referred to as refugee candidates. For purposes of this Article, the terms refugee candidate and asylum-seeker are synonymous.

19. At one time the Netherlands had a somewhat similar situation regarding the role of the UNHCR, but this was revised in the early 1970's. Since then, the Minister of Justice in the Netherlands has decided whether or not to grant refugee status and asylum. Interview with Lex Takkenberg, Chief Legal Advisor, VluchtelingenWerk Nederland (Dutch Refugee Council), in Hamburg, Federal Republic of Germany (Nov. 29, 1986) [hereinafter Takkenberg Interview II].

which applicants qualified as refugees.²⁰ This grant of decision-making authority to an international organization largely reduced the overt political pressures that appear to influence the refugee decision process in other countries.²¹ Because Belgian officials had no voice in determining whether an asylum-seeker was likely to face persecution in his homeland, any impulse to consider Belgium's foreign policy interests as a factor in deciding the likelihood of persecution in a particular country was muted.²²

Although Belgian authorities did not decide the merits of claims for refugee status, they did decide certain threshold issues. The Aliens Office of the Ministry of Justice first examined each refugee claim filed in Belgium to determine if the refugee candidate had filed a timely application, had previously requested asylum in another country, or had resided for more than three months in another country after leaving his homeland and before arriving in Belgium.²³ If the refugee candidate prevailed on these preliminary issues, the Ministry of Justice declared his application "*recevable*" or eligible for consideration on the merits by the UNHCR.²⁴ Thus, in Belgium an alien deemed eligible to petition for refugee status presented his claim to the office of the UNHCR Representative to Belgium. One of the Representative's assistants reviewed the claim and developed the supporting evidence through one or more informal interviews and through the documents the refugee candidate submitted.²⁵ The government took no position on an application, but added interviews and background investigations conducted by the Aliens Office to the claimant's file.²⁶

Both the informality of the procedure and the nonadversarial nature of the decision-making process diminished the need for legal

20. Arrêté ministériel du 22 février 1954 relatif à la compétence du délégué en Belgique du Haut Commissaire des Nations-Unies pour les réfugiés pour déterminer la qualité de réfugié [Ministerial Decree of Feb. 22, 1954 Relating to the Competence to Determine Refugee Status of the Representative in Belgium of the United Nations High Commissioner for Refugees], 1954 Moniteur Belge 3124.

21. See, e.g., Political Bias in United States Refugee Policy Since the Refugee Act of 1980, 1 Geo. Immigr. L.J. 495 (1986).

22. But see Avery, Refugee Status Decision-Making: The Systems of Ten Countries, 19 Stan. J. Int'l L. 235, 253-54 (1983) (noting that UNHCR's dependence on financial support from governments for relief work may undermine its impartiality and suggesting that Belgian government's financial support of UNHCR office in Brussels may compromise UNHCR's independence).

23. Law of Dec. 15, 1980, art. 52, 1980 Moniteur Belge at 14,598. See also Asylum in Europe, *supra* note 15, at 72, ¶ 35.

24. Asylum in Europe, *supra* note 15, at 72, ¶ 38.

25. *Id.* at 73, ¶ 44.

26. *Id.* at 72, ¶ 40 and 73, ¶ 44.

representation and protracted formal litigation. Applicants could be, but usually were not, accompanied by a lawyer.²⁷ The law did not allow the Belgian government or the alien to appeal the UNHCR Representative's decision.²⁸ Decisions denying refugee status could, however, be reopened at any time by the UNHCR Representative.²⁹ The standard for reopening was extremely generous: "when new elements are brought to [the] . . . attention [of the UNHCR Representative] or when it appears that an error or misunderstanding has occurred."³⁰ Thus, the procedure for deciding refugee claims preserved an enormous amount of flexibility for the UNHCR Representative. Although the Belgian refugee determination process was not immune from criticism,³¹ the international perspective and impartiality of the decision-makers and the informality and flexibility of the process added much to the system.

2. *Recent Legislation*

In July 1987 the Belgian Parliament enacted legislation fundamentally changing the procedures affecting refugees.³² Although the new

27. *Id.* at 73, ¶ 46. Lawyers often contacted the UNHCR Office separately to review their client's file, but did not, as a matter of course, attend UNHCR interviews of the client. *Id.*

28. *Id.* at 69, ¶ 18, 76, ¶ 65.

29. *Id.*

30. *Id.* at 69, ¶ 18. An additional safeguard lay in the practice developed by the UNHCR Representative of allowing a refugee candidate three weeks after a negative decision to present additional information supporting his claim to refugee status. Only at the end of the three week period did the UNHCR Representative submit the negative decision to the Minister of Justice, whose office oversees expulsions from the country. *Id.* at 76, ¶ 64.

31. Many lawyers criticized the fact that the UNHCR decisions provided no basis for their conclusions and the fact that no appeals were permitted. Avery, *supra* note 23, at 254-55. Others argued that personnel in UNHCR Branch Offices are particularly sensitive to political pressure from the host country. *Id.* at 254.

32. Loi du 14 juillet 1987 apportant des modifications, en ce qui concerne notamment les réfugiés, à la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers [Law of July 14, 1987 Modifying, with Particular Regard to Refugees, the Law of Dec. 15, 1980 Concerning Access to the Territory, Sojourn, Establishment and Removal of Aliens], 1987 Moniteur Belge 11,111. Originally reported as the Law of July 15, 1987, the date of the legislation was subsequently corrected to Law of July 14, 1987. See 1987 Moniteur Belge 12,210.

A short review of the political battle surrounding this legislation demonstrates the controversy currently surrounding the refugee issue in Europe. Despite the fact that the coalition government, the sponsors of the legislation, had an overwhelming majority in Parliament, it took almost an entire year between introduction of the bill and its enactment. The bill was championed by Jean Gol, Minister of Justice, a member of the rightist Liberal Party and a leading member of the coalition government that led Belgium from 1982 to the end of 1987. See Fitzmaurice, *The Politics of Belgium: Crisis & Compromise in a Plural Society* 165 (1983); Leonard, *Tough Policy On Would-Be Refugees*, *The Bulletin*, July 31, 1986 at 11. Even before its official introduction, rumors of the Gol bill aroused much criticism

legislation technically modified the existing statute regulating the entry and residence of all foreigners, its provisions focused on refugees. The heart of the bill revised the liberal entry requirements and the role of the UNHCR in Belgium. In addition, the new law explicitly changed many other procedures that previously had benefited individuals seeking admission as refugees.

The 1987 legislation revamps the Belgian procedure for recognizing and protecting refugees by making four major changes in existing asylum law. First, it grants broad authority to border police to turn away asylum-seekers at the border.³³ Second, it institutes a system of fines for airlines and shipping companies who bring asylum-seekers lacking proper passports and visas to Belgium.³⁴ Third, it removes the power to determine refugee status from the UNHCR and places it with a newly created government Office for Refugees and Stateless Persons.³⁵ Finally, it eliminates the ability of asylum-seekers to

among the opposition Socialist Party and among lawyers in general. After the government proposed the legislation to the House of Representatives, political and public criticism managed to stall the bill for months. Interview with Gilbert Jaeger, Président du Comité belge d'aide aux réfugiés (Chairman, Belgian Committee for Assistance to Refugees), in Brussels, Belgium (Feb. 12, 1987) [hereinafter Jaeger Interview I]. Ultimately, however, the opposition forces failed to prevent the passage of the measure or even to modify it significantly. The House approved the bill by a large majority and referred it to the Senate. Lawyers and others critical of the bill rallied to attempt to influence the deliberation in the Senate. The Minister of Justice responded by intensifying the pressure on the Senate to support the legislation. Interview with Gilbert Jaeger, Chairman, Belgian Committee for Assistance to Refugees, in Brussels, Belgium (July 30, 1987). He let it be known that he would leave the government if the Senate amended the bill in any way. The threat was powerful because his departure would likely have caused the whole government, a rather fragile coalition, to fall. Acquiescing, the Senate adopted the identical bill that had passed the House. *Id.* The coalition government ultimately fell in October 1987. Montgomery, *Belgium's Coalition Loses Ground in Election*, N.Y. Times, Dec. 14, 1987, at A6.

33. Law of July 14, 1987, art. 6, 1987 *Moniteur Belge* at 11,112. The authority granted border police is considered in depth, *infra* notes 38-47 and accompanying text. -

34. Law of July 14, 1987, art. 17, 1987 *Moniteur Belge* at 11,118. For a more detailed discussion of these penalties, see *infra* notes 74-77 and accompanying text.

35. Law of July 14, 1987, art. 9, 1987 *Moniteur Belge* 11,113 (amending Law of Dec. 15, 1980 by adding new section 2, Articles 57/2 through 57/11, entitled "Commissariat général aux réfugiés et aux apatrides" (Office for Refugees and Stateless Persons) to Chapter II of Title II) (subsequent citations are to revised article numbers). The Belgian legislation of 1987 in effect rescinds the authority of the UNHCR Representative to determine which refugee candidates are entitled to refugee status and protection under Belgian law. The law creates within the Ministry of Justice a Commissariat général aux réfugiés et aux apatrides (Office for Refugees and Stateless Persons). The Office is headed by a Commissaire général (Director) and two deputy directors, each of whom is nominated by the Minister of Justice and appointed by the King. Each of the three must be Belgian, must be at least 30 years old, and must have received a law degree. They are appointed for five year terms, and can be reappointed for subsequent terms. *Id.* arts. 57/3 and 57/4.

The Director of the Office for Refugees and Stateless Persons has the power to recognize or

refuse to recognize refugee status in light of the international conventions to which Belgium is a party, to withdraw refugee status previously recognized, and to issue administrative documents to refugees as provided for in Article 25 of the Geneva Convention of 1951 relating to the Status of Refugees. *Id.* art. 57/6. The law requires that decisions refusing to recognize refugee status or withdrawing refugee status must explain why the particular circumstances of the case resulted in a negative conclusion. *Id.* art. 57/6. The UNHCR Representative to Belgium no longer plays an official role in the primary phase of the refugee recognition process. The legislation merely authorizes the Office for Refugees and Stateless Persons to request information from the UNHCR. *Id.* art. 57/7.

A refugee candidate dissatisfied with a decision by the Office for Refugees and Stateless Persons can appeal. Article 10 of the Law of July 14, 1987 amends Chapter II of Title II of the Law of December 15, 1980 to add section 3, consisting of Articles 57/12 through 57/23, entitled "Commission permanente de recours des réfugiés" (Refugee Appeals Commission). The Appeals Commission consists of two chambers, one French-speaking and one Flemish-speaking. *Id.* art. 57/12. Each chamber consists of a magistrate or counselor nominated by the Minister of Justice, an official of the Ministry of Foreign Affairs, an official of the Ministry of Justice, and a lawyer nominated by the Minister of Justice after consultation with the Belgian Bar Association. The Appeals Commission members are appointed by the King, and serve for renewable terms of five years. *Id.* In proceedings appealed to the Commission, the UNHCR Representative to Belgium plays an advisory role, and is authorized to be present at each session of the Appeals Commission in order to provide advice concerning the specific cases under consideration. *Id.* arts. 57/12-57/13. The magistrate or counselor assumes the chairmanship of the chamber; tie votes are decided in favor of the position advocated by the chairman of the chamber. *Id.* art. 57/13.

Appeals to the Appeals Commission must be filed within 30 days of notice of the negative decision, *id.* art. 57/11, and may be filed only by aliens who reside in Belgium. *Id.* art. 57/16. Thus, an asylum-seeker refused entry is ineligible to pursue his claim for refugee status from abroad. An alien no longer residing in Belgium or one who does not comply within 30 days with a request for information can be refused recognition as a refugee. *Id.* art. 57/17.

The filing of an appeal stays execution of the underlying decision. *Id.* art. 57/11. An alien may represent himself on appeal or may be represented by a lawyer of his choice. *Id.* art. 57/18. If he lacks the funds to retain a lawyer, he will be provided a lawyer at public expense. *Id.* Five working days before the scheduled hearing, the alien and his lawyer and a member of the Ministry of Justice can review the administrative file. *Id.* art. 57/19. The Appeals Commission must issue written decisions explaining their conclusion. *Id.* art. 57/22. These decisions can be appealed to the Council of State. *Id.* art. 57/23.

The new recognition procedure with its newly created government agencies does not on its face appear objectionable. In fact, the new procedures appear more protective of the rights of refugee candidates. The right to counsel, *id.* art. 57/18, the right to present evidence on one's own behalf, *id.* art. 57/21, and the right to interpreter services, *id.* art. 57/20, are all explicitly protected by the legislation. In addition, the refugee candidate now has the right to receive a written opinion explaining a negative decision. *Id.* art. 57/22. Further, the new law grants a right to appeal. *Id.* art. 57/23. Indeed, the disappointed refugee candidate has two chances to have an erroneous decision corrected: first, by the Refugee Appeals Commission, and second, by the Council of State, a juridical body that is not part of the government bureaucracy. In particular, these last two provisions add important new safeguards to the refugee process. Whereas the right to counsel, the right to interpreter services, and the right to presentation of evidence on one's own behalf are crucial and were not expressly mandated by the earlier law, the practice of the UNHCR Representative to Belgium in fact always protected these rights. The UNHCR Representative's decisions on refugee status did not contain written opinions explaining the decisions, however, and this lack of explanation gave rise to frustration and criticism among lawyers and refugee candidates. Similarly, the old law provided no appeal of the UNHCR Representative's decision. Asylum in Europe, *supra* note 15, at 69, ¶ 18.

obtain an injunction against government action to expel them.³⁶

Although a refugee candidate could always request a reopening and reconsideration of his file, this avenue of potential relief was limited because it only involved a review by the same decision-maker who had initially arrived at the allegedly incorrect decision. Thus, in at least two provisions, the 1987 legislation contains more protective procedures for refugee candidates.

Nonetheless, the new procedure raises some cause for concern on the part of refugee candidates. The decision-maker under the new system is no longer an international civil servant who is part of an organization whose mission is to aid refugees. Rather, decision-making is located in two new agencies administered by the Minister of Justice, whose central focus is law enforcement. Furthermore, the agency members serve renewable five year terms. Thus, they are potentially subject to intense political pressure as well as to the gradual development of a law enforcement mentality. Although the agency members may well attempt to resist these pressures, nonetheless, these influences are likely to be substantially greater under the new system than under the prior procedure. Therefore, there is a heightened risk that domestic political pressure and xenophobia will affect the refugee recognition process.

It must be noted, however, that Marc Bossuyt, the first person appointed as Director of the Office for Refugees and Stateless Persons, is a highly respected professor of international law at the University of Antwerp, and a member of the U.N. Commission on Human Rights. His stature in the field and his commitment to human rights makes him an ideal choice to administer the Office for Refugees and Stateless Persons.

36. Prior to 1987 Belgian lawyers representing refugee candidates on occasion initiated court actions seeking to restrain a government official from carrying out an improper administrative decision. If persuaded that the government action was unlawful, the court could order the government agency to reconsider the matter using the proper criteria and procedures. Jaeger Interview I, *supra* note 32. Known as *référé*, this type of proceeding could protect litigants against government action that might moot their case. In the refugee context, an alien might seek a *référé* in order to halt the government's efforts to remove him from the country before he could present his claim for refugee status to the UNHCR Representative's office. For example, the Aliens Office might have decided his request for refugee status was "non-receivable" because he had spent more than three months in another country en route from his homeland to Belgium. If his refugee claim was non-receivable and he had no other legitimate basis for residing in Belgium, the government would likely seek to expel him. Once outside of Belgium he would have no ability to challenge the non-receivability decision or to advance his petition for recognition as a refugee in Belgium. Consequently, a refugee candidate might proceed in court in order to try to convince the government that its initial decision had been incorrect. Although success by the refugee candidate on the *référé* procedure only required the government to consider the matter again in light of the prescribed procedures and criteria and did not guarantee the litigant the desired result on the merits, this success granting the litigant a second chance assumed great importance in some refugee cases because removal from the country could lead to dire results. Expulsion from the Belgium would not only moot the refugee claim of a refugee candidate, but might also return the individual to a country where his life or freedom would be threatened. Thus, the relief provided by a successful *référé* proceeding, although temporary, could often be significant.

The 1987 legislation completely revised this procedure. In principle the law prohibits the *référé* procedure, but in actuality, there are a few circumstances in which a *référé* can still be used. Article 16 of the Law of July 14, 1987 amends the Law of Dec. 15, 1980 by adding Article 70bis, which provides for limited judicial review. An alien whom the government attempts to return to a country where his life or liberty will be threatened may file an emergency petition with the presiding judge of the local trial court. Law of July 14, 1987, art. 16, 1987 *Moniteur Belge* 11,118. The court must decide whether there is substantial evidence that a serious threat to the refugee candidate's life or liberty exists. The law instructs the court

Together, these provisions change Belgian policy from a flexible, humanitarian approach to one hostile to asylum-seekers. The authority granted border police and the fines on carriers, which operate together to preclude most bona fide refugees from entering Belgium, are the most critical and, accordingly, will be examined in greater detail below.³⁷

a. Authority to Border Police

Prior to 1987 an alien claiming refugee status at the border had the absolute right under Belgian law to enter the country and initiate the process of seeking formal acknowledgement as a refugee.³⁸ The law required a refugee candidate entering without proper travel documents to report to a public official within 15 days of entry and claim refugee status.³⁹ As long as the individual satisfied this requirement

to use the *référé* procedure in deciding this issue. The law requires the court to render a decision within 15 days. The decision cannot be enjoined or appealed. *Id.*

37. This is not to say that the procedures surrounding the process of determining refugee status are insignificant. Quite the contrary is true. The fairness of these procedures is very important. There is no indication, however, that the government Office for Refugees and Stateless Persons will be unfair. Though by law the Office will be part of the Ministry of Justice, Law of July 14, 1987, art. 9, 1987 *Moniteur Belge* at 11,114, and thus, by definition, will be more sensitive to government pressure than the UNHCR Representative, the legislative guidelines ensure such hallmarks of procedural fairness as notice, right to counsel, right to present evidence, right to interpreter services, and right to written decisions. Furthermore, the legislation provides judicial review for negative decisions, and automatic stay of the decision challenged on appeal. *Id.*

Nor is this to say that the limitation of the *référé* (injunctive relief) provision regarding expulsion orders, described *supra* note 36, is insignificant. The *référé* proved useful to asylum-seekers as they sought to garner evidence and assistance in order to support more convincingly their asylum claim. This potential avenue of relief will be missed by asylum-seekers. Nonetheless, both the limitation of temporary relief and the changes in the refugee determination procedure are much less important than the legislative changes that prevent refugee candidates from crossing the borders of Belgium. After all, the usefulness of procedures provided to those in Belgium is irrelevant if few can enter Belgium to avail themselves of those procedures.

38. Asylum in Europe, *supra* note 15, at 71, ¶ 30. Belgian law authorizes an alien to enter the territory of Belgium if he carries a document prescribed according to an international treaty, law, or royal decree, or if he carries a valid passport or other travel document with a visa valid for entry into Belgium issued by a Belgian, Dutch, or Luxembourg diplomatic or consular official. In addition, the Minister of Justice can authorize the entry of an alien who does not possess any of the prescribed documents. Law of Dec. 15, 1980, art. 2, 1980 *Moniteur Belge* at 14,585.

39. Specifically, an alien entering Belgium without the required documents had to act within 15 working days of his entry to (1) seek recognition of his refugee status from the competent authority [UNHCR] and (2) give notice of his refugee claim to one of the following officials: an officer of the judiciary police, a non-commissioned officer of the state police, an agent of the *Sûreté publique*, a customs official, or an official of the borough in which he lives. *Id.* art. 50, 1980 *Moniteur Belge* at 14,597.

In addition, aliens legally entering Belgium under non-refugee status but seeking asylum had

and had not spent more than three months en route to Belgium from his homeland in a third country where he was free from persecution,⁴⁰ he could present his claim to the UNHCR for a decision on the merits.⁴¹

The new legislation drastically revised the procedures applied to potential refugees at borders and airports. It expressly authorizes the Minister of Justice to turn away candidates claiming refugee status but lacking proper travel documents under any of the following circumstances⁴²:

(1) the alien is considered a threat to public order or national security;⁴³

(2) the alien's refugee claim is manifestly unfounded, and in particular is a fraudulent claim or is a claim that does not conform to the criteria set forth by the Geneva Convention Relating to the Status of Refugees of 1951, or to other criteria for granting asylum;⁴⁴

(3) the alien has a visa for a third country;⁴⁵

(4) the alien since leaving his homeland has resided more than a total of three months in one or more countries en route to Belgium — and has left an interim stop without fear of persecution there;⁴⁶

(5) the alien has been expelled from Belgium in the past

to apply for asylum before the end of their authorized stay. *Id.* art. 52, 1980 *Moniteur Belge* at 14,598.

40. The Minister of Justice could refuse entry or permission to remain if the alien delayed filing his claim for refugee status without justification or if, between his departure from his homeland and his arrival in Belgium, he resided more than three months in a third country and voluntarily left that country. *Id.* art. 52, 1980 *Moniteur Belge* at 14,598.

41. Articles 49, 50, and 52 of the Law of Dec. 15, 1980 all refer to the international authority to whom the Minister of Foreign Affairs has delegated his competence over refugee status decisions. *Id.* arts. 49, 50, and 52, 1980 *Moniteur Belge* at 14,597-98. Although the UNHCR Representative to Belgium is not expressly mentioned in the law, the decree of 22 February 1954 delegates decisions on refugee status to this official. See Ministerial Decree of Feb. 22, 1954, art. 6, 1954 *Moniteur Belge* 3124.

42. Law of Dec. 15, 1980, art. 52, 1980 *Moniteur Belge* at 14,598 as amended by Law of July 14, 1987, art. 6, 1987 *Moniteur Belge* 11,112 (subsequent citations are to revised article numbers).

43. *Id.* art. 52, § 1er, para. 1, 1°.

44. *Id.* para. 1, 2°.

45. *Id.* para. 2, 1°.

46. *Id.* art. 52, § 1er, para. 2, 3° and 4°. Paragraph 2, 3° refers to aliens who have resided more than three months in a third country; 4° refers to aliens who have resided in a number of third countries for a total of more than three months.

10 years.⁴⁷

The expansion of decisions concerning refugee status made at the borders is not accompanied by an expansion of safeguards to ensure accurate decisions. Instead, the decision-making process, the criteria for the decisions, and the review of the decisions have remained rudimentary at best.

i. *Summary Border Proceedings*

The 1987 legislation authorizes summary rejection of certain refugee candidates at the border,⁴⁸ while providing neither a hearing nor an interpreter. Moreover, the law lacks provisions for making a record concerning the refugee's claim either on the merits or on the technical grounds for exclusion and lacks provisions for informing a rejected refugee candidate of the basis of the decision denying entry. Rather, the law simply states that the Minister of Justice or his delegate⁴⁹ can refuse to admit those refugee candidates who fall into the disfavored categories and that the border guards can send them back to the country from which they journeyed to Belgium.⁵⁰ Because the legislation seeks to tighten border controls and allow far fewer refugee candidates into the country in an expeditious manner, it lacks procedural safeguards. The absence of even minimal procedural protections magnifies the opportunity for honest error, as well as abuse.

ii. *Criteria for Rejection at the Border*

The summary nature of the decisions at the border is compounded by the newly established criteria that lead to summary rejection. The authorities enjoy a wide variety of grounds upon which to base denial of entry to persons at the border seeking entry as refugees. Several of the bases for summary rejection are quite vague, conferring in practice extremely broad power to border guards.⁵¹ For example, an alien

47. This prohibition does not apply if the expulsion has been suspended or annulled. *Id.* art. 52, para. 2, 2°.

48. Article 52, § 1er, para. 1 expressly permits the Minister of Justice to deny entry to aliens claiming refugee status. ["Le Ministre de Justice peut décider que l'étranger qui . . . se déclare réfugié . . . fait l'objet d'un refus d'entrée sur le territoire national . . ."]. *Id.*

49. The legislation distinguishes between cases to be decided by the Minister of Justice (public order or national security, manifestly unfounded claims) and those decided by the Minister of Justice or his delegate (all of the rest). *Id.* art 52, § 1er.

50. See *id.* art. 52, § 1er, para. 1 (authorizing the Minister of Justice to refuse entry into Belgium and the border guards to turn away the asylum-seeker. ("[L] étranger . . . fait, l'objet d'un refus d'entrée sur le territoire national et qu' en conséquence il sera refoulé par les autorités chargées du contrôle aux frontières.")).

51. The legislation consigns the two vaguest criteria to decisions by the Minister of Justice;

may be denied entry if he is considered a threat to public order or national security; yet the legislation fails to define or limit these terms in any way. Consequently, many different circumstances might be interpreted to fit into these vague categories. Indeed, a country that perceives itself inundated with refugees might possibly interpret a large number of bona fide refugee candidates, on the basis of numbers alone, as a threat to public order.

Similarly, the provision denying entry to a refugee whose claim is "manifestly unfounded" is quite vague and broad. Although the legislation describes several types of claims that would fall within this provision, the examples are themselves vague — a "fraudulent" claim or a claim that does not satisfy "other criteria that justify the grant of asylum."⁵² Again, this vagueness confers great power on the police at the border. In addition, the text of the legislation literally includes as an example of manifestly unfounded claims those not conforming to the refugee definition set forth in the Geneva Convention Relating to the Status of Refugees.⁵³ Thus, it is possible to construe every application that does not ultimately succeed on the merits as manifestly unfounded. Logic and common sense indicate that the "manifestly unfounded" criterion should be construed more narrowly than "unsuccessful." Nevertheless, the ambiguity of the legislative language allows an extremely broad definition of "manifestly unfounded" claims and, accordingly, a large number of summary denials of entry at the border.

Other provisions justifying refusal of refugee candidates at the border are admittedly more precise. Exclusion of an alien expelled from Belgium in the past ten years is straightforward. The provision allowing Belgian authorities to turn away a refugee candidate possess-

the less vague criteria may be applied by either the Minister of Justice or his delegate. See *supra* note 49. In fact, it is hard to imagine the Minister of Justice personally making all these decisions. Common sense dictates that most decisions will have to be delegated, perhaps directly to the border guards. Even if the Minister of Justice or some other high-level official does decide these cases personally, he is dependent solely on the information he receives from the border guards who have stopped the asylum-seeker.

52. Similar language appeared in Conclusions Number 28 and 30 of The Executive Committee of the UNHCR. These conclusions recognized the need for effective measures to deal with "manifestly unfounded" or "clearly abusive" applications for refugee status. See 33 U.N. GAOR Supp. (No. 12A) at 19, U.N. Doc. A/33/12/Add. 1 (1978); 38 U.N. GAOR Supp. (No. 12A) at 25-26, U.N. Doc. A/38/12/Add. 1 (1983). Such measures were tolerable, however, only in cases that are "clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum." Conclusion 30(d). 38 U.N. GAOR Supp. (No. 12A) at 25-26, ¶ 97(2)(d), U.N. Doc. A/38/12/Add. 1 (1983).

53. 1951 Refugee Convention, *supra* note 7.

ing a travel visa valid for a destination in a third country is also not difficult to comprehend, although the law itself may be difficult to apply in certain instances. At first glance, the provision excluding those refugees who have taken more than three months to make their way to Belgium from their home elsewhere also appears comparatively clear. This appearance is deceptive. The legislation requires that refugees who have spent more than three months en route must show that they feared persecution in the last country they entered prior to Belgium.⁵⁴ The difficulty of establishing freedom from fear of persecution is legendary, and this issue is not one susceptible of quick determination. Moreover, even if this legislative provision were easy to apply, it would be troublesome. This provision and the third country visa provision expressly attempt to restrict the flow of bona fide refugees into Belgium. They do not seek to address the problem of refugee candidates who themselves are deemed suspect or troublesome, such as those threatening national security or making fraudulent claims or having been recently expelled, but rather simply push these refugees elsewhere — to other countries further along the route or back to countries through which they have already passed. In addition, the provisions exacerbate the problem of the “refugee in orbit,” whose unquestionably meritorious claim is nonetheless rejected by one country after another because of the belief that some other country is more appropriate to receive him.⁵⁵

54. Indeed, the new legislation explicitly provides for refusal of entry to refugee candidates who have resided in a third country more than three months en route to Belgium or have resided more than three months total in a number of third countries. The legislation authorizes refusal of entry only when the three month residence has occurred in a country where the refugee candidate did not have a fear of persecution within the meaning of the 1951 Refugee Convention. Law of Dec. 15, 1980, art. 52, § 1er, para. 2, 3° and 4°. Although the language is reasonably precise compared to “public order,” “national security,” and “manifestly unfounded,” there are ambiguities. For example, what constitutes residence? What evidence is relevant to the issue of fear that propelled departure from a third country? What degree of certainty exists that the third country will not return the refugee candidate to his homeland?

55. The “refugee in orbit” syndrome came to public attention in the 1970’s as more Third World asylum-seekers arrived in Europe and North America. See Melander, *Refugees in Orbit*, in *African Refugees and the Law* 27 (G. Melander & P. Nobel eds. 1978); Uipobuu, *supra* note 4, XVIII, XIX. The typical scenario involved one country after another rejecting an asylum-seeker on technical grounds and placing him on an airplane or train bound for yet another country where his admission was uncertain. For example, based on its treaty with the Federal Republic of Germany, and without regard to the sufficiency of his proof that he was a bona fide refugee, Denmark might return an Afghan asylum-seeker to the Federal Republic of Germany merely because he had crossed through the Federal Republic on his way to Denmark. The Federal Republic might refuse to admit him and put him on a flight to Pakistan on the theory that he had already found “protection elsewhere” (in Pakistan). If Pakistan refused to allow him to disembark from the airplane, the carrier was likely to return

iii. *Lack of Effective Appeal*

More troubling, perhaps, than either the vagueness of some criteria or the clear but restrictive nature of other provisions is the failure of the new Belgian legislation to provide for effective appeal of the summary rejection of a refugee candidate at the border. Thus, mistakes of the Belgian border authorities, which can occur with even the best-intentioned officials, will often go uncorrected. For refugees, such mistakes are more than abstract error. They can be life or death matters.

Although the new law precludes appeals to judicial authorities, it affords a measure of protection through the possibility of reconsideration of the denial of entry at the border or airport.⁵⁶ The request for reconsideration must be filed with the Minister of Justice within 24 hours of notice of the negative decision.⁵⁷ The Minister of Justice must seek the opinion of the Director of the Office for Refugees and Stateless Persons, who must provide his opinion within 24 hours.⁵⁸ The Minister of Justice is not bound to follow the opinion of the

the asylum-seeker to Europe where the process could repeat itself. During all this time, the asylum-seeker would likely be lodged only in airplanes and airport lounges. Obviously, such a situation presented a very distasteful and inhuman response to a serious problem. The Executive Committee of the UNHCR attempted to address this problem in 1979, 30th Session, Conclusion No. 15 by urging cooperation among refugee-receiving countries. See 30 U.N. GAOR Supp. (No. 12A) at 14, U.N. Doc. A/10012/Add. 1 (1975). For a short description of the phenomenon of refugees in orbit, see also Lamb, *Knocking on Haven's Door*, *Refugees*, June 1987, at 10. Case studies illustrating the refugee in orbit syndrome can be found in Castellani, *Expulsion of Asylum Seekers From Denmark*, in *Current Asylum Policy and Humanitarian Principles* 31, 35, 40, 57 (1988).

56. Law of Dec. 15, 1980, 1980 *Moniteur Belge* 14,584 as amended by Law of July 14, 1987, art. 14, 1987 *Moniteur Belge* at 11,117 (subsequent citations are to revised article numbers). This revision added a new Article 63/2 that authorizes an immediate request for reconsideration by the Minister of Justice ("une demande urgente de réexamen auprès du Ministre de la Justice").

A description of this reconsideration process reveals its inadequacy as a substitute for an administrative or judicial appeal procedure. Reconsideration requests are addressed to the Minister of Justice. Technically, the Minister of Justice or his delegate also makes the decision summarily refusing entry at the border. Thus, the refugee candidate merely has the opportunity to ask the same official who made the initial negative decision to change his mind. The refugee candidate must act immediately and has no time to gather further evidence that he is a refugee. Indeed, the candidate may not even know what further evidence would be pertinent, as the law does not require the Minister of Justice to state the basis of his initial decision.

57. *Id.* art. 63/2, para. 2. An asylum-seeker admitted to Belgium but refused authorization to remain has three working days in which to seek reconsideration. *Id.*

58. *Id.* art. 63/2, paras. 3-4. The Director heads the Office for Refugees and Stateless Persons. This agency replaces the UNHCR in deciding the merits of claims to refugee status. Law of July 14, 1987, art. 9. For a description of the UNHCR's role before the 1987 legislation, see *supra* note 35 and accompanying text.

Director,⁵⁹ but if he chooses to maintain the denial of admission despite a contrary opinion by the Director, he must provide reasons for his decision.⁶⁰ If the Minister of Justice continues to refuse entry, the refugee candidate may seek administrative review of the decision by the Council of State.⁶¹ Filing a petition for review with the Council of State does not, however, stay the order refusing entry and returning the refugee candidate to the country from which he came.⁶² Thus, the right of review remains a safeguard in theory but provides no protection in practice.⁶³

In one instance the new legislation does mandate a limited judicial review of a summary denial of entry. When a refugee candidate denied entry alleges that his life or liberty will be endangered if turned back to the country from which he came, he may present an emergency petition to the presiding judge of the local court of first instance.⁶⁴ He must present his claim within two working days of the decision to refuse entry.⁶⁵ The judge is limited to deciding whether

59. If an individual who commands enormous respect is appointed Director of the Office for Refugees and Stateless Persons, his recommendations may carry great weight even though they do not technically limit the authority of the Minister of Justice. Indeed, there are indications that the first person appointed to this position, discussed *supra* note 35, has such influence.

60. Law of Dec. 15, 1980, art. 63/2, para. 6. If the decision refusing entry was made by a delegate of the Minister of Justice, the request for reconsideration is addressed to the delegate. The same reconsideration procedure applies except that the delegate is bound to follow the Director's recommendation that the refugee candidate be allowed to enter Belgium. See *id.* art. 63/3, paras. 1-5.

61. *Id.* art. 63/4 (providing that the decision of the Minister of Justice concerning the request for reconsideration must be sent to the refugee candidate). The refugee candidate is simultaneously informed of the right to appeal the decision to the Council of State and of the time limit during which the appeal must be filed. *Id.*

62. Appeals to the Council of State suspend the enforcement of an administrative decision only if the legislation specifies such a suspension. The Law of July 14, 1987 does not provide that the appeal to the Council of State will have suspensive effect. In contrast, Article 63/5 provides that the government may not enforce its orders during the pendency of a request for reconsideration. Cf. Law of July 14, 1987, art. 9, 1987 *Moniteur Belge* at 11,113 (amending the Law of Dec. 15, 1980 by adding article 57/11, which stays execution of a negative decision challenged before the Refugee Appeals Commission).

63. Although leaving Belgian territory does not technically moot the appeal, it is extremely unlikely that a refugee candidate who is not in Belgium can obtain effective legal counsel to plead his cause in Belgium. Even if the refugee managed to obtain a qualified lawyer, the distance will certainly impede his ability to assist his attorney in preparing an effective appeal.

64. Law of Dec. 15, 1980, art. 70, 1980 *Moniteur Belge* at 14,603 as amended by Law of July 14, 1987, art. 16, 1987 *Moniteur Belge* at 11,118 (adding art. 70*bis*) (subsequent citations are to revised article numbers). Article 70*bis* authorizes judicial review of refused claims where the asylum-seeker contends that the refusal of admission (or expulsion) will jeopardize his life or freedom ("... sa vie ou sa liberté serait menacée..."). See also discussion of limited judicial review *supra* note 36.

65. Law of Dec. 15, 1980, art. 70*bis*.

danger to the refugee candidate's life or liberty exists.⁶⁶ He must render a decision within 15 days of the filing of the claim,⁶⁷ and the decision is final.⁶⁸

Although the pre-1987 Belgian law provided no formal appeal process to an individual denied refugee status,⁶⁹ the new legislation's inadequate review of border decisions is far worse.⁷⁰ Under the prior law, anyone stating he was a refugee was allowed to enter the country. He applied for refugee status to the UNHCR Representative who provided the refugee candidate with an extensive opportunity to present his claims and to develop his supporting evidence.⁷¹ There was nothing summary about the process. Furthermore, though the pre-1987 law did not permit a formal appeal of the UNHCR Representative's decision, broad power to reopen and reexamine the case in a deliberate and full manner did exist.⁷² Moreover, the pre-1987 legislation provided that refugee candidates deemed ineligible for refugee status and ordered by the Belgian authorities to leave the country could protest that government action through an administrative appeals process.⁷³ Thus, in contrast to those refused entry at the border pursuant to the 1987 legislation, refugee candidates admitted to Belgium prior

66. *Id.* The judge is instructed to apply the procedures that have developed with regard to the *référé*, an injunction-like proceeding. *Id.* art. 70*bis*, para. 2. See also discussion *supra* note 36.

67. *Id.* art. 70*bis* para. 4. During the 15 days, the decision to turn back the refugee candidate is stayed. *Id.* art. 70*bis* para. 5.

68. *Id.* art. 70*bis* para. 4.

69. The Representative of the UNHCR Commissioner decided which refugee candidates qualified for refugee status. Decisions denying refugee status could be reopened at any time by the UNHCR Representative. The role of the UNHCR is discussed, *supra*, in text accompanying notes 22-30. Decisions other than those recognizing refugee status were made by Belgian officials, and could be reviewed through an administrative appeal process. Asylum in Europe, *supra* note 15, at 69, ¶ 17.

70. Although the presiding judge — unlike the Director of the Office for Refugees and Stateless Persons — can overrule the denial of entry, the judicial review permitted falls far short of an adequate check on improper and incorrect decisions at the border. Only those alleging they are being sent back to a country where they are endangered can file suit, and the scope of the review is limited to threat to life or liberty. Consequently, there is no inquiry into the correct application of the criteria that can support a summary denial of entry. Moreover, the judicial proceeding must be initiated so quickly that it virtually precludes the possibility of gathering convincing evidence to substantiate the assertions of threat to life or liberty. Thus, the reviewing court is hampered by the same inadequacy of the record which hampered the reconsideration of the initial negative decision. This limited judicial review is unsatisfactory. Its inadequacy is highlighted by the huge expansion in power and discretion of the border authorities.

71. See *supra* notes 23-26 and accompanying text.

72. See *supra* notes 27-31 and accompanying text.

73. See *supra* note 36.

to 1987 had a much greater opportunity to obtain legal assistance and to assist their attorneys in preparing effective cases on their behalf.

b. Penalties on Airlines and Shipping Companies

As troubling as is the broad grant of power to the border police to refuse entry to refugees, the impact of this legislative change might be dismissed as irrelevant in light of the potential effect of the new provision regulating carriers. This feature could, if effective, prevent refugees from ever reaching the borders of Belgium. The law, directed chiefly at airlines but applicable also to ferry lines, other shipping companies, and noncommercial ventures, penalizes anyone, public or private, who brings an alien lacking proper travel documents to Belgium.⁷⁴ The law is much broader than it first appears because it imposes fines not only for those passengers who lack documents permitting entry into Belgium, but also for passengers traveling to a third country who lack documents that the third country may require.⁷⁵ As many international flights schedule layovers at Zaventem Airport outside Brussels, airline carriers are at great risk under this law.

A much more powerful threat to many carriers than the fine is the provision allowing seizure of the vessel that carried the passengers with improper travel documents.⁷⁶ Although the law includes procedures by which the seizure may be challenged and lifted,⁷⁷ these are of little consolation to commercial air companies who lose a substantial amount of money whenever their planes are grounded. Therefore, airlines flying to or through Belgium now have a huge financial incen-

74. Law of Dec. 15, 1980, art. 74, 1980 *Moniteur Belge* at 14,604 as amended by Law of July 14, 1987, art. 17, 1987 *Moniteur Belge* at 11,118 (adding arts. 74/2-74/4) (subsequent citations are to revised article numbers). This revision adds a new title regarding the obligations of those who transport aliens to Belgium. The first provision of this new title imposes fines on public companies or private individuals who bring five or more aliens lacking prescribed travel documents by air or sea to Belgium. *Id.* art. 74/2, § 1^{er}. The fine is 1,000 Belgian Francs (about U.S.\$25) per person transported to Belgium. *Id.* For purposes of the fine, immediate relatives (spouses and direct kin) are not counted as additional persons. *Id.* art. 74/2, § 1^{er}, 4^o. In addition, a carrier that does not have registered offices or a residence in Belgium is required to deposit 100,000 Belgian Francs (approximately U.S.\$2,500) for each person lacking proper travel documents. *Id.* art. 74/3; see also Arrêté Royal du 10 août 1987, [Royal Decree of Aug. 10, 1987]. 1987 *Moniteur Belge* 12,206 (fixing amount of fine at 100,000 Francs).

75. *Id.* art. 74/2, § 1^{er}, 3^o and 4^o.

76. *Id.* art. 74/3, § 2. The legislation authorizes the government to hold, at the owner's risk, the means of transport on which the infraction occurred for 96 hours until a sum covering costs, penalties, and storage is deposited. *Id.* art. 74/3, § 3. If the owner fails to make payment within 96 hours, the government may seize the vessel. *Id.* § 3.

77. *Id.* art. 74/3, §§ 3-8.

tive to remove from their planes all passengers whose travel documents raise even the slightest doubt.

B. *Denmark*

1. *Entry for Asylum-Seekers*

The Danish legislation enacted in 1983⁷⁸ has often been praised for its solicitude toward refugees.⁷⁹ As in Belgium prior to 1987, Denmark permitted an asylum-seeker at the border claiming refugee status to enter and remain while a decision was made concerning his claim.⁸⁰ Critics of this liberal refugee policy asserted that Denmark would soon be flooded with refugees. Indeed, the number of refugee claims filed in Denmark increased dramatically in the years following the 1983 legislation. Refugee applications rose from 800 in 1983 to 4,300 in 1984, and 8,700 in 1985.⁸¹ The Danish government reacted quickly to the increasing number of asylum-seekers entering Denmark, and sought more restrictive legislation.⁸² This action reflected growing public concern over the number of refugees entering the country. Although only 30,000 refugees had come to Denmark in the prior three decades, public opinion polls revealed that the average Danish citizen believed that 100,000 to one million refugees were living in Denmark.⁸³

2. *Recent Legislation*

In response to these concerns, the Danish Parliament amended the 1983 legislation three times.⁸⁴ Each time, the Parliament imposed greater barriers to entry.⁸⁵ Consequently, the Aliens Act, as last amended in 1986, is among the most restrictive in Europe.⁸⁶ The Act precludes an individual arriving at the border without a passport and visa or other proper travel documents from entering the country in order to process a claim for refugee status.⁸⁷ Although appeals of

78. Udlændingeloven [The Aliens Act], Act No. 226, June 8, 1983 (as amended by Act No. 232, June 6, 1985; Act No. 574, Dec. 19, 1985; and Act No. 686, Oct. 17, 1986).

79. See, e.g., Lamb, *supra* note 55, at 9.

80. *Id.* at 9-10; Asylum in Europe, *supra* note 15, at 103, ¶ 7.

81. Lamb, *supra* note 55, at 10. Applications further increased in 1986 to 9,300. *Id.*

82. *Id.* at 9-10.

83. *Id.* at 10.

84. See Act No. 232, June 6, 1985; Act No. 574, Dec. 19, 1985; Act No. 686, Oct. 17, 1986.

85. See Lamb, *supra* note 55, at 10.

86. *Id.* The Danish parliament considered the Aliens Act again in 1987, but decided not to revise the legislation. See Letter from Gunnar Homann, Attorney (Aug. 18, 1988) [hereinafter Homann Letter] (Copy on file at the offices of the Virginia Journal of International Law).

87. Aliens Act § 28(1)(i).

decisions denying entry are still possible, the refugee candidate must remain outside Denmark during the process.⁸⁸ In addition, the government may impose fines on carriers bringing to the country aliens lacking proper entry documents.⁸⁹ Several provisions of the 1986 legislation follow the trend in northern Europe of restricting the caravan of asylum seekers.

a. Authority to Border Police

In Denmark, as in Belgium, the new legislation places exceptional power in the hands of the border police. The Aliens Act authorizes the border police to deny entry to aliens at the border under the following six circumstances:

1. The alien lacks the necessary passport and visa that permit entry into Denmark;⁹⁰
2. The alien has previously been expelled and forbidden to re-enter Denmark;⁹¹
3. The alien intends to stay or work in Denmark without proper authorization;⁹²
4. The alien is not financially independent in Denmark and cannot pay for the return home;⁹³
5. The alien would be a threat to public order, security, or health;⁹⁴ or
6. The alien is a threat to national security.⁹⁵

i. *Border Proceedings*

The 1986 amendments did not modify the preceding grounds for denial of entry. Instead they changed the procedure at the border so as virtually to preclude the admission of all asylum-seekers. A refugee or asylum-seeker requesting entry at the Danish border or at an

88. Id. §§ 46(2), 48(2).

89. Id. § 59(3).

90. Id. § 28(1)(ii) (prohibits entry of aliens lacking the required passport and visa for entering Denmark). Generally, all aliens are required to have visas allowing entry and stay in Denmark. Id. § 4(1). However, aliens from the four other Nordic countries (Finland, Iceland, Norway, Sweden) and the eleven other countries of the European Economic Community (EEC) may enter without visas. Id. §§ 1-2.

91. Id. § 28(1)(i). If the alien possesses a visa that permits re-entry despite the earlier prohibition, he may enter. Id. § 32.

92. Id. § 28(1)(iii).

93. Id. § 28(1)(iv). This prohibition does not apply to nationals of EEC countries. Id.

94. Id. § 28(1)(v).

95. Id. § 28(3).

airport must produce a valid passport and visa.⁹⁶ A refugee lacking these documents may ask the border police to admit him or her in order to apply for asylum in Denmark. Under the new procedure the border police then telephone the Directorate for Aliens, which decides, based on the information relayed by the border police, whether to admit the asylum-seeker.⁹⁷ The Directorate generally refuses to consider the merits of the asylum request at this time, focusing instead on the refugee's request to enter Denmark.⁹⁸ As a result, many asylum-seekers are denied entry at the border.⁹⁹ Moreover, they lack an opportunity to present a well-developed, compelling case for refugee status in their initial encounter with the border police.

Arguably, the new Danish procedure is superior to the Belgian legislation because it contains a safeguard against erroneous decisions by the border police. The police, presented with a request for asylum, must telephone the Directorate of Aliens, the government agency that ordinarily determines claims to refugee status. Thus, the office responsible for resolving refugee claims, rather than the law enforcement arm of the government, technically makes the entry decision. This safeguard is illusory. Although the Directorate of Aliens rather than the border police decides entry requests, this decision is based only on what the border police relay after a cursory examination of the asylum-seeker's request.¹⁰⁰ Furthermore, the Directorate of Aliens divorces the merits of the asylum claim from the request to enter. Because most refugees lack the formal documents required for entry,¹⁰¹ an initial negative decision on an asylum-seeker's request to

96. Aliens Act § 28(1)(i). Because individuals from EEC countries and other Nordic countries need not present visas, asylum-seekers from any of those countries can enter Denmark without travel documents. *Id.* §§ 1-2.

97. G. Homann, Denmark Country Report, The Second European Hearings on the Right to Asylum I (Mar. 6, 1987) (unpublished manuscript) [hereinafter Homann Report] (Copy on file at the offices of the Virginia Journal of International Law). The *Direktoratet for Udlændinge* (Directorate for Aliens) is an administrative body charged with determining refugee status. See Aliens Act § 46(1) (providing that decisions pursuant to the Act be made by the Directorate for Aliens). Sections 7(1) and 7(2) of the Act specifically provide for decisions about refugee status and asylum in Denmark. *Id.* §§ 7(1), (2).

98. Aliens Act § 48(2), states: "An application for a residence permit under the rules in sections 7 or 8 [regarding refugees and asylum-seekers similar to refugees] shall not be treated till it has been decided whether the alien in question shall be denied entry or expelled . . . and has left the country." See also Homann Report, *supra* note 97, at 1.

99. Lamb, *supra* note 55, at 10. Between October 1986 and June 1987 Denmark admitted only 850 individuals who sought asylum at the border. *Id.* But see number of asylum-seekers allowed to enter Denmark, Jan.-Aug., 1988, *infra* note 114.

100. See Homann Report, *supra* note 97, at 1.

101. Asylum-seekers lacking proper travel documents are rejected at the border even

enter Denmark is often a foregone conclusion.

There are certain limits on denial of entry to undocumented asylum-seekers. The Danish legislation includes a provision forbidding expulsion of aliens to countries in which they risk persecution or to countries which will, in turn, deport the aliens to a country in which they risk persecution.¹⁰² Accordingly, some asylum-seekers lacking proper documents are allowed to enter Denmark.¹⁰³ Yet, this protection, more limited than it seems, results in a great many anomalous decisions. This legislative scheme, combined with the realities of international transportation, places great emphasis on the route taken by the asylum-seeker. The denial of entry generally results in the return of the alien to the country from which he most recently departed.¹⁰⁴ Consequently, an individual fleeing persecution who makes his way directly to Denmark will be allowed to enter, but his compatriot who flees the same persecution but stops en route in another country — no matter how briefly — will be refused entry if

though they are able to prove they risk persecution in their country of origin and have close ties to Denmark. Homann Letter, *supra* note 86, at 3. Thus, although they ultimately will prevail on their asylum claim, they are forced to leave Denmark and apply from abroad. The Danish procedure for applying for asylum from abroad is discussed, *infra*, notes 113-25 and accompanying text.

102. Section 8 of Act No. 686 of Oct. 17, 1986 modifies section 48(2) of the Aliens Act to read:

Where an alien claims to fall within the provisions of Sections 7 and 8, the decision on denial of entry shall be made by the Directorate for Aliens pursuant to the rules in Part V. An application for Danish residence permit under the provisions of Sections 7 and 8 shall not be considered until (a) it has been decided whether the alien concerned shall be denied entry or be expelled under the provisions of Sections 24(v) and (b) the alien concerned has left Denmark. The alien concerned shall however not be deported to a country where there is a risk of persecution on the grounds referred to in the Convention on the Legal Status of Refugees, 28th July 1951, Article 1A, or where there is no protection against further deportation of the alien to such country. Decision on expulsion shall be made by the Directorate for Aliens. Where a decision on denial of entry or on expulsion and deportation is made by the Directorate, appeal against such decision shall lie to the Minister of Justice, cf. Section 46(2). Such appeal made to the Minister of Justice shall not have suspensive effect. If the Directorate for Aliens makes no decision on denial of entry or on expulsion and deportation, the alien shall be notified of the possibility of contacting the Danish Refugee Council.

Id.

103. Those asylum-seekers allowed to enter pursuant to Section 48(2) of the Danish Aliens Act are entitled to present their claims for refugee status in the same manner as other aliens who entered Denmark *with* proper documents. Homann Letter, *supra* note 86, at 2.

104. The Convention on International Civil Aviation provides: "Upon refusal of admission and transfer back of any person, the operator shall be responsible for promptly returning him to the point where he commenced the use of the operator's aircraft or to any other place where the person is admissible." Convention on International Civil Aviation, Dec. 7, 1944, Annex 9, Standard 3.35, 59 Stat. 1693, E.A.S. No. 487, 84 U.N.T.S. 389.

that intermediate country is deemed free from persecution.¹⁰⁵ Thus, an asylum-seeker from Turkey who spent two hours in transit in an airport in the Federal Republic of Germany would be refused entry, whereas a Turkish asylum-seeker who flew directly to Denmark would be admitted.¹⁰⁶

More troubling, however, is the determination by Denmark of "safe" countries. The Directorate for Aliens decides which countries are "safe" for asylum-seekers.¹⁰⁷ A "safe" country is one that will neither persecute the asylum-seeker nor send him on to a country where he risks persecution. It should provide a "genuine state of security" for the asylum-seeker.¹⁰⁸ An asylum-seeker from a "safe" country or who has traveled through a "safe" country will not be allowed to enter Denmark. Instead, he will be returned to the "safe" country. Currently, asylum-seekers lacking the proper documents who arrive from Canada, the United States, or any of the Western European countries are rejected at the border, no matter what their country of origin nor how tenuous their connection with the "safe" country.¹⁰⁹

Although the legislation precludes return of an asylum-seeker to a country that might deport him to his country of origin where he risks persecution, the Danish authorities do not seek any guarantees from an intermediate "safe" country that it will allow the asylum-seeker to stay there.¹¹⁰ Instead, the Danish officials rely on the fact that generally the transit countries are signatories of the Geneva Convention and thus are obligated to refrain from returning asylum-seekers to countries in which they will be persecuted.¹¹¹ Unfortunately, in dealing with asylum-seekers, theory and practice often diverge. In fact, the "safe" countries often have different opinions as to which other countries may be "safe" for an asylum-seeker.¹¹² As a consequence,

105. As mentioned earlier, *supra* note 98, the merits of the asylum claim are not considered. Thus, an asylum-seeker entitled under § 7(4) of the Aliens Act to reside in Denmark will be rejected if he lacks the proper travel documents and travelled through a "safe" country. He will be forced to apply for asylum from abroad. Homann Letter, *supra* note 86, at 3.

106. Homann Letter, *supra* note 86, at 2.

107. *Id.* at 3.

108. Castellani, *supra* note 55, at 31.

109. Letter from Eva Kjaergaard, Legal Advisor, Danish Refugee Council (Sept. 1, 1988) [hereinafter Kjaergaard Letter] (Copy on file at the offices of the Virginia Journal of International Law); Homann Letter, *supra* note 86, at 3.

110. Homann Letter, *supra* note 86, at 3.

111. Article 33 of the 1951 Refugee Convention prohibits returning refugees to countries where their lives or freedom would be threatened. 1951 Refugee Convention, *supra* note 7. See also discussion *infra* notes 294-99 and accompanying text.

112. Castellani, *supra* note 55, at 31.

Danish border guards may turn an asylum-seeker back to an intermediate "safe" country, which in turn sends him on to a country which the Danish authorities deem "unsafe." Thus, Danish authorities accomplish indirectly what they are prohibited from doing directly.¹¹³

In the future, similar "mistakes" are bound to recur. These mistakes undercut the protection that the Danish legislation in theory affords to asylum-seekers.¹¹⁴ As a consequence, the need for an effective appeal from rejection at the border is great.

ii. *Lack of Effective Appeal*

Danish law provides that an individual denied entry at the border may ask the Minister of Justice to reconsider this negative decision.¹¹⁵ The asylum-seeker must leave Denmark immediately, however, and await the Minister of Justice's decision elsewhere.¹¹⁶ Consequently, the asylum-seeker's ability to prepare an adequate request for reconsideration is limited. In most cases this places an insuperable burden

113. For example, the Danish policy is that Iranian asylum-seekers cannot be returned to Turkey, because they risk deportation from Turkey to Iran. Homann Letter, *supra* note 86, at 3. Nonetheless, Iranian asylum-seekers who travelled to Denmark through Turkey and the Federal Republic of Germany have been rejected at the Danish border and returned to the Federal Republic. The Federal Republic then returned them to Turkey. By pushing these Iranian asylum-seekers back to the Federal Republic without any guarantees that the Federal Republic would allow them to enter or that, at least, the Federal Republic would not send them on to an "unsafe" country such as Turkey, the Danish legislation forbidding expulsion to unsafe countries was eviscerated. *Id.* For other examples, see Castellani, *supra* note 55, at 32-33.

114. From January 1, 1988 to August 14, 1988, 722 asylum-seekers were rejected at the Danish border and returned to the country from which they came. During the same period, 2,540 asylum-seekers were allowed to enter Denmark. Those allowed to enter fell into the following categories: (1) asylum-seekers arriving directly from countries in which they fear persecution, (2) asylum-seekers who travelled through an intermediate country in Eastern Europe (Eastern European countries deemed "unsafe"), (3) unaccompanied minors, (4) asylum-seekers who have destroyed travel documents and other proof of travel route to prevent the authorities from determining the countries to which they should be returned, and (5) asylum-seekers with proper travel documents. Homann Letter, *supra* note 86, at 3-4.

115. The Aliens Act § 46(2), provides that decisions of the Directorate for Aliens may generally be appealed to the Minister of Justice. Section 48(2) of the Act further specifies that decisions concerning denial of entry to asylum-seekers shall be appealed to the Minister of Justice in accordance with § 46(2). Although § 53(a) provides for certain appeals from the Directorate for Aliens to another administrative body known as the Refugee Board, such appeals pertain only to residence permits and travel documents, not to denials of entry. *Id.* § 53a(1). See also Homann Report, *supra* note 97, at 1.

116. Aliens Act § 48(2), specifies that appeals of denials of entry to asylum-seekers "shall not suspend the operation of an administrative decision." However, an alien shall not be expelled to a country in which the alien risks being persecuted on the grounds set forth in Article 1A of the Convention on Status of Refugees, or where the alien will not be protected from such expulsion. *Id.* See also Homann Report, *supra* note 97, at 1.

on the refugee's Danish advocate. The Belgian legislation, which allows reconsideration prior to departure, is superior to Danish law in at least this respect.¹¹⁷

More significantly, however, the scope of the review on appeal is exceedingly narrow in light of the bifurcation of the entry and asylum request. The legal issue under reconsideration is the asylum-seeker's entitlement to enter Denmark.¹¹⁸ Because the asylum-seeker in most cases lacks the requisite entry documents, he will not be able to prove that he was technically entitled to enter. In reality, the error that the asylum-seeker is protesting is not the incorrect evaluation of his entry documents, but rather the denial of the opportunity to enter Denmark and show that he is entitled to asylum under Danish law.¹¹⁹ This error, however, is not cognizable on appeal.¹²⁰

117. Furthermore, although an asylum-seeker can seek reconsideration of a negative decision on entry, the reconsideration process lacks the indicia of an appeals procedure aimed at rooting out error. The appeal is to the same government agency that made the original decision.

118. See Aliens Act § 48(2) ("If the Directorate for Aliens makes a decision as regards denial of entry or expulsion, the decision can be appealed against to the Minister of Justice.").

119. On occasion, an asylum-seeker denied entry at the border may seek to show that the Danish authorities violated § 48(2) of the Aliens Act by returning him to an unsafe country. The fact that he is able to present an appeal from this "unsafe" country to some extent undercuts his argument.

120. This procedure that denies entry without closely examining the merits of the asylum claim reveals the exceedingly restrictive effect of the 1986 legislation. Yet Danish law continues to maintain adequate procedures for determining asylum applications filed by asylum-seekers who have already entered Denmark. For example, sections 53 to 58 of the Aliens Act establish elaborate procedures for review of decisions made by the Directorate for Aliens concerning refugee status. These procedures include review by a Refugee Board composed of judges and other members nominated by the Danish Refugee Council and government ministers. Aliens Act § 53(1). The appellant may plead his case orally before the Board, *id.* § 56(1), may be represented by a lawyer, *id.* § 55(1), and may have a lawyer appointed with costs paid by the government. *Id.* § 58.

In addition the Danish law provides that a refugee who is unable to meet the precise elements of the refugee definition in the 1951 Refugee Convention (Convention-status or K-status) may still be deemed a refugee if he can show "reasons similar to those listed in the Convention or . . . other weighty reasons" that preclude returning the asylum-seeker to his home country (*de facto*-status or F-status). *Id.* § 7(2). Furthermore, the law allows that a residence permit may be granted to an alien who lacks close connections to Denmark if "essential considerations of a humanitarian nature . . . make it appropriate," *id.* § 9(2)(ii) or "exceptional reasons otherwise make it appropriate." *Id.* § 9(2)(iv).

Danish law also mandates generous assistance to those aliens in Denmark whose asylum applications are pending. Section 42a of the Aliens Act provides that asylum-seekers in Denmark who have applied for refugee or *de facto* refugee status shall receive financial assistance, if needed, from the Directorate for Aliens. See Lamb, *supra* note 55, at 11 ("Once a refugee has been granted status, . . . they have the right to work, public welfare assistance, full access to the Danish school system and may even vote in local elections."). However, Danish law now makes it practically impossible for asylum-seekers to enter Denmark and avail themselves of these procedures.

Furthermore, there is no possibility of judicial review of the decision of the Minister of Justice. If the Minister of Justice upholds the refusal of entry, no appeal is possible. In theory, at least, another avenue of relief is available. The law allows an asylum-seeker to apply for asylum at a Danish consulate abroad.¹²¹ This procedure is not, however, as generous as it may appear at first glance. To be granted asylum in Denmark from abroad, an asylum-seeker must satisfy more stringent requirements than had he entered Denmark and filed his asylum application there. If he applies while he is in Denmark, he must show only that he has a well-founded fear of persecution in his country of origin,¹²² or that he can demonstrate other weighty reasons why he should not be returned to his homeland.¹²³ For an applicant from abroad, proving a well-founded fear of persecution or other weighty reasons for remaining away from his country of origin is not enough. He must also demonstrate that his relationship to Denmark is closer than his relation to any other country.¹²⁴ Thus, as a practical matter, only an asylum-seeker who has close relatives already living in Denmark¹²⁵ or has himself previously lived in Denmark in a lawful status has any hope of successfully applying for refugee status abroad,¹²⁶ no matter how compelling his claim.¹²⁷

121. Aliens Act § 7(4); Homann Report, *supra* note 97, at 1-2. See Danish officials will give an asylum-seeker rejected at the border a list of Danish consulates and written guidelines on filing asylum applications abroad. *Id.*

122. The Aliens Act provides that residence permits shall be issued to aliens who fall within the provisions of the 1951 Geneva Convention on the Status of Refugees. Aliens Act § 7(1). The Convention recognizes as refugees those who are outside their country of nationality face a well-founded fear of persecution in their country of nationality based on race, religion, nationality, membership of a particular social group, or political opinion. 1951 Refugee Convention, *supra* note 7, art. I.A.(2).

123. The Aliens Act § 7(2) expressly provides that residence permits shall also be issued to aliens who do not satisfy the 1951 Refugee Convention definition of refugee, but who, "for reasons similar to those listed in the Convention or for other weighty reasons . . . ought not to be required to return to his home country." *Id.*

124. The Aliens Act § 7(4) provides that an alien outside Denmark who qualifies as a refugee or *de facto* refugee under subsections 7(1) and 7(2) may receive a residence permit "if because of the alien's previous prolonged stay in Denmark, or close relatives living in Denmark or of other relationship, Denmark [is] deemed to be the country nearest to affording protection to that alien." See also Homann Report, *supra* note 97, at 2. This "close relationship" requirement is not applied to an asylum-seeker in Denmark requesting refugee status. Instead, such claims are evaluated only to determine if they satisfy the definition of refugee set forth in the 1951 Refugee Convention, *supra* note 7, or the legislative criteria set forth for *de facto* refugee status, discussed *supra* note 120.

125. It may be insufficient to have a brother or sister living in Denmark if the asylum-seeker's relationship with his sibling is not a close one. M. Kjaerum, *An Asylum Seeker's Way Through the System* 10 (1988).

126. *Id.*

127. Even an asylum-seeker with relatives in Denmark does not fare well in an application

Similarly, the possibility of appeal of the denial of an application submitted from abroad is severely limited. An application for asylum received from a Danish consulate abroad is sent through the Ministry for Foreign Affairs to the Directorate of Aliens.¹²⁸ Negative decisions by the Directorate of Aliens can be appealed to the Refugee Appeals Board.¹²⁹ If the asylum-seeker has relatives living in Denmark or other close links to Denmark, the Appeals Board will appoint a lawyer to represent him.¹³⁰ Few asylum-seekers have such ties.¹³¹ Even those who do and who have lawyers appointed rarely have a chance to meet or correspond with their attorneys.¹³² Consequently, most appeals are based solely on the written record below¹³³ and are unsuc-

from abroad. The relative living in Denmark must be a close relative; even a brother or sister may not suffice if the sibling relationship has not been a close one. *Id.*

Once the family hurdle is cleared, the asylum-seeker still faces many obstacles. He will generally be applying for asylum at a Danish consulate that is not located in his home country. Article 1A(2) of the 1951 Refugee Convention, *supra* note 7, defines a refugee as one "outside the country of his nationality" or "not having a nationality and . . . , outside the country of his former habitual residence." See Kjaergaard, the "New" Asylum Rule and its Implementation, in *Current Asylum Policy and Humanitarian Principles* 21, 24-25 (1988). He will probably not speak either Danish or the language of the local consulate employees and will thus have difficulty in obtaining advice about the asylum application and complying with the required procedures. Kjaergaard, *supra*, at 25.

In addition to the lack of interpreters, the asylum-seeker will face other problems. Consulate personnel are understaffed and untrained in refugee law. The asylum-seeker may fear disclosing to government officials details of the activity that triggered persecution by public officials in his home country. Moreover, if he applies for asylum in a country neighboring his own, he may also fear that local authorities will notify his home country of the asylum application and even repatriate him as a diplomatic gesture of good will. An asylum-seeker who overcomes these fears may well have difficulty expressing himself in writing. *Id.* His relatives in Denmark may also be uneducated and unsophisticated and unable to provide guidance. Even if the relative in Denmark is educated and eager to help, he is not allowed to act on behalf of the asylum-seeker without written authorization. *Id.* at 26. All in all, the avenue of applying from abroad is a narrow one.

128. *Id.* The Directorate of Aliens estimates that it has received 4,000 applications from abroad since the 1986 amendment to the Aliens Act; approximately 2,000 of those applications have been filed in Lebanon by stateless Palestinians. *Id.* at 23.

129. *Id.* The Refugees Appeal Board is an administrative body with 7 members. The chairman must be a judge. The Minister of Justice, the Minister for Social Welfare, the Minister for Foreign Affairs, and the Bar Association each nominate one member. The Danish Refugee Council nominates the other two members. Kjaerum, *supra* note 125, at 13. The Directorate of Aliens estimates that since the 1986 Amendment to the Aliens Act it has granted 50 applications and denied 1,700 applications from abroad. Kjaergaard, *supra* note 127, at 29.

130. Kjaergaard, *supra* note 127, at 26. Over 90% of appeals without a lawyer are rejected by the Refugee Appeals Board.

131. *Id.*

132. Kjaergaard, *supra* note 127, at 26.

133. *Id.*

cessful.¹³⁴ There is no administrative or judicial review of negative decisions of the Refugee Appeals Board.¹³⁵

In sum, the 1986 grant of authority to the border police to reject asylum-seekers at the border and at airports, coupled with the restrictive technical approach to reviewing denials of entry, the lack of judicial review, and the inadequacies of filing an asylum application from abroad, has dramatically decreased the number of asylum-seekers in Denmark.

b. Penalties on Airlines and Shipping Companies

In addition to revising the entry procedures, the 1986 legislation explicitly provides penalties for persons bringing aliens without proper travel documents to Denmark.¹³⁶ The offending carriers are strictly liable and can be fined even if they were totally unaware that a passenger lacked a valid passport and visa.¹³⁷ Under this provision the Minister of Justice has the authority to specify sanctions against carriers that transport asylum-seekers who lack valid passports and entry visas to Denmark.¹³⁸ Interestingly, the Minister of Justice has not yet set forth regulations detailing the applicable sanctions. Nonetheless, the very fact that the Minister has the explicit power to establish penalties against transporters has had a powerful effect.¹³⁹ Air carriers, in particular have become extremely restrictive, prohibiting aliens who lack entry permits from boarding airplanes bound for Denmark.¹⁴⁰

Indeed, the Danish experience highlights the power of financial penalties on private companies. The law accomplishes its purpose — preventing most incompletely documented aliens from boarding Denmark-bound vehicles — even though it has not been implemented. A

134. The Refugee Board estimates that since the 1986 amendment to the Aliens Act it has received 150 appeals of asylum applications filed abroad. It has decided approximately 40 cases and rejected most of them. Kjaergaard, *supra* note 127, at 29.

135. *Id.* at 15.

136. The 1986 amendment, Act No. 686 of Oct. 17, 1986, added a new final paragraph to section 59 of the Aliens Act: "With penalty shall be punished any person who brings to this country an alien who upon his entry is not in possession of requisite travel permit and visa . . ." Aliens Act § 59(3).

137. M. Kjaerum, *supra* note 125, at 11.

138. Homann Report, *supra* note 97, at 6.

139. See *id.* ("[T]he mere existence of the rule has made the carriers more reluctant to transport passengers without proper travel documents.").

140. *Id.* Interview with Gunnar Homann, Attorney, in Copenhagen, Denmark (July 17, 1987); see also Lamb, *supra* note 55, at 10 ("Since 1 January this year, fewer than 25 per cent of the 235 rejected cases were turned away at the airport, suggesting that the airlines have taken the threat seriously and are applying controls themselves.").

mere threat is sufficient. As a result, most asylum-seekers never even reach Danish borders or airports where they can at least apply for asylum and hope for a sympathetic hearing.

C. *The Federal Republic of Germany*

1. *Entry for Asylum-Seekers*

The Constitution of the Federal Republic of Germany guarantees political refugees asylum in Germany.¹⁴¹ This constitutional guarantee, extensively interpreted and developed by the German courts, is supplemented by legislation regulating the admission of asylum-seekers and the recognition of those who qualify as political refugees.¹⁴² Prior to 1987 an asylum-seeker entering the Federal Republic legally or illegally began the asylum process by applying to the local aliens police for refugee status and asylum.¹⁴³ An alien stopped at the border who lacked the necessary visa and other travel documents could apply for asylum to the border police.¹⁴⁴ The border police generally referred the informal asylum application to the local aliens police and allowed the asylum-seeker to enter the country. In certain circumstances, however, the border police could deny entry and refuse to refer the asylum request to the aliens police.¹⁴⁵ If the border police believed the asylum-seeker had already found protection from perse-

141. Grundgesetz [GG], art. 16, § 2 ("Persons persecuted on political grounds shall enjoy the right to asylum.").

142. Gesetz über das Asylverfahren vom 16 Juli 1982 [Law of July 16, 1982 on Asylum Procedure], 1982 Bundesgesetzblatt [BGBl.] I 946. The Asylverfahrensgesetz (AsylVfG) [Asylum Procedure Law] is the basic legislative act regulating the procedures by which asylum-seekers may enter and seek refugee status in the Federal Republic of Germany. It is roughly analogous to the Refugee Act of 1980 in the United States.

The Asylum Procedure Law of July 16, 1982 was modified by legislation passed on July 11, 1984. See Gesetz vom 11 Juli 1984, 1984 BGBl. I 874. It was further modified on January 6, 1987. See Gesetz zur Änderung asylverfahrensrechtlicher, arbeitserlaubnisrechtlicher und ausländerrechtlicher Vorschriften vom 6. Januar 1987 [Law of January 6, 1987 to amend the process governing asylum, work permits, and aliens], 1987 BGBl. I 89.

143. AsylVfG § 8(1), 1982 BGBl. I at 947. An alien must file his asylum application with the *Ausländerbehörde* (aliens police) located in the district where the alien resides. Although the ultimate decision on recognition as a refugee is made by the *Bundesverwaltung* (federal authorities), the initial applications and matters concerning social assistance are handled by the *Länderverwaltung* (state authorities). Each *Land* (state) has its own aliens police. *Id.*; see also Asylum in Europe, *supra* note 15, at 154-55, ¶¶ 15-16 (describing initial application procedure).

144. AsylVfG § 9(1), 1982 BGBl. I at 947. Section 9(1) provides that an asylum-seeker who makes known his asylum claim to the *Grenzbehörde* (border police) should be referred to the competent aliens police for further developing the request. See also Asylum in Europe, *supra* note 15, at 155, ¶¶ 16-17.

145. AsylVfG §§ 9(1), 7(2)-(3), 1982 BGBl. I at 947. Section 9(1) refers to sections 7(2) and 7(3), and provides that an asylum-seeker should be denied entry if he already found protection

cution in another country before he attempted to come to Germany,¹⁴⁶ the police could refuse entry altogether.¹⁴⁷ In addition, the Federal Republic had concluded reciprocal agreements with nine neighboring countries regulating the flow of asylum-seekers, and the border police relied on these agreements to turn away many asylum-seekers at the border.¹⁴⁸

An asylum-seeker authorized to enter the Federal Republic in order to seek recognition as a refugee was required to initiate the formal asylum process by filing an application with the aliens police.¹⁴⁹ The aliens police denied all applications where the Federal Republic had previously denied the asylum claim and the circumstances had not changed,¹⁵⁰ and where the applicant had previously secured pro-

elsewhere or carried a travel document indicating that he had been recognized as a refugee by another country. *Id.*

146. See AsylVfG § 2, 1987 BGBl.I at 946 (referring to *anderweitiger Schutz vor Verfolgung* (protection elsewhere)). Under the 1982 law, aliens who had already found protection from persecution in another country had no right to asylum. *Id.* Protection from persecution was defined not only as freedom from persecution in another country, but also as freedom from fear of deportation to a country where there is a threat of political persecution. *Id.* Compare similar provision under Danish law, *supra* notes 102-113 and accompanying text.

147. For example, a country that has signed the 1951 Geneva Convention Relating to the Status of Refugees is required to issue to a refugee lawfully staying within its territory a Convention Travel Document, which provides the refugee with a passport substitute and permits him to travel to other countries. (A sample travel document is annexed to the 1951 Refugee Convention.) 1951 Refugee Convention, *supra* note 7, art. 28. Thus, an asylum-seeker carrying a Convention Travel Document would be presumed to have found protection from persecution in the country that issued the Document and, consequently, would not be permitted to enter the Federal Republic to apply for asylum. AsylVfG § 7(3), 1982 BGBl.I at 947 (providing that an alien who bears a travel document issued by another country in recognition of the alien's status as a refugee is deemed to have already found protection in that country). See Asylum in Europe, *supra* note 15, at 155, ¶ 17. An individual traveling on a Convention Travel Document to the Federal Republic for *non*-asylum reasons would be allowed entry provided he had a visa issued by the Federal Republic. A Convention Travel Document and visa should thus be sufficient to allow the bearer to enter the Federal Republic for business, tourist, or family reasons. Telephone Interview with Rudolf Klever, Member, Steering Committee, European Legal Network on Asylum (Feb. 8, 1989) [hereinafter Klever Interview].

148. Asylum in Europe, *supra* note 15, at 156, ¶ 21. These agreements bind Austria, Belgium, France, Luxembourg, the Netherlands, Norway, Sweden, Switzerland, and Denmark to take back asylum-seekers who have left their borders to seek asylum in the Federal Republic. They apply both to asylum-seekers who have only briefly passed through the countries and to those who have been present for a longer time. Klever Interview, *supra* note 147. Because the agreements are reciprocal, the countries in question also return to the Federal Republic many asylum-seekers who have passed through the Federal Republic en route to the country where they have applied for asylum. See, e.g., Refugees, June 1987, at 10.

149. AsylVfG § 8(1), 1982 BGBl.I at 947; Asylum in Europe, *supra* note 15, at 155, ¶ 18.

150. AsylVfG § 14, 1982 BGBl.I at 948 (forbidding consideration of new asylum applications based upon evidence presented in a previously denied application); Asylum in Europe, *supra* note 15, at 155, ¶ 18.

tection from persecution in another country.¹⁵¹ If neither of these factors was present, the aliens police sent the asylum application, along with a report of the preliminary interview,¹⁵² to the Federal Office for the Recognition of Foreign Refugees.¹⁵³

The Federal Office then interviewed the applicant more extensively.¹⁵⁴ During this interview the asylum-seeker had the right to the presence of an attorney and an interpreter of his choice.¹⁵⁵ A staff member of the Federal Office prepared a report on the interview.¹⁵⁶ This report along with the earlier report from the aliens police and other documentary evidence became the record on which the Federal Office issued a written decision¹⁵⁷ recognizing or denying the applicant's claim.¹⁵⁸ A decision granting asylum could be appealed to the courts by the Federal Commissioner for Asylum Affairs.¹⁵⁹ A decision denying asylum could be, and often was, appealed to the courts by the asylum-seeker.¹⁶⁰ Filing an appeal stayed all efforts by the gov-

151. AsylVfG § 7(2), 1982 BGBl.I at 947; Asylum in Europe, supra note 15, at 155, ¶18(a); see also AsylVfG § 2, 1982 BGBl.I at 946 (defining "protection elsewhere").

152. AsylVfG § 8(2), 1982 BGBl.I at 947; see also Asylum in Europe, supra note 15, at 155, ¶ 18.

153. AsylVfG § 8(5), 1982 BGBl.I at 947. Section 8(5) requires that the aliens police transmit the asylum application to the federal agency charged with refugee status decisions, the *Bundesamt für die Anerkennung ausländischer Flüchtlinge* (Federal Office for the Recognition of Foreign Refugees). See Asylum in Europe, supra note 15, at 155, ¶ 18.

154. AsylVfG § 12, 1982 BGBl.I at 948 (providing that an asylum-seeker have a hearing before the Federal Office); Asylum in Europe, supra note 15, at 156, ¶ 22.

155. AsylVfG § 8(4), 1982 BGBl.I at 947; Asylum in Europe, supra note 15, at 156, ¶ 23.

156. AsylVfG § 12(1), 1982 BGBl.I at 948; see also Asylum in Europe, supra note 15, at 156, ¶ 24.

157. AsylVfG § 12(6), 1982 BGBl.I at 948 (requiring a written decision); Asylum in Europe, supra note 15, at 156, ¶ 25.

158. AsylVfG § 4(1), 1982 BGBl.I at 946. The Federal Office has the power to make all decisions concerning asylum applications pursuant to the Asylum Protection law of 1982. *Id.*

159. AsylVfG § 5(2), 1982 BGBl.I at 946 (authorizing the *Bundesbeauftragter für Asylangelegenheiten* (Federal Commissioner for Asylum Affairs) to appeal decisions by the Federal Office); Asylum in Europe, supra note 15, at 157, ¶ 29. Decisions granting asylum to applicants from Eastern European countries were rarely appealed. The vast majority of decisions granting asylum to applicants from non-Eastern European countries were appealed by the Federal Commissioner. Klever Interview, supra note 147.

160. AsylVfG §§ 28(1), 30, 1982 BGBl.I at 951; see also Asylum in Europe, supra note 15, at 157-58, ¶¶ 31-33. Some asylum-seekers who receive a negative decision from the Federal Office are allowed to remain in the Federal Republic based on humanitarian grounds. Each of the *Länder* (states) sets its own policy as to which groups of asylum-seekers may remain. For example, all of the states except Baden-Württemberg and Bavaria have issued directives allowing Tamils to remain despite negative decisions on their asylum applications by the Federal Office. Such asylum-seekers generally do not appeal. Klever Interview, supra note 147.

For asylum-seekers not allowed to remain on humanitarian grounds, a denial of asylum by the Federal Office leads to an order issued by the aliens police to the asylum-seeker to leave the

ernment to expel the asylum-seeker.¹⁶¹ The appeals process itself could take many years.¹⁶² Thus, the incentive to appeal a negative asylum decision was great.

During the 1980's the number of asylum-seekers in the Federal Republic increased dramatically. Asylum applications increased from 35,728 in 1984 to 73,832 in 1985 and 99,650 in 1986.¹⁶³ Public dis-

country. AsylVfG § 28(1). AsylVfG § 30 provides that the asylum-seeker must challenge both the Federal Office's denial of asylum and the aliens police's order to leave the country in one judicial proceeding. *Id.*

If the Federal Office rejects the asylum application as "*offensichtlich unbegründet*" (manifestly unfounded), the applicant is given one month to challenge the decision in a *Beschwerde* (summary proceeding) before the local *Verwaltungsgericht* (Administrative Court). Filing this challenge does not stay the deportation order. *Id.* § 11(2), 1982 BGBI.I at 948. Rather, within one week of the negative decision from the Federal Office, the asylum-seeker must separately file an application with the court seeking to suspend the effect of the order. *Verwaltungsgerichtsordnung* (VWGO) [Rules of the Administrative Courts] § 80, § V, 1986 BGBI.I 2191. If he fails to seek a stay of the Federal Office's decision, the aliens police may deport him — despite the fact that the one month deadline for seeking review of the decision may not yet have expired or, if he has already sought review of the decision, despite the fact that a challenge is pending.

If the Court finds that the application is manifestly unfounded, no further appeal is allowed. AsylVfG § 32(6), 1982 BGBI.I at 952; Asylum in Europe, *supra* note 15, at 157-58, ¶¶ 32-33; see also *id.* at 155-56, ¶ 19. An asylum-seeker can, however, seek an injunction from the highest court or *Bundesverfassungsgericht* (Federal Constitutional Court) by arguing that the denial of his asylum claim violates the constitutional guarantee of asylum to victims of political persecution. The Federal Constitutional Court only rarely provides relief in asylum cases. During the months (often two or three) the asylum-seeker awaits the decision of the Constitutional Court, he is in a "tolerated" status and will not be deported. Letter from Rudolf Klever, Member, Steering Committee, European Legal Network on Asylum (Sept. 3, 1988) [hereinafter Klever Letter].

If the Court upholds the rejection of the application, but does not find that it is manifestly unfounded, an appeal is allowed in cases which present important issues of law or which conflict with higher court decisions. AsylVfG § 32(2), 1982 BGBI.I at 952; see also Asylum in Europe, *supra* note 15, at 158, ¶ 35. The denial of an appeal can itself be challenged in a summary proceeding before the *Oberverwaltungsgericht* (Administrative Court of Appeals). AsylVfG § 32(4), 1982 BGBI.I at 952; Asylum in Europe, *supra* note 15, at 158, ¶ 36; see generally *id.* at 157-58, ¶¶ 32-37; Aleinikoff, Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States, 17 U. Mich. J.L. Ref. 183, 209-11 (1984).

161. AsylVfG § 30, 1982 BGBI.I at 951; Asylum in Europe, *supra* note 15, at 158, ¶ 38. Section 11(2) provides, however, that an appeal of the Federal Office's decision that an application is manifestly unfounded does not suspend expulsion. *Id.* § 11(2), 1982 BGBI.I at 948. Similarly, an appeal of a denial of asylum based on a finding of protection elsewhere, *supra* note 120, possession of refugee status, or subsequent submission of a previously rejected asylum application without new evidence did not suspend expulsion. *Id.* § 10(3), 1982 BGBI.I at 947.

162. Avery, *supra* note 22, at 285 (stating that an appeal could take up to eight years). See also Aleinikoff, *supra* note 160, at 209 (noting that adjudication process was so lengthy that it encouraged more asylum-seekers to seek review).

163. Wolken, Country Report of the Federal Republic of Germany, European Consultation on Refugees and Exiles 1 (Mar. 9-10, 1987) [hereinafter Wolken Report I]. The total number

may, which had been slowly building as the number of applicants rose, increased to a fever pitch in 1986 due to the manipulation of asylum-seekers by the authorities of the German Democratic Republic. The focal point of the crisis was Berlin, which formally is still occupied by the four victorious Allied Powers of World War II.¹⁶⁴ Because Berlin is an occupied city, as a legal matter its sovereignty lies with neither the Federal Republic of Germany nor the German Democratic Republic, but with the four occupying countries.¹⁶⁵ In addition, the Federal Republic views traffic between the various occupied sectors as traffic within one German city.¹⁶⁶ Consequently, the Federal Republic and the occupying powers have not established passport controls for entry into West Berlin from East Berlin.¹⁶⁷

Exploiting this "Berlin Gap," the government of the German Democratic Republic freely dispensed transit visas authorizing travel through, but not permission to stay in, East Germany and allowed plane-loads of asylum-seekers from Third World countries to land in East Berlin.¹⁶⁸ After collecting air fare charges, payable only in hard

of asylum-seekers decreased in 1987 to 57,379. During 1988 the numbers rose again, with 39,885 asylum-seekers registered during the first six months of 1988. Wolken, Country Report for the Federal Republic of Germany, European Consultation on Refugees and Exiles 2 (Oct. 1-2, 1988) [hereinafter Wolken Report II].

164. Before the end of World War II, the United States, Great Britain, and the Soviet Union agreed that their armies would occupy Berlin after their eventual victory over Germany. Protocol on Zones of Occupation and Administration of "Greater Berlin," Sept. 12, 1944, 5 U.S.T. 2078, T.I.A.S. No. 3071, 227 U.N.T.S. 279. From 1945 until 1955 these three armies, along with the French army, occupied all of Germany, including Berlin. In 1955, the United States, England, and France transferred governance of Germany to the newly created Federal Republic of Germany. Protocol on Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 4117, T.I.A.S. No. 3425, 331 U.N.T.S. 253. The occupation of West Berlin, however, continued, and Soviet troops remained in East Berlin. In 1971, the four occupying powers signed an agreement, which the Federal Republic of Germany was not allowed to sign, detailing obligations concerning travel between the Federal Republic and West Berlin and entry into the various sectors of Berlin. Quadripartite Agreement on Berlin, *supra* note 164, note.

165. For example, in 1971 the United States, the United Kingdom, and France notified the Federal Republic that "[our] governments will continue, as heretofore, to exercise supreme authority in the Western Sectors of Berlin." Quadripartite Agreement on Berlin, *supra* note 164, note.

166. Asylum in Europe, *supra* note 15, at 154, ¶ 11. The forces occupying West Berlin, refuse to erect regular border controls between East and West Berlin because they maintain that Berlin is still one unified city as it was in 1945. See, e.g., *Int'l Herald Tribune*, July 26, 1986, at 6, col. 2.

167. Asylum in Europe, *supra* note 15, at 154, ¶ 11; Markham, *Influx of Refugees to Berlin Stirs Debate*, *Int'l Herald Tribune*, July 26-27, 1986, at 6.

168. See, e.g., Markham, *supra* note 167. For a general description of the surge of asylum-seekers through the "Berlin Gap", see Kjaerum, *The Danish Procedure of Denial of Entry into Denmark, in Current Asylum Policy and Humanitarian Principles* 3, 3-6 (1988). Prior to 1986 many asylum-seekers traveled through East Germany to Sweden and Denmark. At the end of

currency, East German authorities immediately conducted the new arrivals to the crossing points to West Berlin, where no passports or visas were demanded for entry.¹⁶⁹ Once in West Berlin, the asylum-seekers were cared for by the West German government.

As the numbers of asylum-seekers entering the Federal Republic via East Berlin mounted daily, the political temper in the Federal Republic soared.¹⁷⁰ Not wishing to acknowledge divided sovereignty in Berlin, the western occupying powers and the West German government refused to institute passport controls at the city border crossings.¹⁷¹ Instead they pressured the East German government, a beneficiary of large loans from West Germany, to halt the importation and transit of Third World asylum-seekers.¹⁷² Finally, an agreement was reached. The German Democratic Republic closed the Berlin Gap on October 1, 1986 by limiting its issuance of transit visas to individuals possessing valid entry visas issued by the Federal Republic.¹⁷³ This change in East German policy had an immediate and drastic effect. The number of asylum-seekers filing applications in the Federal Republic decreased from 14,812 in August 1986 to 4,764 in November 1986 and continued to decrease thereafter.¹⁷⁴

2. *Recent Legislation*

Although the immediate crisis of the "Berlin Gap" subsided, political discontent with the refugee process in the Federal Republic continued. The campaigns for the general elections on January 25, 1987 included numerous exhortations to admit fewer asylum-seekers.¹⁷⁵ In addition, in late 1986 the Parliament enacted legislation designed to speed the asylum process and discourage abuse of the asylum sys-

1985 the Swedish and Danish governments concluded agreements with the East German government to prevent asylum-seekers lacking valid passports and visas from continuing on to Sweden and Denmark. As a consequence, the number of asylum-seekers entering Denmark dropped from 1140 in November 1985 to 213 in January 1986. The stream of asylum-seekers did not stop. It was instead diverted from Denmark and Sweden to West Germany. *Id.* at 3.

169. Kjaerum, *supra* note 168, at 3; *Int'l Herald Tribune*, July 29, 1986, at 2, col. 1.

170. Wood, *Bonn Says Refugees Have Become a Threat*, *Int'l Herald Tribune*, July 24, 1986, at 1, col. 5; Markham, *supra* note 167; *Int'l Herald Tribune*, July 29, 1986, at 2, col. 1.

171. Markham, *supra* note 167.

172. *Id.*; see also *Int'l Herald Tribune*, Sept. 19, 1986, at 5, col. 1.

173. Wolken Report I, *supra* note 163, at 1; *Int'l Herald Tribune*, Sept. 29, 1986, at 5, col. 1.

174. Wolken Report I, *supra* note 163, at 1-2.

175. See, e.g., Markham, *Kohl Unveils Plan to Limit Immigration*, *Int'l Herald Tribune*, Aug. 28, 1986, at 1, col. 8.

tem.¹⁷⁶ The Law of January 6, 1987 amending the process governing asylum, work permits, and aliens¹⁷⁷ erects new barriers for asylum-seekers.¹⁷⁸ The new law gives border guards more power to refuse entry to asylum-seekers, imposes fines on carriers that transport aliens lacking travel documents to the Federal Republic, restricts the grounds on which an asylum application can be granted,¹⁷⁹ and

176. See Zar Aktuell (quarterly information service of the Zeitschrift für Ausländerrecht und Ausländerpolitik (Journal of Aliens Law and Policy)), Jan. 2, 1987, at 1.

177. Gesetz zur Änderung asylverfahrensrechtlicher, arbeitserlaubnisrechtlicher und ausländerrechtlicher Vorschriften vom 6 Januar 1987 [Law of Jan. 6, 1987 to amend the process governing asylum, work permits, and aliens], 1987 BGBl.I 89.

178. In addition to the restrictive measures discussed *infra* notes 179-87 and accompanying text, the legislation includes provisions that assist asylum-seekers currently in the Federal Republic. For example, asylum-seekers who can demonstrate the availability of alternative housing arrangements that will not require greater expenditure of public funds are no longer required to live in group shelters. Amendment of Jan. 6, 1987 to Laws of Asylum, Work Permits, and Aliens, art. 1, § 13, 1987 BGBl.I at 91. Asylum-seekers whose cases are on appeal by the Federal Commissioner for Asylum Affairs, see *supra* note 139 and accompanying text, can leave their designated residence zones temporarily without obtaining prior permission. *Id.* art. 1, § 14, 1987 BGBl.I at 91. Despite these measures, which eased restrictions on some asylum-seekers, the thrust of the 1986 legislation was restrictive.

179. The German constitutional guarantee of asylum to political refugees has been interpreted to include those with a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group. See generally Köfner & Nicolaus, *Grundlagen des Asylrechts in der Bundesrepublik Deutschland* (Fundamentals of the Law of Asylum in the Federal Republic of Germany) § 3.2 (1986). The definition of these terms has engendered vigorous debate. The new law has mooted a significant portion of this debate by expressly rejecting — and labeling as manifestly unfounded — claims of asylum-seekers who have come to the Federal Republic to avoid armed conflict or a general state of emergency. Amendment of Jan. 6, 1987 to Laws of Asylum, Work Permits, and Aliens, § 11, ¶ 1, 1987 BGBl.I 91. Indeed, in a telling conjunction, the same provision of the law rejects asylum claims based solely on economic grounds, on armed conflict, or on a desire to avoid a general state of emergency in the homeland. The legal significance of the “manifestly unfounded” designation is that such a finding withdraws almost all rights to appeal from the rejected asylum-seeker who can then be immediately expelled. See *supra* note 188. The political significance is that it will preclude most claims of asylum based on the states of crises in Sri Lanka, Iran, and Lebanon, which impelled many refugees to flee to the Federal Republic. Wolken Report I, *supra* note 163, at 7-8.

Asylum-seekers may fear persecution in their homeland based on incidents that occurred before they fled or based on events that occurred after they had departed. Post-flight grounds (*Nachfluchtgründe*) can range from events beyond the control of the asylum-seeker, such as a change in government, to circumstances initiated by the asylum-seeker. For example, an asylum-seeker may for the first time in the relative safety of the Federal Republic criticize his country's government. He may begin in the Federal Republic to take part in political demonstrations against his home government. Less obtrusively, he may simply file an application for asylum, thereby implicitly criticizing the political system at home.

Because the credibility of the asylum-seeker is generally the crucial issue in asylum claims, post-flight grounds for an asylum claim have often been viewed with some skepticism when the grounds involved actions voluntarily taken by the applicant. An elaborate jurisprudence concerning “post-flight grounds” for asylum has developed. In October 1986 the Federal

lengthens the time during which asylum-seekers are prohibited from working.¹⁸⁰ The first two measures directly impose new restrictions

Administrative Court ruled that an asylum-seeker whose fear of persecution was based solely on post-flight activity in which he took part voluntarily, unnecessarily, and solely for the purpose of obtaining asylum should be granted asylum. Bundesverwaltungsgericht (BVerwG) Urteil vom 21. Oktober 1986, 9C 28.85. The court concluded that based on this post-flight activity the applicant's homeland would likely persecute him if he returned, and held that the objective threat of persecution outweighed the subjective intent of the asylum-seeker. In November 1986 the Federal Constitutional Court took a less expansive view of post-flight reasons. Bundesverfassungsgericht (BVerfG) Beschluss vom 26. November 1986, 2 BvR 1058/85. It ruled that there must be a direct connection between the political persecution and the flight. Consequently, self-created post-flight basis for fear of persecution activity could lead to asylum only if this activity manifested a previously held political attitude that had actually impelled the flight and that had been expressed at home before departure. Three weeks later the Federal Constitutional Court again examined asylum claims based on post-flight grounds. Bundesverfassungsgericht (BVerfG), Beschluss vom 17. December 1986, 2 BvR 2032/83. In this later decision the Court reversed a lower court which had rejected as manifestly unfounded an asylum application based on post-flight reasons. The Court emphasized that asylum claims based solely on post-flight activity may not be automatically rejected.

The controversy surrounding post-flight grounds for asylum attracted Parliament's attention. The 1987 legislation amends the Asylum Procedure Law by adding a new section explicitly addressed to this issue. Section 1a is now entitled "*Nachfluchtgründe*" (post-flight grounds). The law specifies that any actions taken by an asylum-seeker after leaving the country of persecution cannot be considered in his application for asylum if he took these actions in order to gain recognition as a refugee. With this provision the Parliament appears to have rejected the approach taken by the Federal Administrative Court. This measure may even be stricter than the rulings of the Federal Constitutional Court. For example, consider an asylum-seeker who had expressed political opposition at home, as a result began to fear persecution and fled, then once in the Federal Republic decided to become an outspoken critic of his home government in order that his homeland would notice him and be likely to threaten him if he returned. In this scenario the asylum-seeker acted to assure he would be recognized as a refugee in the Federal Republic. According to the language of the new law this individual could be denied asylum because he undertook this post-flight activity in order to obtain recognition as a refugee. Under the analysis of the Federal Constitutional Court, however, this post-flight activity expressed a political attitude that had been previously held and expressed at home and that had triggered his flight. Thus, his post-flight activity could serve as a basis for his asylum claim. Whether the legislative provision will be interpreted as congruent with or stricter than the Federal Constitutional Court holding remains to be seen.

180. In addition to tightening up the procedure at the border and the grounds upon which refugee status can be based, the 1987 legislation amended the *Arbeitsförderungs-gesetzes* vom 25 Juni 1969 [Law of June 25, 1969 to Promote Employment], 1969 BGBl.I 582 and the *Arbeitslaubnisverordnung* vom 12 September 1980 [Regulation on Work Permits], 1980 BGBl.I 1754. These amendments affect only those asylum-seekers who have entered the Federal Republic. Prior to 1987 asylum-seekers were denied authorization to work for their first two years in the Federal Republic, see Zar Aktuell, supra note 176, at 2, and were required to reside in communal dwellings during that time while they awaited the decisions on their applications. AsylVfG § 23, 1982 BGBl.I at 950. These measures were adopted in response to the high unemployment rate (approximately 11%) in the Federal Republic and in order to deter those asylum-seekers who are motivated by economic opportunities in the Federal Republic.

The 1987 legislation amends section 19 of the Law of June 25, 1969 to Promote Employment to increase substantially the prohibition against work. Asylum-seekers must wait

on entry and will be examined below.

a. Authority to Border Police

Under prior law the border police of the Federal Republic had the authority to refuse admission to asylum-seekers who managed to find some protection from persecution en route to Germany.¹⁸¹ The new legislation places renewed emphasis on this ground for refusal. It explicitly authorizes the border police to deny an asylum-seeker entry if he has previously found protection elsewhere;¹⁸² if he has spent more than three months in any EEC member country or in Austria, Switzerland, Sweden, or Norway;¹⁸³ or if he possesses a Convention Travel Document pursuant to the Geneva Convention Relating to the Status of Refugees.¹⁸⁴ Most significantly, however, the 1986 legisla-

five years after filing asylum applications before they can apply for a work permit. Amendment of Jan. 6, 1987 to Laws of Asylum, Work Permits, and Aliens, art. 2, § 1, 1987 BGBl.I at 92. At the end of this five-year period, they may apply to the Labor Department for permission to work. In deciding whether to grant a work permit, the Labor Department takes into account the general unemployment situation in the Federal Republic. Because the rate of unemployment is high, it is difficult for an asylum-seeker to obtain official permission to work. Klever Letter, *supra* note 160.

Asylum-seekers whose applications have been rejected but who have not been ordered to depart face a one year waiting period before they can apply for work authorization. Amendment of Jan 6, 1987 to Laws of Asylum, Work Permits and Aliens, art. 2, § 1 1987 BGBl.I at 92. Spouses of rejected asylum-seekers who have not been ordered to leave have a four-year waiting period; their children have a two-year wait. *Id.* § 19, ¶ 1(b). Asylum-seekers from Eastern European countries, who are subject to different rules, need wait only one year before applying for work permits. *Arbeitsurlaubnis VO.* art. 1, ¶ 2. See also Wolken Report I, *supra* note 163, at 8.

181. See *supra* notes 145-46 and accompanying text.

182. Amendment of Jan. 6, 1987 to Laws of Asylum, Work Permits, and Aliens, art. 1, § 2, 1987 BGBl.I at 89. The 1987 law revised AsylVfG § 2(2) to provide that an alien who spent more than three months in a country in which he was not threatened with political persecution before coming to the Federal Republic of Germany will be presumed to have found protection from persecution. The presumption can be rebutted by credible evidence that the asylum-seeker lacked a sufficient guarantee against deportation from the interim country to a country in which he might be threatened with persecution. *Id.*

183. Amendment of Jan. 6, 1987 to Laws of Asylum, Work Permits, and Aliens, art. 1, § 7, 1987 BGBl.I. at 90. The 1987 law revised AsylVfG § 9 to permit denial of entry at the border to aliens who en route to the Federal Republic had spent longer than three months in any of the following countries: Austria, Norway, Sweden, Switzerland, or the members of the European Community (Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, the United Kingdom). Again, there is an escape clause for those who can demonstrate that they feared deportation to a country where they fear political persecution.

184. Amendment of Jan. 6, 1987 to Laws of Asylum, Work Permits, and Aliens, art. 1, § 7, 1987 BGBl.I at 90. Article 1, § 7 of the 1987 law also revised AsylVfG § 9 to permit rejection at the border of those who fall within the revised § 7(3), which states: "An alien who possesses a travel document issued by another country in recognition of his status as a refugee will be presumed to have already found protection from persecution in another country." AsylVfG

tion expands the definition of "protection elsewhere."¹⁸⁵ It denies a right to asylum in the Federal Republic if the applicant has already spent time in another country where he was safe from political persecution.¹⁸⁶ It further equates a stay of more than three months in another country without threat of political persecution with protection from persecution,¹⁸⁷ no matter how illegal or precarious the stay.

Because the term "protection elsewhere" is more subjective and requires greater factual development than the other two provisions, the border police have more leeway in interpreting the phrase and, necessarily, more discretion in applying it. It thus significantly increases the authority of the border police. Compared to the "manifestly unfounded" claim and "threat to public order" criteria that allow rejection at the border in Belgium, the "protection elsewhere" ground for denial of entry into the Federal Republic may seem tolerably precise. It is not, however, and the asylum-seekers who run afoul of it will not be comforted by the knowledge that Belgian border police may have even more unbridled discretion than the German authorities.

Although the criteria for rejection of asylum-seekers at the border are problematic, the heart of the problem in the Federal Republic as well as in Belgium and Denmark is the summary nature of these decisions. The asylum-seekers lack the ability to present their claims fully and the legal representation to present them most effectively. The summary nature of the decisions is further compounded by the lack of any opportunity for meaningful appellate review¹⁸⁸ and, in the case of

§ 7(3), 1982 BGBl.I at 947 (as amended by Amendment of Jan. 6, 1987 to Laws of Asylum, Work Permits, and Aliens, art. 1, § 7, 1987 BGBl.I at 90). Cf. *supra* note 146.

Both this provision and the provision denying refugee status to aliens who have stayed in certain countries for at least three months stem from the "protection elsewhere" theme. In effect, they presume that an asylum-seeker who has a Convention Travel Document or has been in one of the listed countries has found a safe haven. Based on this presumption, the new legislation gives the border police absolute authority to deny entry to asylum-seekers who have traveled through certain European countries. This is so whether or not the asylum-seekers have a legal right to remain in that country.

185. AsylVfG § 2, 1982 BGBl.I at 946.

186. AsylVfG § 2(1), 1982 BGBl.I at 946 (as amended by Amendment of Jan. 6, 1987 to Laws of Asylum, Work Permits, and Aliens, art. 1, § 2, 1987 BGBl.I at 89).

187. Amendment of Jan. 6, 1987 to Laws of Asylum, Work Permits, and Aliens, art. 1, § 2, 1987 BGBl.I at 89. See *supra* note 184.

188. Legislation in the Federal Republic permits an asylum-seeker turned away at the border to seek review of that decision through the administrative court system. Letter from Simone Wolken, Legal Counselor, Zentrale Dokumentationstelle der Freien Wohlfahrtspflege für Flüchtlinge (ZDWF) (Central Documentation Center of the Voluntary Agencies for Assistance to Refugees) (Oct. 12, 1988). For a discussion of the appellate process, see *supra* notes 160-62 and accompanying text. The inadequacies of an appeals process initiated from

Germany, by the absence of any participation by officials with special competence in refugee matters.

b. Penalties on Airlines and Shipping Companies

The 1987 legislation prominently features provisions penalizing air, sea, and other carriers that transport asylum-seekers who lack a valid residence permit or temporary visa to the Federal Republic. The law imposes a fine of 2000 Deutsch Marks for each unauthorized foreigner brought to the Federal Republic.¹⁸⁹ Furthermore, the law makes the carriers strictly liable for any public expenditure incurred as a result of the arrival of these unauthorized individuals in the Federal Republic.¹⁹⁰

The law also requires carriers to transport unauthorized asylum-seekers away from the Federal Republic. This duty applies to all improperly documented asylum-seekers, those rejected at the border, those returned to a country in which they previously stayed, and those allowed to enter to file asylum applications later determined to be unsuccessful,¹⁹¹ but is ameliorated somewhat by a three-year statute of limitations.¹⁹²

D. *The Netherlands*

1. *Entry for Asylum-Seekers*

In the Netherlands, in contrast to Belgium, Denmark, and the Federal Republic of Germany, the recent upsurge in the number of asylum-seekers has not yet led to new restrictive legislation.¹⁹³ In the absence of legislative action, however, administrative measures have been taken that parallel some of the restrictions now in place in Belgium, Denmark, and the Federal Republic. The administrative action is more limited than the legislation previously discussed. As a

abroad are obvious, see *infra* text accompanying notes 280-81, and the lengthiness of the German appeals procedure, *supra* note 162, only compounds these problems.

189. Amendment of Jan. 6, 1987 to Laws of Asylum, Work Permits, and Aliens, art. 4, § 2, 1987 BGBl.I at 92.

190. *Id.*

191. *Id.* art. 4, § 1, 1987 BGBl.I at 92. See also Zar Aktuell, *supra* note 176, at 3.

192. The new legislation provides that a carrier's responsibility for the costs of carrying asylum-seekers away for the Federal Republic lapses three years after arrival of the asylum-seeker. Amendment of Jan. 6, 1987 to Laws of Asylum, Work Permits, and Aliens, art. 4, § 1, 1987 BGBl.I at 92. See also Zar Aktuell, *supra* note 176, at 3. Thus, a carrier does not bear the cost of removing an asylum-seeker whose claim is rejected and who receives an order to depart more than three years after his entry into the Federal Republic.

193. For statistics on asylum-seekers entering the Netherlands in recent years, see *infra* note 224.

consequence, much of the pre-1987 asylum procedure described below is still in effect. Nonetheless, certain aspects of the asylum procedure have become more summary and more restrictive.¹⁹⁴

Prior to 1987 an alien seeking asylum in the Netherlands followed a different procedure depending on his manner of arrival in the Netherlands. An alien entering legally based on a non-refugee status, as a student, for example, was required to apply for asylum with the local Aliens Service as soon as possible.¹⁹⁵ An alien who entered without being checked at the border¹⁹⁶ was required to file an immediate asylum request with the local police.¹⁹⁷ An asylum-seeker stopped at the border, however, applied on the spot to the border police for asylum.¹⁹⁸ As more and more applicants fell within this third category, the government developed elaborate procedures to cope with asylum requests at the border.

An alien presenting himself at the border seeking asylum in the Netherlands was briefly interviewed by the border police,¹⁹⁹ who then notified the Ministry of Justice and summarized the basis of the asylum claim.²⁰⁰ The Ministry of Justice decided whether to permit entry and informed the border police of the decision.²⁰¹ Entry decisions were based on a preliminary evaluation of the merits of each claim. The Ministry of Justice ordered the border police to admit asylum-seekers who it believed had valid grounds for asylum. These individuals were then referred to the Aliens Service.²⁰²

If the Ministry of Justice concluded that the asylum claim lacked foundation, it instructed the border police to refuse entry.²⁰³ If entry was refused, the ministry of Justice sent a ministry official to the border to interview the asylum-seeker.²⁰⁴ This official conducted a more

194. For a discussion of the specific aspects of the asylum procedures that were changed in 1987, see text accompanying notes 240-49, *infra*.

195. Asylum in Europe, *supra* note 15, at 250, ¶ 14. This generally meant within 8 days of entry. *Id.*

196. In 1960 Belgium, the Netherlands, and Luxembourg abolished internal passport controls between the three countries. Agreement of 11 April 1960, Belgium-Netherlands-Luxembourg, 374 U.N.T.S. 3. Thus, many people are able to enter the Netherlands without being inspected by Dutch border officials. Letter from Lex Takkenberg, Chief Legal Advisor, Dutch Refugee Council (July 8, 1988) [hereinafter Takkenberg Letter I].

197. Asylum in Europe, *supra* note 15, at 251, ¶ 16.

198. *Id.* at 250, ¶ 15.

199. *Id.* at 251, ¶ 18.

200. *Id.*

201. *Id.*

202. *Id.* The *Vreemdelingendienst* (Aliens Service) is an arm of the local police. Takkenberg Letter I, *supra* note 196.

203. Asylum in Europe, *supra* note 15, at 251, ¶ 18.

204. *Id.*

thorough interview with the asylum-seeker and reported back to the Ministry of Justice.²⁰⁵ Again, the Ministry of Justice evaluated the information forwarded by the interviewer. If the Ministry determined there might be valid grounds for the asylum request, the asylum-seeker was admitted to the country and referred to the Aliens Service.²⁰⁶ If the Ministry concluded that the asylum-seeker was not in immediate danger of persecution, he was refused entry and returned to the country from which he came.²⁰⁷

This two-step entry procedure, first interview by border police, second interview by Ministry of Justice official, was streamlined for those asylum-seekers arriving at Schiphol Airport outside Amsterdam. The Ministry of Justice stationed officials at the airport who interviewed arriving asylum-seekers who lacked valid authorization to enter the Netherlands.²⁰⁸ The interview reports were quickly forwarded to the Ministry of Justice, which could act expeditiously on the asylum requests and immediately decide to return asylum-seekers to the countries from which they came.²⁰⁹

Asylum-seekers denied entry at the airport or elsewhere could request reconsideration by the Minister of Justice, but in general were not permitted to remain in the Netherlands pending the reconsideration.²¹⁰ Thus, as a practical matter, asylum-seekers denied entry at the border were forced to leave the Netherlands.²¹¹ If they decided to pursue their asylum claims from outside the country, they were required to do so within thirty days.²¹²

Although a request for reconsideration did not stay the decision to refuse entry, Dutch law allowed an asylum-seeker to challenge this decision by invoking a special summary judicial proceeding, the *Kort geding*.²¹³ Petitioning the presiding judge of the district court to con-

205. Id. at 251, ¶ 19.

206. Id.

207. Id.

208. Id. at 250-51, ¶ 15.

209. Id.

210. Id. at 251, ¶ 20.

211. Id. An asylum-seeker may be able to forestall immediate expulsion by obtaining a court order prohibiting deportation. To obtain such an order he must apply to the presiding judge of the district court who can convene a special summary procedure known as *Kort geding*. Id. at 253, ¶ 34.

212. Id. at 253, ¶ 32. This reconsideration procedure is available both for those denied entry at the border, id. ¶ 20, and for those admitted to the Netherlands, but subsequently denied asylum. Id.

213. Id. at 251, ¶ 20 and 253 ¶ 34. The Aliens Act contains no provision for judicial review of a decision to refuse entry at the border. The courts, however, have ruled that judicial review is available to consider whether the state's action refusing entry constitutes a tort. In so

vene a *Kort geding* suspended the challenged government actions.²¹⁴ The *Kort geding* is a speedy procedure governed by informal procedural rules.²¹⁵ Although the law provides that applicants may attend the court hearing, asylum-seekers at Schiphol airport usually were denied permission to attend.²¹⁶ More than 90% of the cases submitted to the *Kort geding* resulted in negative decisions for the asylum-seekers.²¹⁷ Asylum-seekers could appeal negative decisions, but filing an appeal did not stay the decision.²¹⁸ Thus, asylum-seekers who availed themselves of the *Kort geding* procedure managed to delay their departure from the Netherlands for a few days, but then generally were forced to leave.

Those individuals who requested asylum at the border and were permitted to enter filed their formal applications for asylum with the Aliens Service. An extensive investigation of their claims took place,²¹⁹ during which they could be represented by a lawyer and an asylum counselor.²²⁰ Based on information submitted by the applicant, official interviews, police reports, and advice from the Ministry of Foreign Affairs, the Ministry of Justice decided whether to grant or deny asylum.²²¹ Asylum was granted on either a finding of refugee status or a finding that compelling humanitarian reasons warranted asylum.²²² The latter category was commonly known as B-status.²²³

holding, the courts have applied the general principles of Dutch administrative law, which, in the absence of legislative provisions authorizing administrative or judicial review, allow parties to challenge government action by filing tort actions in the civil courts. Letter from Lex Takkenberg, Chief Legal Advisor, Dutch Refugee Council (Sept. 28, 1988) [hereinafter Takkenberg Letter II].

214. Takkenberg Letter I, *supra* note 196.

215. Takkenberg Letter II, *supra* note 213. It has been said that the assistance of a lawyer in this procedure is indispensable. Asylum in Europe, *supra* note 15, at 253, ¶ 34.

216. Takkenberg Letter II, *supra* note 213.

217. Interview with Virginia Korte Van Hemel, Secretary of State for Justice, The Netherlands, Refugees, Oct. 1988, at 43.

218. Asylum in Europe, *supra* note 15, at 253, ¶ 34.

219. *Id.* at 252, ¶¶ 22-26.

220. *Id.* at 252, ¶ 27. A non-lawyer who is a representative of a voluntary agency, such as the Dutch Refugee Council, often works with an asylum-seeker on all aspects of his case and helps shepherd him through the government process. Interview with Lex Takkenberg, Chief Legal Advisor, Dutch Refugee Council, in Amsterdam, The Netherlands (June 22, 1987) [hereinafter Takkenberg Interview III].

221. *Id.* at 253, ¶ 29.

222. *Id.* at 252-253, ¶¶ 23, 29-31.

223. An individual admitted as a refugee (*toelating als vluchteling*) under the terms of the 1951 Refugee Convention is granted a permanent residence permit; an individual allowed to stay on humanitarian grounds is given a temporary residence permit (*vergunning tot verblijf*) marked with the letter "A" for *Asielgerechtigde*. This "A" permit is referred to as B-status. Asylum in Europe, *supra* note 15, at 252-253, ¶¶ 23, 30-31. For a discussion of recent legal developments affecting B-status, see *infra* note 258.

2. *Recent Legal Changes*

As in other countries in Northern Europe, the number of asylum-seekers in the Netherlands increased significantly in the 1980's. Although the total number of individual applicants was small compared to the number in the Federal Republic of Germany, the proportional increase was nonetheless dramatic. From an average of 800 to 900 asylum applications per year in the late 1970's, the number swelled to more than 5,600 in 1985.²²⁴ This upsurge aroused fears of the Netherlands' being engulfed by refugees and led to more restrictive government measures. As a result, in 1985 the total number of asylum-seekers granted asylum dropped below 1000, the lowest number since 1979.²²⁵ More ominously, perhaps, the rate of approval of asylum-seekers plummeted from 57.2% in 1982 to 19.8% in 1985.²²⁶

a. *Legislative Inaction*

Although the Netherlands Parliament has not yet enacted legislation in response to the increase in asylum applications, the two parties forming the center-right government coalition, the Christian Democrats and the Liberals, announced that the Aliens Act, including provisions dealing with refugees, would be reviewed in 1988.²²⁷ In the interim there were several parliamentary debates concerning asylum-seekers. On June 23, 1986, the government presented a proposal to Parliament to require that all asylum-seekers live in communal housing.²²⁸ This proposal generated great controversy,²²⁹ but ultimately

224. Ministry of Justice figures show the following number of arrivals of asylum-seekers in the Netherlands: 386 in 1975; 470 in 1976; 575 in 1977; 775 in 1978; 993 in 1979; 1,330 in 1980; 754 in 1981; 1,214 in 1982; 2,015 in 1983; 2,603 in 1984; 5,644 in 1985; 5,865 in 1986, and 13,460 in 1987. Kumin, *Reception of Asylum Seekers in the Netherlands, Refugees*, Oct. 1988, at 16.

225. Takkenberg, *Country Report on the Netherlands, European Consultation on Refugees and Exiles*, April 1986, at 1, § 1 [hereinafter Takkenberg Report I].

226. The rate of approval has declined yearly, from 57.2% in 1982 to 53.5% in 1983, 37.9% in 1984, and 19.8% in 1985. *Id.* at 5.

227. Florin, *Country Report on the Netherlands, European Consultation on Refugees and Exiles* 2, § 2(e) (Sept. 11, 1986) [hereinafter Florin Report I]. At the time this Article went to press, no new legislation concerning refugees had been enacted.

228. Takkenberg, *Country Report on the Netherlands, European Legal Network on Asylum* 4, § 3, ¶ 4 (Nov. 1986) [hereinafter Takkenberg Report II].

229. *Id.* Prior to this time only Tamils were, in effect, required to live communal housing. In April 1986, outbursts of violence occurred in the Tamil housing. In June 1986, when the government of the Netherlands proposed that all asylum-seekers live in communal housing, Parliament responded by stating that the government should improve and regularize the situation at the Tamil reception centers before extending housing requirements to other groups of asylum-seekers. See *id.* at 4, § 3.

was put into effect.²³⁰ In September 1986 the government presented a note describing its overall policy on refugees.²³¹ Initial parliamentary response to the note was limited, but the Parliament did schedule discussions on the note for March 1987.²³² In November 1986 the government presented yet another note to Parliament proposing that refugees be treated the same as other aliens in matters concerning residence regulations and procedural protections.²³³ Again, Parliament has not yet legislated on this proposal; in this instance, however, Parliament registered its general opposition to a plan merging procedures governing refugees with those governing all other aliens.²³⁴

b. Recent Administrative Action

In the first few months of 1987 the number of asylum-seekers requesting permission to remain in the Netherlands rose to 1500 per month, generating concern over the possibility of 18,000 to 24,000 asylum-seekers per year.²³⁵ Government officials reacted quickly. In a letter dated March 31, 1987, the Secretary of State for Justice outlined new guidelines for the rejection of asylum-seekers whose claims are deemed manifestly unfounded.²³⁶ This letter provoked a heated

230. On November 1, 1987, the government opened communal reception centers at five rural locations. The *Regeling Opvang Asielzoekers (ROA)* [Government Regulation on the Reception of Asylum-Seekers], which took effect on November 1, 1987, provides that asylum-seekers will be dispersed in many different municipalities, rather than clustering in Amsterdam. The five new government reception centers are designed to accommodate the overflow when accommodations provided by the municipalities are filled. Asylum-seekers are supposed to stay in these reception centers for up to nine weeks, after which they are to be placed in private housing in the various municipalities. See Biegel, Gabreyesus, and van Heelsum, *Elderly Refugees in the Netherlands*, *VluchtelingenWerk*, 1988, at 3; Kumin, *supra* note 224, at 14-16. Asylum-seekers stopped at Schiphol Airport outside Amsterdam are kept in a reception center at the airport. See also *infra* notes 241, 258.

231. Florin, *Country Report on the Netherlands*, *European Consultation on Refugees and Exiles*, Feb. 1987, at 2, § 2(a) [hereinafter *Florin Report II*].

232. *Id.* At the time this Article went to press, no new legislation concerning refugees had been enacted.

233. *Id.* § 2(b).

234. *Id.* In July 1987 the government proposed legislation that would apply the same procedures to refugees as are applied to other aliens. It would maintain the distinction between "A-status" and "B-status" refugees. Due to the controversial nature of the proposal, it is not expected to be enacted quickly, if at all. Florin, *Country Report on the Netherlands*, *European Consultation on Refugees and Exiles*, Sept. 1987, at 4 [hereinafter *Florin Report III*]. At the time this Article went to press, no new legislation concerning refugees had been enacted.

235. Takkenberg Interview III, *supra* note 220. Although the "threat" of 24,000 asylum-seekers per year did not materialize, the number of asylum-seekers rose dramatically, from approximately 6,000 in 1986 to approximately 13,000 in 1987. See Kumin, *supra* note 224, at 16.

236. *Id.*

debate in Parliament.²³⁷ In the end, however, opposition forces in Parliament lacked the power to block the guidelines.²³⁸ On April 15, 1987, the Minister of Justice issued its new procedures.²³⁹

i. *Summary Procedures*

Compared with the prior system of interviews and re-interviews, the new procedure is more truncated and contains more stringent standards. The method of applying for asylum still varies according to whether the asylum-seeker enters legally in a non-refugee status, enters without being checked at the border, or is stopped at the border. But all asylum-seekers now are interviewed briefly by police officers wherever they happen to apply for asylum. The initial interviews are generally handled by officials of the Ministry of Justice; on occasion officials of the aliens police conduct the interviews.²⁴⁰ If this cursory interview reveals that the applicant has come to the Netherlands from Belgium, Luxemburg, the Federal Republic of Germany, France or Austria, or has presented a claim deemed manifestly unfounded or fraudulent, he usually receives a negative decision within two to three hours.²⁴¹ In many instances the asylum-seeker is detained by the police while awaiting the initial decision.²⁴² Consequently, upon receiving a negative decision, he may be immediately expelled.²⁴³ Those who are not immediately rejected follow the regu-

237. *Id.*

238. *Id.* These guidelines, discussed *infra* notes 240-49 and accompanying text, may become the basis for government-proposed legislative revisions to the Aliens Act in 1989.

239. *Id.* On April 15, 1987 the Minister of Justice placed its new directive in force by issuing a new chapter B(7) of the *Vreemdelingendecret* [Aliens Circular of Oct. 26, 1982]. The Aliens Circular is a set of three notebooks containing administrative policy concerning aliens. The Circular fleshes out the legislative provisions of the alien's law. Chapter B(7) of the Aliens Circular deals with refugee matters. Aliens Circular of Oct. 26, 1982. For a description of the Aliens Circular and the ease with which it can be amended, see Takkenberg, Country Report on the Netherlands, European Consultation on Refugees and Exiles, Mar. 1988, at 2-4 [hereinafter Takkenberg Report V].

On November 1, 1987, the government issued a new regulation establishing communal housing for asylum-seekers. Government Regulation on the Reception of Asylum-seekers, *supra* note 230.

240. Takkenberg Interview III, *supra* note 220. The policy for asylum-seekers at Schiphol Airport, described *supra* in text accompanying notes 188-89, has not been changed. Members of the staff of the Minister of Justice still carry out the first interview. Negative decisions are generally rendered at Schiphol within 24 hours. *Id.*

241. *Id.*

242. *Id.* Asylum-seekers are also detained at the airport pending the decision on their claims, Government officials assert that holding people at this reception facility does not legally constitute detention because it is an aspect of the "implied authority to regulate admission to the country." See also *infra* note 241.

243. *Id.*

lar pre-1987 procedures in submitting their claims for asylum.²⁴⁴ Since April 15, 1987, a considerable number of asylum-seekers have been detained, rejected, and expelled all on the same day.²⁴⁵ Although the new procedure still guarantees asylum-seekers the right to a lawyer and the right to seek reconsideration of a negative decision, these rights are of little avail.²⁴⁶ Stays of negative decisions are generally denied by the Ministry of Justice; thus, the asylum-seeker is sent out of the country before any reconsideration can occur. This, in effect, moots his claim, although in theory he can seek reconsideration from abroad.²⁴⁷ Compounding this difficulty is the summary nature of the process which often moves too quickly to give lawyers sufficient time to familiarize themselves with the cases,²⁴⁸ hampering the effectiveness of legal representation.²⁴⁹

The possibility of seeking to overturn the decision by invoking the summary *Kort geding* judicial procedure is still available.²⁵⁰ Therefore, some asylum-seekers manage to prolong their stay for a short time while seeking judicial review. They are not, however, entitled to a full-fledged hearing by either administrative or judicial authorities. If detained at Schiphol airport, they generally are not even allowed to attend the judicial hearing.²⁵¹

In effect, the government of the Netherlands has administratively established three categories of asylum-seekers whose claims lead to instant rejection: (1) those with claims deemed manifestly unfounded; (2) those with claims deemed fraudulent; and (3) those who passed through Belgium, Luxembourg, France, Austria, or the Federal Republic of Germany. This third category is the equivalent in the Netherlands of the practice in the Federal Republic of automatically

244. For a description of these procedures, see generally text accompanying notes 195-98.

245. Takkenberg Interview III, *supra* note 220.

246. *Id.*

247. *Id.*; Interview with Frederique de Vlaming, Staff Member, UNHCR Representative to the Netherlands, in The Hague (June 23, 1987).

248. Takkenberg Interview III, *supra* note 220.

249. In contrast to the asylum process in effect prior to April 1987, the new procedures emphasize speedy decision-making at the expense of the thorough factual development and skillful probing that lead to correct decisions. The speed of the decision-making is not in itself bad. The problem is that the decision is based on an extremely cursory interview. Moreover, the brevity of the interview is compounded by the practice of having unqualified interviewers. Sometimes the interviewers are members of the Ministry of Justice; other times the interviewers are police officers who do not specialize in asylum matters. For a discussion of the incidence of inaccurate interview reports, see *infra* note 278.

250. For a description of the *Kort geding* procedure, see *supra* notes 213-18 and accompanying text.

251. Takkenberg Letter II, *supra* note 213.

refusing at the border asylum-seekers from certain European countries.²⁵² The current Dutch practice is to reject immediately all asylum-seekers who have even passed through any of five specified countries; German border guards deny entry to asylum-seekers who have traveled in any of nine neighboring countries.

This immediate refusal of asylum-seekers who have merely been in transit through certain countries is also similar to the Danish practice of denying entry to asylum-seekers who are from or have been in transit in countries deemed "safe" for asylum-seekers.²⁵³ In some respects, the practice in the Netherlands is superior to that in the Federal Republic and Denmark. The Dutch "safe" country list is significantly shorter than the German or the Danish list.²⁵⁴ Moreover, the availability to all litigants — including asylum-seekers in the disfavored categories — of the summary *Kort geding* judicial procedures before deportation is a safeguard that German and Danish law do not provide.²⁵⁵

The new Dutch practice of immediate rejection of asylum-seekers with claims deemed manifestly unfounded or fraudulent echoes important provisions of the new Belgian legislation restricting entry of asylum-seekers.²⁵⁶ The Belgian law's judicial review provisions to prevent the return of asylum-seekers to countries where they risk threats to their lives or liberty appear, however, to be less summary than the Dutch judicial procedure.²⁵⁷ Therefore, in this respect Belgian legislation provides more of a safeguard for asylum-seekers.

ii. *Tightening of Standards*

In addition to the promulgation of new criteria for immediate rejection and a more truncated procedure, the government response to the increase in asylum-seekers in the mid-1980's appeared to become

252. The policy in the Federal Republic is discussed, *supra*, note 148. The new Federal Republic legislation expressly allows border guards to turn back asylum-seekers from 15 European countries, but only if they have spent more than three months in those countries. See *supra* notes 183-87 and accompanying text. In addition, the Federal Republic has entered into agreements with nine neighboring countries providing that it may immediately return asylum-seekers who have passed through any of the countries to those countries. See *supra* note 148 and accompanying text.

253. See generally discussion of Danish practice in text accompanying notes 112-24, *supra*.

254. Currently, the Danish list comprises Canada, the United States, and the Western European countries. Kjaergaard Letter, *supra* note 109.

255. For a description of the reconsideration procedures available under Danish law, see *supra* text accompanying notes 115-20.

256. See *supra* text accompanying note 44.

257. For a description of the Belgian judicial review provisions, see *supra* text accompanying notes 64-68.

more restrictive in other ways.²⁵⁸ For example, officials reviewing

258. Government officials claimed that they had not changed their policy, which they described as a "liberal refugee policy, but restrictive immigration policy." Takkenberg Report I, *supra* note 225, at 1, § 2. Nonetheless, government action toward asylum-seekers became harsher. The Secretary of State for Justice appeared to adopt stricter standards for evaluating a well-founded fear of persecution. *Id.* at 2, § 2(c). In addition, conditions experienced by asylum-seekers once they have entered the Netherlands have also become more onerous. Asylum-seekers who are not detained must report weekly to the police. Forms of detention have become more common. Starting in 1985 the government introduced a system of reception centers or mandatory communal living accommodations for certain groups of asylum-seekers. In addition, government authorities regularly detained many asylum-seekers at Schiphol Airport near Amsterdam. Because refugee advocates were not allowed in the transit area of the airport (the area one passes through after disembarking from the plane and before emerging from the passport control zone) it was impossible to ascertain how many asylum-seekers were kept waiting in that area. Nonetheless, it became known that some asylum-seekers spent weeks there attempting to enter the Netherlands. Protests of this practice led to the opening of a reception center at the airport where asylum-seekers can be detained under more humane conditions. Takkenberg Report II, *supra* note 228, at 3-4.

There is more than one basis for asylum under Netherlands law. See *supra* note 227. By definition, all granted asylum are entitled to reside in the Netherlands. The most protected status, however, is awarded to those individuals who meet the refugee definition contained in the 1951 Refugee Convention Relating to the Status of Refugees: an individual with a "well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion." 1951 Refugee Convention, *supra* note 7, art. 1A(2). Individuals deemed to qualify under the 1951 Refugee Convention criteria are entitled to be admitted and granted residence in the Netherlands. They are said to receive "refugee status," Asylum in Europe, *supra* note 15, at 249-250, §§ 9-11, the equivalent of "A-status."

Individuals who do not qualify under the 1951 Refugee Convention definition may still be granted asylum in the Netherlands, however. Until 1988, an asylum-seeker who could demonstrate compelling humanitarian reasons that indicated he should not be returned to his homeland, might be granted a residence permit as an asylee. He was said to receive "B-status." "B-status" originated in 1974 as a method of protecting war resisters. Asylum in Europe, *supra* note 15, at 256, § 47. From 1974 to 1988 it remained a part of the administrative practice, and was expanded to offer protection to additional groups seeking refuge. During the 1980's, "B-status" was far easier to attain than "A-status." For example, in 1986, 565 asylum-seekers were granted "B-status," while 176 were granted "A-status." Florin Report II, *supra* note 231, at 2.

Although entitled to many protections under the law of the Netherlands, an asylum-seeker granted "B-status" was not as secure as one granted "refugee status." For example, a "refugee" was granted the right to reside permanently, whereas a "B-status" residence permit initially was valid for six months, and then was renewable every twelve months. Asylum in Europe, *supra* note 15, at 257, § 56. A "refugee" needed no work permit; a "B-status" individual obtained a work permit valid only for a specific job with a specific employer. *Id.* at 258, §§ 62-64. With regard to social assistance, a "refugee" was treated like a Dutch citizen, whereas a "B-status" claimant was treated like an alien. *Id.* at 259, ¶¶ 65-66. There was a similar discrepancy in terms of educational benefits. *Id.* at ¶¶ 67-69. Travel documents provided to those granted asylum in the Netherlands, too, were different, depending on "refugee" status or "B-status." *Id.* at 257, §§ 56-58.

The distinction between "A-status" and "B-status" has recently been called into question. The Council of State, in a decision on February 29, 1988, ruled that in the future asylum-seekers who satisfy the criteria leading to the grant of "B-status" will be awarded "A-status". Whether those who received "B-status" prior to 1988 will now be treated as "C-status" (discussed below) is open to question. Takkenberg Letter I, *supra* note 196. For a discussion

requests for asylum now scrutinize more carefully the route that an asylum-seeker has taken to reach the Netherlands to determine if his claim for asylum in the Netherlands can be rejected on the basis that he voluntarily departed his country of first asylum.²⁵⁹ The Secretary of State for Justice has indicated that any country through which the asylum-seeker passed on his way to the Netherlands will be deemed a country of first asylum if the asylum-seeker theoretically could have applied for asylum there.²⁶⁰ This presumption will be accepted no matter how brief the transit through the country, and can be rebutted only if the asylum-seeker produces documents or other proof to demonstrate that before passing through another country he had pre-

of this decision, see Takkenberg, Country Report for the Netherlands, October 1988, at 2 [hereinafter Takkenberg Report VI].

In the mid-1980's a new, even less protected "C-status" appeared to be emerging. In numerous cases asylum-seekers were denied "A-status" and "B-status," but were allowed to remain in the Netherlands. They were granted an ordinary residence permit. This permit allows them to live in the Netherlands, but does not recognize the validity of their claim for asylum. In effect, they are treated as other non-refugee aliens; they are entitled to remain so long as the authorities periodically renew their residence permits. Perhaps the most conspicuous example of the growth of a "C-status" occurred in the Ministry of Justice's 1986 decisions concerning 1100 Tamil asylum-seekers from Sri Lanka: 1 received "A-status," 25 received "B-status," and 100 received "ordinary" residence permits. Takkenberg Report I, *supra* note 225, at 4. This "C-status" phenomenon, however, is not confined to Tamils. The overall statistics for 1986 indicate that 326 asylum-seekers denied "A-status" and "B-status" were nonetheless granted permission to reside in the Netherlands, thus receiving "C-status." Florin Report II, *supra* note 231, at 2. In 1987, 237 asylum-seekers received "A-status," 444 received "B-status," and 450 received "C-status," while 7,425 were denied asylum. Takkenberg Report V, *supra* note 239, at 1.

Because the "C-status" phenomenon is so new, it cannot yet be described definitively. The indications are that asylum-seekers granted "C-status" have none of the special protections accorded in the past to "refugee" status and "B-status" individuals. They are protected to the extent the Dutch government protects aliens. This protection may well be inadequate, however. Non-asylum-seeking aliens generally can rely on the protection of their home governments, whereas "C-status" asylum-seekers are generally fleeing from their homelands and cannot depend on their home governments' protection. See Takkenberg, European Legal Network on Asylum, Country Report for the Netherlands, Feb. 1988, at 2-3 [hereinafter Takkenberg Report IV].

The emergence of lesser forms of protection for asylum-seekers in the Netherlands is troubling. To the extent that the growth of "B-status" and "C-status" signifies that the Netherlands recognizes that many asylum-seekers have fled from dangerous situations and should not be returned to their homelands, one might describe this as a somewhat positive trend. Nonetheless, it is a negative development that lower levels of protection for asylum-seekers have not only become acceptable, but have supplanted "refugee-status" as the typical mode of asylum in the Netherlands.

259. Takkenberg Report I, *supra* note 225, at 1, § 2(a). See discussion of "protection elsewhere," *supra* notes 185-87 and accompanying text, a concept similar to the concept of "country of first asylum."

260. Florin Report I, *supra* note 227, at 3, § 2(g).

viously formed an intent to apply for asylum in the Netherlands.²⁶¹ This presumption may have an even broader effect in turning away asylum-seekers than the Danish practice of returning asylum-seekers to "safe" countries through which they traveled.²⁶²

c. Penalties on Airlines and Other Deterrent Measures

Among the countries surveyed, the Netherlands alone does not impose fines on air carriers that land in the Netherlands carrying asylum-seekers who lack valid entry visas or other travel documents. Current legislation does not authorize such financial penalties against shipping companies and carriers,²⁶³ but the government has announced that such penalties will be proposed in new aliens legislation.²⁶⁴ The administrative practice, to date, has not moved in this direction, although present legislation does require carriers to bear the costs of returning "inadmissible passengers."²⁶⁵

Current administrative policy has, however, had a significant impact on airlines as a result of the imposition of increasingly stringent transit visa requirements.²⁶⁶ The government requires inhabitants of certain countries to obtain transit visas if their travel plans require them to pass through the Netherlands en route to their final destination. This requirement applies no matter how short the scheduled transit time in the Netherlands. As a consequence, citizens of countries to which the transit visa requirement applies find travel more difficult and sometimes impossible. Not only must they obtain an entry visa for their destination country, but they must also go to a Dutch consulate abroad and obtain a transit visa for the Netherlands. Only those possessing this transit visa may board an airplane scheduled to make a stopover in the Netherlands.

The transit visa requirement does not apply with equal force to all non-Dutch nationals, but is instead aimed at specific countries. Not surprisingly, in light of the government's fear of being engulfed by asylum-seekers, it targets refugee-producing countries.²⁶⁷ The list of

261. *Id.*

262. The Danish authorities consider Canada, the United States, and all Western European nations to be safe countries, see *supra* note 118 and accompanying text. The Dutch may deem additional countries to be countries of first asylum.

263. Takkenberg Interview III, *supra* note 220.

264. Takkenberg Letter I, *supra* note 196.

265. *Id.*

266. Takkenberg Report I, *supra* note 225, at 2, § 2(d).

267. *Id.* A cursory examination demonstrates this targeting. The transit visa requirement applies to citizens of Sri Lanka, to Turkish citizens who are not residents of a European or American country, to Afghans who purchased their plane tickets in Pakistan, India, or Nepal,

targeted countries is not static. For example, as more asylum-seekers from Ghana and Zaire sought to enter the Netherlands in the mid-1980's, those countries were added to the list.²⁶⁸ By 1987 the government of the Netherlands had increased the number of countries on the transit visa list to twenty.²⁶⁹ The obvious intent was to deter asylum-seekers from seeking refuge in the Netherlands during a stopover at Schiphol Airport. Indeed, this practice, together with the new summary procedures, appears to have had the desired result. The number of asylum-seekers attempting to enter the Netherlands decreased from 1500 per month at the beginning of 1987 to 800 per month during the summer of 1987.²⁷⁰

II. CRITICAL EVALUATION OF RECENTLY ENACTED ASYLUM LEGISLATION

A. *Summary Border Proceedings*

The new legislation in Belgium, Denmark, and the Federal Republic of Germany gives border guards great authority over asylum-seekers.²⁷¹ The administrative practice in the Netherlands grants similar power to officials of the aliens police.²⁷² In all four countries, the lack of opportunity for a searching appeal of the initial decision to refuse entry magnifies the power granted these authorities.²⁷³ Although the grounds for summary denial of entry differ from country to country,²⁷⁴ in each country the new law permits authorities to base the initial rejection on a proceeding so summary that it vitiates all confidence in the fairness of the decision. One would not expect elaborate, full-blown judicial proceedings available at every border crossing.

to Iraqis who bought their tickets in Syria or Iran, and to Iranians who booked passage in Turkey, Pakistan, India, Nepal, or Thailand. *Id.*

268. Takkenberg Interview III, *supra* note 220.

269. Florin Report II, *supra* note 231, at 3, § 2(d).

270. Takkenberg Interview III, *supra* note 220. The number of applicants for each month of 1987 follows: 1,111 in January; 1,307 in February; 1,922 in March; 1,683 in April; 1,020 in May; 820 in June; 749 in July; 753 in August; 1,096 in September; 1,143 in October; 996 in November; and 935 in December. Takkenberg Report V, *supra* note 239, at 1-2.

271. The authority given border guards under the new legislation is discussed, *supra*, in Parts I.A.2.a. (Belgium), B.2.a. (Denmark), and C.2.a. (Federal Republic of Germany).

272. The administrative practice in the Netherlands is discussed, *supra*, in Part I.D.2.b.

273. See country-by-country discussion, *supra*, Part I.

274. Belgium has five categories that lead to instant rejection, *supra* notes 42-47 and accompanying text; Denmark has five categories, different from and more narrowly defined than those in Belgium, *supra* notes 84-89 and accompanying text; the Federal Republic has three categories, two of which are quite precise, *supra* notes 205-07 and accompanying text; and the Netherlands has three threshold issues that lead to immediate rejection of an asylum claims, text accompanying notes 251-25, *supra*.

Nonetheless, the lack of even minimal procedural safeguards for refugee decisions that can have life or death consequences is appalling.

The recently adopted legal provisions described in this Article share certain glaring procedural defects: the decision-makers are unsuitable; the hearings are inadequate; the decisions are made under undue pressure; the officials have unbridled discretion; the appeal, if any, is insufficient.²⁷⁵ These deficiencies will be examined below.

1. *Unsuitable Decision-Makers*

The legislation authorizing summary denial of entry to asylum-seekers at the border places the power of life and death in the hands of border guards.²⁷⁶ These individuals, although they may be trained in the skills needed to deal with routine travelers and criminals, are generally untrained in skills pertinent to detecting a bona fide claim for asylum. Without training or expertise in refugee law at either the international or municipal level, they are likely to overlook the important, but perhaps subtle, elements of a refugee's case. Furthermore, without training at interviewing skills, and particularly interviewing individuals from cultures different from their own, the border guards may often be unable to elicit relevant information that supports asylum claims. This difficulty may often be exacerbated by the problem of communicating with someone who speaks a different language.

In addition, border guards most likely develop a law enforcement mentality. Much of their routine work focuses on detecting criminal activity. Attuned to skulduggery and deceit, they may become cynical about human nature. Such cynicism may unduly distort their evaluation of the claims of asylum-seekers. There is cause for concern when the law entrusts to border guards or to other police officers the power to make decisions on refugee claims.

2. *Inadequate Hearing*

The problems associated with using border guards as decision-makers is compounded by the inadequate hearing provided under the new laws.²⁷⁷ In essence, the hearing is a short interview with a border guard. The asylum-seeker states that he is a refugee, shows whatever

275. These procedural defects are described in the country-by-country analysis, *supra*, Part I.

276. In the Netherlands asylum-seekers are interviewed by the aliens police or officials of the Ministry of Justice. See *supra* note 240 and accompanying text. For ease of description, all future references to border guards will also encompass a reference to officials of the Ministry of Justice.

277. The inadequacy of hearings is discussed country-by-country, *supra*, Part I.

evidence he has been able to assemble, and seeks admission. The guard looks at the documents, perhaps asks questions, and makes his decision. The asylum-seeker has no ability to make a record. In addition, the asylum-seeker generally has no access to an attorney or to any other type of advocate to help present his case, and is not entitled to an interpreter.

In short, the summary proceedings at the border contemplate the most cursory type of interrogation by a law enforcement officer. This inquiry will be directed at an individual who likely speaks another language, is unfamiliar with the culture and proceedings of the country he is trying to enter, is unable, because of his flight, to gather and present the evidence necessary to bolster his asylum claim, and lacks legal representation. Initial errors are bound to occur. Indeed, there is evidence that, at least in the Netherlands, cursory interviews of asylum-seekers in similar settings have resulted in mistaken impressions of asylum-seekers' statements in well over a majority of the cases.²⁷⁸ Furthermore, due to the summary nature of the encounter at the border, the opportunity to seek more time to develop and present further evidence is unavailable. Consequently, these impediments to presenting and articulating refugee claims make it likely that a significant number of incorrect decisions will occur.

3. *Circumstances of Undue Pressure*

The possibility of error and abuse is magnified by the practical impediments at most borders and in many airports. The personnel who actually interview and evaluate asylum-seekers at these locations are likely to be law enforcement officers or civil servants untrained in international law. Furthermore, they are required to deal quickly with large numbers of people, asylum-seekers and non-asylum-seekers alike. They must make instantaneous decisions based on minimal information. Prejudices and presumptions, intensified by frustration, are bound to play a large role in the decision-making process. Such circumstances clearly detract from the border personnel's ability to elicit pertinent information and reach accurate decisions about issues as important as the need for protection from persecution. Errors are bound to occur. Thus, legislation which consigns many asylum deci-

278. Takkenberg Interview III, *supra* note 220. The first short initial interview by the aliens police, see *supra* notes 195-96 and accompanying text, generally led to a report filed by the interviewer within 24 hours of the interview. The reports, which were largely recountings of factual information provided by the asylum-seekers, contained inaccuracies from 70 to 80 percent of the time.

sions to this type of pressured atmosphere is severely deficient because it undermines both accuracy and fairness.

4. *Uncircumscribed Discretion*

In addition to their procedural inadequacies, the new legislative provisions permitting summary rejection are open to criticism because of the broad discretion they give border guards. The vagueness of the Belgian criteria for summary rejection are particularly worrisome.²⁷⁹ Yet each of the laws previously described allows summary denial of entry based on vague criteria such as "threat to public order" or "manifestly unfounded" or "protection furnished elsewhere." Such ambiguous terms, in effect, constitute grants of broad discretion to the initial decision-makers, the often harried and cynical border guards. They can interpret the legislative criteria narrowly or loosely, as they choose. They have significant leeway to incorporate their personal predilections into their decisions. Indeed, their discretion in these situations is virtually uncircumscribed. In light of the guards' lack of expertise in refugee matters, the pressured situations in which they sometimes work, and the cursory review contemplated by the new laws, this grant of broad discretion is especially troubling.

5. *Insufficient Appellate Review*

By far the most glaring defect in the legislation allowing border guards to reject summarily certain categories of asylum-seekers is the lack of a meaningful opportunity for review of the initial negative decisions. In some countries, Denmark and the Federal Republic of Germany, for example, the legislation simply lacks provisions for any appellate review of these decisions at the border before the asylum-seeker is forced to leave. In other countries such as Belgium and the Netherlands, the law does allow an asylum-seeker a second chance of sorts. Unfortunately, none of the four countries provides a full-fledged appeal at a meaningful time.

Under Danish and West German law the opportunity to appeal occurs only after the asylum-seeker has been denied entry and sent back to the country from which he came.²⁸⁰ Thus, the only possible reconsideration does not occur at a time when it can be useful. In most instances, this right to appeal becomes only a theoretical safe-

279. Vague terms such as "manifestly unfounded" are not unique to the legislation of Belgium and its neighbors. The Executive Committee of the UNHCR itself has used this term. See *supra* note 55.

280. See text accompanying notes 115-16 and 188, *supra*.

guard. An asylum-seeker appealing from abroad faces grave difficulties in consulting with a lawyer experienced in refugee law and familiar with the procedures of Denmark or the Federal Republic. Merely communicating the basis for his asylum claim and assisting his lawyer by collecting evidence to support this claim, often difficult tasks even when attorney and client are in the same city, become nearly impossible from a distance. Moreover, the effort is almost always complicated further by differences in language and culture.

Perhaps the most formidable barrier, however, is the catch-22 situation of the asylum-seeker appealing from abroad to protest his rejection at the border. If he has the time, energy, and perseverance to help assemble an adequate appeal, it is unlikely that he is being or is about to be persecuted. If persecuted, he probably will not be able to prepare an appeal and communicate with his lawyer. If he has a well-founded fear of persecution in his homeland but presently is in a third country in which he is safe from persecution, Danish and West German authorities will have no incentive to encourage him to leave his current haven and will feel no obligation to assist him to enter Denmark or the Federal Republic.

Even when the legislation permits some type of review of a negative border decision before the asylum-seeker is turned away,²⁸¹ the review is so rudimentary as to lack any significant chance of correcting erroneous decisions. First, because the initial decision is based on a sparse record, there is, in effect, no record to review on appeal.²⁸² Second, the law allows no time to prepare an adequate request for review.²⁸³ Any legal arguments will necessarily be hastily prepared. There is little, if any, time to gather more persuasive evidence or opportunity to supplement the record in support of the asylum-seeker's request for admission. Indeed, the asylum-seeker may not even know what further evidence would be helpful, as the laws do not require that the basis for the initial decision be provided.²⁸⁴ Moreover, for all practi-

281. Both Belgium and the Netherlands provide for review. See *supra* text accompanying notes 56-68 and 210-19.

282. This deficiency also undermines the efficacy of the advisory opinion requirement in Belgium, *supra* notes 54-55 and accompanying text. Although the law mandates that on reconsideration the Minister of Justice must seek advice from the Director of the Office for Refugees and Stateless Persons, the advisory opinion must be made in haste, based on the same non-existent or inadequate record, and is not binding.

283. In Belgium the appeal to the court must be filed within two working days after receiving the negative decision. See *supra* note 65 and accompanying text. In the Netherlands the time in which the judicial proceeding must be started has been shortened from 30 days to 7 days. *Takkenberg Report V*, *supra* note 239, at 3.

284. See *supra* note 61.

cal purposes there is no ability to procure legal assistance to help in the review. The appeal occurs so quickly that either the asylum-seeker cannot locate a lawyer to assist him, or the lawyer, if hired, cannot familiarize himself with the case in time to be useful.

Furthermore, although the Belgian legislation allows rudimentary review of denials, it does not contemplate an independent review board or appellate tribunal. The review essentially consists of asking the same officials — or others in their department — who made the initial decision refusing entry to think a second time about their decision. Unfortunately, the defects of the initial decision process reappear during the reconsideration process. Once again, there is usually little to reconsider because the record is inadequate or nonexistent. In addition, the sense of haste that characterizes the initial process frequently factors into the reconsideration proceedings. Thus, most reconsiderations are likely to be merely *pro forma*.

The 1987 Belgian legislation does contain a provision allowing judicial review of border decisions when an asylum-seeker alleges that turning him away will endanger his life or liberty.²⁸⁵ Similarly, the availability in the Netherlands of the summary *Kort geding* judicial proceeding in which an asylum-seeker can challenge the decision to refuse him entry also affords a modicum of protection.²⁸⁶ These provisions are insufficient. They founder on the inadequacy of the record developed below, the speed with which the judicial process must be invoked, and the consequent difficulty of obtaining effective legal assistance. Thus, although some judicial review is available in Belgium and the Netherlands, the preconditions for effective judicial oversight are not present.

The lack of full appellate proceedings, either administrative or judicial, compounds the problems of the asylum-seeker at the border. The guard rejecting claims at the border need not consider the possibility that his decisions will be analyzed and reevaluated and thus has no incentives for accurate and fair evaluation. The lack of an independent review body also means that there is no institution likely to detect patterns of error or abuse. As a consequence, incorrect decisions will occur, will perhaps encourage future errors, and will remain beyond correction. Individuals, as well as the system, will suffer.

In summary, the significance of these legislative changes granting border authorities the explicit authority to refuse admission to asylum-seekers cannot be overstated. Law enforcement personnel

285. See *supra* notes 64-68 and accompanying text.

286. See *supra* notes 213-18 and accompanying text.

untrained in international and domestic refugee law are authorized to make snap decisions that are essentially unalterable. The criteria for their decisions enable them to exercise broad discretionary power, from which there is no effective appeal. Indeed, the possibility of a searching review of the initial decision is precluded by the very nature of the border proceeding. The record to be reconsidered is likely to be nonexistent or, at best, inadequate. Further, the reconsideration generally is undertaken in haste by officials who do not constitute an independent appellate tribunal. Thus, although it is possible that the perfunctory appellate procedure may lead on occasion to the correction of an erroneous decision, the laws fail to provide a reliable procedure for identifying and rectifying errors.

B. *Penalties and Seizures of Aircraft*

The new legislative measures providing for fines on carriers and permitting the seizure of aircraft suffer from many deficiencies. First, they assign to employees of commercial enterprises the crucial government function of deciding which individuals should be allowed to enter the country. They thus privatize a fundamental government function, one that governments often refer to as the essence of sovereignty.²⁸⁷ Specifically, they permit airline employees, private individuals of various nationalities who live and work in the many countries from which the flights originate, to interpret and apply the laws of the country in which the planes land.²⁸⁸ These individuals do not receive training in the international and municipal laws concerning refugees. Nor do they necessarily have any understanding of the culture and accepted practices of the country whose fundamental functions they are performing.

Second, the laws make no provision for appeal of decisions by airline personnel and offer no way to correct errors made in assessing the travel documents of a refugee bound for Belgium, Denmark, or the Federal Republic of Germany. More fundamentally, the individual excluded from the flight has, by definition, been prevented from reaching the destination and thus prevented from seeking redress there. Even if he somehow gets to Belgium, Denmark, or the Federal

287. See, e.g., Decision of 18 November 1986, District Court of Haarlem (government can detain asylum-seekers at airport to prevent entry into the Netherlands); *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889) (power to exclude foreigners is incident of sovereignty belonging to government).

288. In some cases the airline employees excluding refugees from airplanes will be citizens of the country the refugees are fleeing. This situation obviously raises questions about the impartiality of the decision-maker, who is entrusted with a politically sensitive decision.

Republic and wishes to challenge the earlier decision removing him from the flight, he is unlikely to find a remedy.²⁸⁹ Because private rather than government employees carried out the law, the traditional legal avenues for challenging incorrect government action would be unavailing.²⁹⁰

Third, the laws permitting seizures of aircraft place such strong financial pressures on the airlines that they distort the decision-making process delegated to the airlines. Since fines and seizures only come into play if people arrive at the destination lacking the required travel documents, the laws encourage airlines to exclude people from flights. Incorrect decisions that allow refugees to arrive are punished; incorrect decisions that prevent properly documented refugees from arriving go unpunished. In the absence of the realistic possibility of financial judgments against airlines for wrongful exclusion, there is no significant counterweight to the pressure placed on the airlines to exclude. A process in which the decision-maker has such a strong financial incentive to reach a particular conclusion cannot ensure accurate decisions.

Last, and most important, by pressuring airlines to exclude passengers without proper travel documents,²⁹¹ the seizure and fine provi-

289. Admittedly, if he reaches his destination, the issue of his prior exclusion from an aircraft is likely to be of little current concern to him. For this reason the occasional asylum-seeker who succeeds in reaching Belgium, Denmark, and the Federal Republic and applying for asylum will lack incentive to file suit against a past wrongful exclusion from an aircraft. Consequently, there will be few, if any, challenges to this delegation of government authority to private profit-making enterprises, and the delegated decisions will remain unappealable.

290. For example, a refugee incorrectly excluded from a flight to Belgium who later arrived in Belgium might file suit. If the refugee initiated a suit against the government, it is unlikely that the courts would deem the airline employee a government official, and the claim would be dismissed. A private action against the airline by the refugee would probably also be dismissed. It is unlikely the Belgian courts would entertain an action by a non-Belgian with few, if any, ties to Belgium against another non-Belgian based on a decision made and action taken in some country other than Belgium.

Because no legal challenges to airline crew decisions made outside Belgium to exclude asylum-seekers from a Belgian-bound flight have been reported, the Belgian courts have not ruled on this issue. Although Belgium would presumably have personal jurisdiction over a defendant airline company based on its business activities in Belgium, it seems likely that the Belgian courts would be reluctant to accept jurisdiction over a potentially large number of suits with relatively minimal connection with Belgium (e.g., suits against Lufthansa for excluding Tamil asylum-seekers who attempted to board in New Delhi flights scheduled to stopover at the Zaventem Airport near Brussels).

291. The 1987 Belgian and German legislation imposing fines on carriers and authorizing seizures of vessels contain no exceptions for bona fide refugees. Rather these laws are framed as blanket provisions penalizing all those who transport individuals lacking the prescribed travel documents. In light of the difficulties that many refugees face in obtaining passports and exit visas from the countries they are fleeing as well as entrance visas for other countries, these

sions ignore the reality that often faces refugees. Many refugees, due to the very circumstances that make them refugees, flee with no travel documents at all. Others flee with incomplete or false papers. Ironically, the new legislation ensures that those individuals fleeing from government persecution — as required by the refugee definition — who are lucky enough to be able to escape and buy passage on an airplane will attract the attention of airline employees and will likely be excluded from flights to or through Belgium, Denmark, and the Federal Republic. No matter how compelling their situation and extensive their proof that they are refugees, they will be totally barred from such flights unless they possess valid passports and hold valid visas issued by officials of the destination and transit governments.²⁹²

III. INTERNATIONAL LEGAL OBLIGATIONS

A. *The Geneva Convention Relating to the Status of Refugees*

1. *The Duty of Non-refoulement*

In the aftermath of the Nazi era, the turmoil of World War II, and the inadequate responses by nations to refugees fleeing their homelands in the 1930's and 1940's, the United Nations sponsored a Conference of Plenipotentiaries in 1951 to address the need for legal protection of refugees.²⁹³ This conference was the genesis of the 1951 Geneva Convention Relating to the Status of Refugees.²⁹⁴ The Convention defines those who qualify as refugees and outlines the legal

measures are especially severe. Their seeming neutrality is belied by their devastating impact on refugees.

292. Many countries are now requiring aliens to procure visas when their travel plans entail any passage, no matter how brief, through their territory. See, e.g., discussion of the visa requirement imposed by the Netherlands, *supra*, in text accompanying notes 263-66. Thus, a Ghanaian traveling to Canada on a flight that has a one hour stopover at Schiphol Airport outside Amsterdam would need to obtain two visas: a transit visa issued by the Netherlands Consulate in Ghana, and an entrance visa issued by the Canadian Consulate in Ghana.

293. Refugees and Displaced Persons, Conference of Plenipotentiaries, U.N. Doc. A/Conf. 2/108, U.N. Sales No. 1951.IV.6 (1951) [hereinafter Conference of Plenipotentiaries]. This conference was convened in Geneva from July 2 to 25, 1951 in response to G.A. Res. 429(V), 5 U.N. GAOR Supp. (No. 20) at 48, U.N. Doc. A/1775 (1950).

294. 1951 Refugee Convention, *supra* note 7, art. 1. The Conference of Plenipotentiaries reviewed the work submitted by the Ad Hoc Committee on Statelessness and Related Problems, which was established in January 1950 in response to the concern of the United Nations Economic and Social Council (ECOSOC) that a treaty for the protection of refugees was necessary. Conference of Plenipotentiaries, *supra* note 293, at 6. The work of this Committee was essentially adopted by the Conference as the Geneva Convention of 28 July 1951 Relating to the Status of Refugees. See generally Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (1953).

status of refugees.²⁹⁵ Article 33 of the Convention,²⁹⁶ a provision binding on all signatories,²⁹⁷ guarantees that refugees will not be returned to countries in which their lives or freedom would be threatened. It imposes on signatories an absolute duty, often referred to as the duty of *non-refoulement*, not to take actions that result in the return of refugees to persecution.²⁹⁸

One hundred and two nations,²⁹⁹ including Belgium, Denmark, the Federal Republic of Germany, and the Netherlands, have signed the 1951 Geneva Convention³⁰⁰ and its update, the 1967 Protocol Relating to the Status of Refugees.³⁰¹ These countries are legally obligated to refrain from returning refugees to countries in which their lives or freedom would be threatened. This obligation binds government officials, as well as their delegates who carry out government policy. The summary procedures at the border and the financial penalties imposed on airlines and shipping lines that allow improperly documented asylum-seekers to book passage are measures designed to restrict the flow of asylum-seekers. They aim to deter future asylum-seekers by actually turning away many current asylum-seekers. They do so according to procedures containing so few procedural safeguards that there

295. 1951 Refugee Convention, *supra* note 7, art. 1.

296. Article 33 provides:

1. No contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

1951 Refugee Convention, *supra* note 7, art. 33.

297. The treaty provides that signatories may make reservations to all articles of the Convention other than Articles 1, 3, 4, 16(1), 33, and 36-46. *Id.* art. 42.

298. *Id.*

299. UNHCR Information Paper, Apr. 1987, Annex I (May 1987 update).

300. Three nations, Monaco, Madagascar, and Mozambique, have signed the 1951 Convention only. *Id.*

301. The Convention expressly refers only to refugees resulting from events that occurred prior to January 1, 1951. 1951 Refugee Convention, *supra* note 7, art. 1. The Protocol Relating to the Status of Refugees was drafted to protect persons who became refugees as a result of events occurring after January 1, 1951. Protocol, Jan. 31, 1967, art. 1, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 8791. See G.A. Res. 2198, 21 U.N. GAOR Supp. (No. 16) at 48, U.N. Doc. A/6316 (1966).

The Protocol changes the 1951 time deadline in Article 1 and incorporates Articles 2 through 34 of the Convention. Thus, signatories of the Protocol are bound by the *non-refoulement* provision of Article 33. Three nations, the United States, Venezuela, and Swaziland, have signed only the 1967 Protocol. Ninety-six other nations have signed both the Protocol and the Convention. UNHCR Information Paper, *supra* note 242.

is a high likelihood of erroneous decisions. The lack of effective appellate review of the summary border proceedings and of the airline companies' decisions to exclude refugees from flights bound to or through Belgium, Denmark, and the Federal Republic ensures that many of these decisions will not be corrected. Consequently, the recently adopted laws will result in the denial of entry to a number of bona fide refugees who, as a result, will be endangered by a return to a country in which their lives or freedom would be threatened. Thus, Article 33 will be violated. In short, these new legal provisions are so procedurally deficient that they run afoul of the Article 33 duty to refrain from returning refugees to persecution.

In addition to violating the *non-refoulement* mandate of Article 33, these laws violate the notion that the right to a meaningful hearing before being condemned to suffer grievous loss is a principle basic to civilized society.³⁰² They ignore the principle mandating that governments implement additional procedural safeguards to minimize errors when the risk that errors will occur is high and the nature of the loss that will be suffered if an error does occur is grievous.³⁰³ The general recognition of these principles and the need for heightened procedural protection in face of potential grievous loss has led to international law protecting the rights of those accused of criminal offenses.³⁰⁴ Similar concerns have led to the growth of international law recognizing the need for adequate procedures when other fundamental rights are threatened.³⁰⁵ Although violations of the *non-refoulement* obligation do not involve the stigma and hardship of a criminal conviction,³⁰⁶ the consequences of being sent back to a country to face threats to life and freedom obviously can be far more severe than a criminal sentence. Accordingly, the serious results of violating Article 33 warrant procedures that are likely to yield enough relevant information to result in accurate decisions. Otherwise, procedural inadequacies will reduce the substantive right of *non-refoulement* to empty words.

302. See, e.g., *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

303. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

304. See, e.g., The Universal Declaration of Human Rights, arts. 10, 11, G.A. Res. 217 A(III) at 71, U.N. Doc. A/810 (1948); Human Rights Convention, *supra* note 8, arts. 5, 6; American Convention on Human Rights, Nov. 22, 1969, arts. 7, 8, OAS T.S. No. 36, at 1, reprinted in 9 I.L.M. 673 (1970).

305. See, e.g., Article 8 of the Universal Declaration of Human Rights, *supra* note 304; Article 6(1) of the European Convention on Human Rights, *supra* note 8 (in determination of obligations and civil rights, everyone is entitled to a fair trial by an independent hearing).

306. See *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. at 168.

The procedural safeguards surrounding rejection of asylum-seekers in airports and borders need not be so stringent that an incorrect decision cannot possibly occur. Rather the safeguards must be sufficient to ensure that correct decisions are reached in most instances. The guarantees set out by the United Nations High Commissioner for Refugees for procedures determining refugee status suggest procedures for determining *non-refoulement* claims:

- (1) competent officials instructed in refugee law should be the decision-makers;
- (2) *non-refoulement* claims should be decided by a higher —and preferably central — authority than a border guard or a regular police officer;
- (3) the asylum-seeker should receive adequate instruction as to how to present his *non-refoulement* claim;
- (4) the asylum-seeker should be able to use a competent interpreter, if necessary;
- (5) the asylum-seeker should be informed that he can consult with a UNHCR representative;
- (6) an asylum-seeker whose *non-refoulement* claim is rejected should have a reasonable time to appeal for a formal reconsideration of the initial decision;
- (7) an asylum-seeker should not be turned away while the appeal of his *non-refoulement* claim is pending.³⁰⁷

Although other procedural safeguards for *non-refoulement* claims may also be desirable, such minimal guarantees would vastly improve the summary procedures embodied in the recent Belgian, Danish, Dutch, and West German laws. It is certain that they would yield more correct decisions concerning the *non-refoulement* claims presented by asylum-seekers and thus reduce the risk of asylum-seekers being sent to countries where they face likely persecution.

Although better procedures would undoubtedly improve the decision-making, government officials do not concede that better procedures are required. Instead, a number of arguments have been raised to support the contention that neither the summary border proceedings nor the fines on airlines violate Article 33. First, these measures merely reaffirm a nation's right to deny asylum. Second, Article 33 only applies to those legally recognized as refugees. Third, a nation has no duty under the Geneva Convention to those individuals

307. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status at 45-46, ¶ 192 (1979) [Recommendation by Executive Committee of UNHCR, October 1977].

beyond the nation's borders. Fourth, the duty on *non-refoulement* applies only to a minuscule subgroup of asylum-seekers. Fifth, the new legal measures at issue provide sufficient protection because most asylum-seekers in Europe will be returned to third countries, not to their homelands. An examination of these assertions reveals that each is unconvincing.

The first argument is that summary border proceedings and airline fines simply reaffirm a nation's sovereign right to control entry into its territory. The 1951 Refugee Convention does not grant a right of asylum to refugees. Therefore, the argument develops, whether an asylum-seeker is a bona fide refugee or not is irrelevant. Even a bona fide refugee has no right to asylum in this country, and the new laws merely reaffirm a nation's right to refuse asylum.

As to the right to refuse to grant asylum, there is no dispute. The 1951 Refugee Convention imposes no duty to grant asylum to refugees.³⁰⁸ This does not end the discussion, however. Despite the fact that the 1951 Refugee Convention does not guarantee a refugee a right to asylum in a signatory country, Article 33 absolutely forbids a refugee's return in certain circumstances.³⁰⁹ Thus, under Article 33 a signatory may refuse a refugee asylum, which connotes a permanent or long-term right of residence, but may not turn him back to a place where his life or freedom would be threatened.³¹⁰ Accordingly, Article 33 mandates that this refugee is entitled to stay in the signatory country until the government can find an alternative solution.³¹¹ The government may choose to let him stay until conditions become less threatening in the country he departed, attempt to help him resettle in another country, or deport him to yet another country in which his life or freedom would not be threatened. In sum, although Article 33 provides no entitlement to asylum, it significantly limits the government's rejection options. To the extent that the new legislation results in turning away refugees who face threats to their lives or freedom, these laws violate Article 33.

Second, it is said that the 1951 Refugee Convention protects only refugees, not asylum-seekers.³¹² Arguably, therefore, a signatory's duty under the Convention is not triggered until an asylum-seeker is recognized as a refugee. Such an interpretation, however, would turn reality on its head. It is not a government's acknowledgement of

308. G. Goodwin-Gill, *The Refugee in International Law* 104-05 (1983).

309. 1951 Refugee Convention, *supra* note 7, art. 33.

310. *Id.*

311. G. Goodwin-Gill, *supra* note 308, at 82-83.

312. *Id.* at 73.

one's predicament that makes that individual a refugee. Rather, it is the actual facts of his life — his well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group — that make him a refugee. It is true that all asylum-seekers do not qualify as refugees; yet some asylum-seekers *are* refugees.³¹³ Therefore, governments that turn away all or most asylum-seekers will likely turn away some refugees and violate Article 33.

Third, signatories might assert that their duties under the Convention apply only to refugees within their territory and not to refugees outside their territory — whether they are at the border or in a third country attempting to board a plane bound for a signatory country.³¹⁴ The physical presence argument fails on two grounds. First, many of the asylum-seekers claiming the protection of Article 33 are already, in fact, within the territory of a signatory. For example, all of those who arrive at a nation's airport are physically within the territory from the moment their plane lands. They may not yet have passed through passport control and thus may not be deemed to have made a legal entry, but they are actually present in a nation's territory. In addition, depending on the placement of the border station, even those stopped at a border as opposed to at an airport may be physically present within the territory claimed by the country they are seeking to enter. Therefore, even if one accepts the argument that the application of Article 33 is limited to those asylum-seekers physically present within a nation's territory, many asylum-seekers at airports and border crossings fall within the protected group.

Furthermore, the *non-refoulement* prohibition of Article 33 has been interpreted to apply to asylum-seekers at the border as well as to those who have crossed the border.³¹⁵ It would thwart the Convention's purpose of providing protection to refugees if signatories could

313. Furthermore, the view that refugees are created solely by government recognition of refugee status leads to absurd results. Under such an interpretation a signatory of the 1951 Refugee Convention could comply fully with all the treaty terms by automatically denying recognition to all who claim they are refugees. Indeed, such an interpretation would encourage this result, which is clearly contradictory to the whole purpose behind the 1951 Refugee Convention. Moreover, nothing in the Convention supports the view that official government recognition is dispositive in determining refugee status. Indeed, the Convention does not even address the issue of how and when a government should officially recognize an asylum-seeker as a refugee. See generally 1951 Refugee Convention, *supra* note 7. Rather, the Convention places great emphasis on the underlying circumstances that create refugees. *Id.* art. 1.

314. G. Goodwin-Gill, *supra* note 308, at 74-75.

315. *Id.* at 76-77.

declare themselves in full compliance with the Convention while simultaneously turning away bona fide refugees at the border and sending them back to life-threatening situations. Such a legalistic and cynical approach would have justified denying landing rights to boatloads of Jewish refugees in flight from Hitler and forcing them to return to Germany, a result the drafters of the Convention could hardly have intended. Indeed, perhaps in partial response to the horrible consequences of just such legalistic approaches to refugees, over the past fifty years customary international law has developed to require greater protection to refugees at the border.³¹⁶

Fourth, the language of the 1951 Refugee Convention may be interpreted to apply the duty of *non-refoulement* only to a minuscule group of asylum-seekers.³¹⁷ Article 33 expressly prohibits the expulsion "or return [of] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."³¹⁸ The Convention then defines a refugee as an individual who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."³¹⁹

Although the Convention definition of a refugee is quite similar to its terms in Article 33, there are two differences. First, Article 33 refers to refugees who "would face" certain unwarranted treatment; the refugee definition speaks of "well-founded fear" of persecution. Although the jurisprudence examining these terms has not articulated precise definitions, the weight of authority interprets the "would face threats" language of Article 33 as requiring a greater showing that the

316. *Id.* at 77-78.

This development is demonstrated by the international condemnation that has greeted the recent policy of Thailand to push people back to sea. *N.Y. Times*, Apr. 6, 1988, at A1, col. 1. The Thai border authorities have been harshly criticized for violating the basic *non-refoulement* obligation of international law by refusing to allow even temporary landings at their border during which the refugee claims of the boat people could be examined. Helton, Letter to the Editor, *N.Y. Times*, Mar. 8, 1988, at A30, col. 4. Although the European laws restricting the entry of asylum-seekers will result in people being put back onto airplanes rather than boats and thus do not conjure up such harsh images, the method of return is not legally significant. The *non-refoulement* principle prohibits all methods of denying entry to refugees and returning them to face threats to their lives or freedom. 1951 Refugee Convention, *supra* note 7, art. 33. While it is true that Article 33 does not bind signatories to protect everyone in the world whose life or freedom is threatened, it significantly limits the signatories' freedom to reject the small group of refugees who manage to arrive at or in its territory. *Id.*

317. See *INS v. Stevic*, 467 U.S. 407, 427 n.22 (1984).

318. 1951 Refugee Convention, *supra* note 7, art. 33.

319. *Id.* art. 1 (a)(2).

feared threats will materialize than that required by the "well-founded fear" language.³²⁰ Second, Article 33 refers to threats to "life or freedom"; the refugee definition refers to "persecution". Again, the distinction between these terms is not self-evident. Arguably, however, the more specific term, "threats to life or freedom," comprises only a portion of the mistreatment that can legitimately be characterized as "persecution". Therefore, only those refugees who can show not only a well-founded fear of persecution upon return but also a greater threat of persecution that rises to the level of threat to life or freedom would be entitled to protection under Article 33.

Because these two differences in language allow Article 33 to be interpreted more narrowly than the refugee definition, Article 33 may not provide protection to all refugees, but rather only to that subcategory of refugees who can show with sufficient likelihood threats to their lives or freedom. Even if one accepts this narrow interpretation of Article 33, however, recent laws permitting summary rejection of asylum-seekers violate the Article 33 prohibition against returning refugees to countries where they face threats to their lives or freedom. These new restrictive provisions allow — indeed, encourage — rejection of asylum-seekers after such a cursory examination that errors are bound to occur. Although not all asylum-seekers will satisfy the refugee definition, and not all the refugees will fall into the subcategory of refugees to whom Article 33 arguably applies, some of the people incorrectly turned away will face threats to their lives or freedom when they are returned to the countries they fled. The return of these individuals will violate the fundamental Convention obligation of *non-refoulement*. Accordingly, countries that intentionally place into effect procedures that obviously will result in erroneous, and unlikely to be corrected, decisions about asylum-seekers whose return will result in threats to their lives or freedom are violating their *non-refoulement* duty.

Of the recent legal developments examined in this article, only the Belgian and Danish legislation include provisions that acknowledge the *non-refoulement* obligation embodied in Article 33. The Belgian law provides that an asylum-seeker rejected in a summary proceeding

320. See *Stevic v. INS*, 467 U.S. at 407 ("would face threats" requires a showing that it is more likely than not that the threatened acts will occur); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) ("well-founded fear" does not require showing that it is more likely than not that persecution will occur); *Matter of Mogharrabi*, Board of Immigration Appeals, Interim Decision 3028, June 12, 1987 ("well-founded fear" requires a showing that reasonable person in same circumstances would fear persecution; reasonable person may fear persecution even when likelihood of persecution is less than probable).

at the border has a right to seek a judicial hearing on the single issue of whether his return would lead to threats to his life or freedom.³²¹ In contrast, the Danish legislation expressly forbids the Danish administrative authorities from expelling an asylum-seeker to a country where he would be persecuted, but provides for no judicial review of *non-refoulement* claims by asylum-seekers.³²² The speed with which the asylum-seeker at the Belgian border must prepare and present his claim to a judge renders it difficult to assemble an effective, well-documented case. Similarly, the lack of judicial oversight weakens the Danish law. Nonetheless, these legislative provisions at least recognize the *non-refoulement* requirement imposed by Article 33 and make minimal attempts to satisfy it.

The practical problem with the Belgian and Danish *non-refoulement* provisions, and also with the German and Dutch laws, is that many refugees may be unable at the border or in an airport or as they board an airplane or ship to produce unequivocal proof of the danger they face.³²³ Circumstances that produce refugees often do not admit of thorough gathering of documentary proof. Bona fide refugees who at the moment lack compelling proof of the threats to their lives or freedom are just as entitled to the protection of Article 33 as refugees fortunate enough to have collected better proof. Under the new laws allowing summary border rejections and imposing fines on air carriers and shipping companies, however, refugees are likely to be turned away and returned to dangerous situations. The inadequate procedural safeguards — the cursory interview, the untrained interviewers, the pressure to make immediate decisions, the lack of a record, the lack of meaningful review, the incentive to deny entry — necessarily will result in the summary rejection of bona fide refugees. Those rejected who, as a consequence, face threats to their lives or freedom, will have been deprived of the protection guaranteed by Article 33.

Fifth, the new legal measures in Belgium, Denmark, the Federal Republic, and the Netherlands arguably provide sufficient protection because most asylum-seekers arriving at the borders or in the airports of these four countries have not come directly from the countries in

321. See *supra* notes 64-68 and accompanying text.

322. See *supra* notes 102 and 115-20 and accompanying text.

323. It may well be that in most instances, if a refugee at the border can show unequivocally that his life or freedom will be threatened if he is turned away, the governments of Belgium, Denmark, the Federal Republic, and the Netherlands will not deny him admission. Their sense of moral, as well as legal, obligation will permit entry. Even if this were always true, it does not justify the enactment of procedures so summary that refugees with bona fide claims but less than unequivocal proof are turned away by border guards.

which they fear persecution.³²⁴ Returning these individuals to the country from which they came to Europe may not return them to the land where their life or freedom would be threatened.

Nevertheless, asylum-seekers in Europe need more protection than the new laws provide. In fact, many asylum-seekers do come to Belgium, Denmark, the Federal Republic, and the Netherlands directly from their homelands.³²⁵ Moreover, although a much larger group of asylum-seekers are indirect arrivals who first surreptitiously left their homelands for neighboring countries and then left those third countries for Europe, these asylum-seekers may still present viable *non-refoulement* claims. They may face threats to their lives or freedom in the third countries if sent back there. Even worse, however, the third countries may return them to their homelands, where the real threats to life or freedom would occur.³²⁶

The likelihood of an eventual return to the land of persecution increases, of course, when the third country is not a signatory of the 1951 Refugee Convention and therefore is not bound by Article 33. The problem, however, is not limited to non-signatories. Instances have occurred in which two signatory nations reached different conclusions concerning the likelihood of threats to life or freedom in a third country.³²⁷ In such cases, country A may have decided that it should not send asylum-seekers back to country C, but have returned them to country B, which had no compunctions about sending asylum-seekers back to country C. This type of two-step return to danger constitutes a violation of Article 33 just as much as a direct return

324. For example, it is relatively rare that an Iranian asylum-seeker would go to Teheran and book passage directly to Frankfurt. Rather, the Iranian, following the age-old tradition of asylum-seekers, will usually make his way from his homeland to a third country where he then books passage to Europe. Ironically, Iranian asylum-seekers who do fly directly from Teheran to Frankfurt, perhaps with the assistance of a generous sum of money paid to airport personnel, often find it difficult to obtain asylum because the inference that they have no well-founded fear of persecution is drawn from their "legal" departure. Klever Interview, *supra* note 147.

325. Eastern Europeans who flee to the Federal Republic or Denmark provide an obvious example of this group of asylum-seekers.

326. For example, an Iranian who came to the Federal Republic via Turkey might be sent back to Turkey by German officials and then returned to Iran by Turkish authorities. Cf. *supra* notes 112-13 and accompanying text. Or a Third World refugee who attempted to enter Denmark from the German Democratic Republic might be turned back to East Germany, which would then return him to his homeland. At the present moment, this particular scenario is unlikely to occur due to the agreement between Denmark and the German Democratic Republic, *supra* note 168, but it has been a problem in the past and could recur in the future.

327. For an example of such a case, see *supra* note 113.

does.³²⁸ To conclude otherwise would allow countries to evade their legal obligations by doing indirectly what they are prohibited from doing directly. Therefore, the procedural protections required to make accurate *non-refoulement* decisions are necessary even if most asylum-seekers arrive in Europe after having passed through countries in which their lives or freedom were not threatened.

Consequently, European governments cannot excuse their cursory border decisions by pointing to the fact that they, by and large, return asylum-seekers only to third countries in which the asylum-seekers do not face imminent danger. They must also assure themselves that those third countries will not return the asylum-seekers to countries where their lives or freedom are threatened. The summary rejection procedures appear to ignore the possibility that there may be a second step to the return process. In this respect, the procedures recently established in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands do not adequately observe the *non-refoulement* obligation of Article 33.

2. *The Lack of Enforcement*

As described above, the procedural deficiencies of the new laws in Belgium, Denmark, the Federal Republic, and the Netherlands ensure that these signatory nations will violate Article 33. Unfortunately, the 1951 Refugee Convention lacks an effective mechanism to enforce the terms of Article 33. The Convention provides that disputes between parties to the Convention may be referred to the International Court of Justice.³²⁹ A refugee whose rights under the Convention have been violated is without recourse. Only a nation that is a signatory to the Convention has standing to bring a case before the International Court of Justice.³³⁰ Although it is theoretically possible that a signatory could sue another signatory for violating Article 33 by sending a refugee back to a land in which his life or freedom would be threatened, in reality this never happens. Each signatory is

328. A two-stage return implicates two nations in the violation of the *non-refoulement* principle. The fact that a second nation actually places the refugee on the airplane back to the country of persecution and violates the duty of *non-refoulement* does not absolve the first country of complicity in this return, if the first country had reason to know the refugee lacked a sufficient guarantee against deportation to the country of persecution. Cf. *supra* notes 102-114 and accompanying text.

329. Article 38 provides: "Any dispute between *parties* to this Convention relating to its interpretation or application, which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute." 1951 Refugee Convention, *supra* note 7, art. 38 (emphasis added).

330. *Id.*

reluctant to criticize other signatories for fear that its own refugee practices will, in turn, be criticized.³³¹

In addition, a dispute must generate a significant amount of hostility and ill will before it results in a suit at the International Court of Justice. Practices that adversely affect individual refugees, a powerless group of people, are unlikely to generate sufficient interest and concern to trigger a formal proceeding before this forum. More importantly, when problems of refugee populations cause friction between nations, diplomatic pressure and negotiation are more effective means of resolving the dispute than litigation. As a result, these informal methods are the general mode of resolution. Although informal resolution may often be preferable to litigation, diplomatic pressure is unlikely to be triggered by incorrect decisions concerning individual refugees refused entry at the border. In consequence, violations of Article 33 occur and go unredressed. Therefore, although the rejection of refugees at the border that is countenanced by the new laws of Belgium, Denmark, the Federal Republic, and the Netherlands violates Article 33, this is unlikely to be curtailed by any international adjudication pursuant to the 1951 Refugee Convention.

B. *The European Convention on Human Rights*

The European Convention For the Protection of Human Rights and Fundamental Freedoms,³³² which entered into force in 1953, has been signed by 21 nations, including Belgium, Denmark, the Federal Republic of Germany, and the Netherlands.³³³ In contrast to the 1951 Geneva Convention, the Human Rights Convention does not focus on refugees. Rather, it attempts to protect the basic civil rights of all people within the jurisdiction of the signatory states.³³⁴ Indeed, the Human Rights Convention contains no explicit references to refugees. Nonetheless, some terms of this Convention potentially provide protection for refugees.

1. *The Prohibition Against Inhuman Treatment*

Of particular interest is Article 3, which states: "No one shall be subjected to torture or to inhuman or degrading treatment."³³⁵

331. Klever Interview, *supra* note 147.

332. Human Rights Convention, *supra* note 8.

333. *Id.* All 21 members of the Council of Europe have signed the Convention.

334. The parties reaffirm "their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world. Human Rights Convention, *supra* note 8, preamble. The Convention then lists these fundamental freedoms. *Id.* arts. 2-12.

335. Human Rights Convention, *supra* note 8, art. 3.

Arguably, sending an individual back to a country in which his life or freedom will be threatened constitutes inhuman treatment. Decisions issued by the European Commission of Human Rights, a body established by the Human Rights Convention to ensure that signatories observe their obligations under the Convention,³³⁶ support this view. The Commission acknowledges, of course, that under traditional international law a nation has the right to admit or expel non-citizens from its territories.³³⁷ The Commission also acknowledges that the Convention does not guarantee to non-citizens of a nation the right to enter that nation's territory.³³⁸ Nonetheless, the Commission has unequivocally stated that in certain circumstances the denial of entry or expulsion of a non-citizen might rise to the level of inhuman treatment within the meaning of Article 3.³³⁹

In reaching this conclusion, the Commission reasoned that signatories of the Convention have limited their rights, including the right to control the entry and exit of foreigners, under general international law to the extent they have agreed to be bound by the terms of the Convention.³⁴⁰ The Commission also reasoned that the Human Rights Convention obliges each signatory country to apply the Convention provisions to all those in the country, whether or not they are entitled to be present.³⁴¹ Further, the Commission ruled that returning an individual to a country in which the basic human rights guaranteed by the Convention are ignored or grossly violated consti-

336. Article 19 of the Human Rights Convention establishes two bodies to enforce the provisions of the agreement: the European Commission of Human Rights ("the Commission") and the European Court of Human Rights ("the Court"). Article 20 defines the membership of the Commission; articles 21-37 establish the procedures of the Commission; article 38 defines the membership of the Court; and articles 39-56 establish the procedures of the Court.

337. See, e.g., Decision of 30 June 1959, App. No. 434/58, 2 Y.B. Eur. Conv. on Hum. Rts. (Eur. Comm'n H.R.) 354, 372.

338. *Id.*

339. See, e.g., *Nazih-al-Kuzbari v. Federal Republic of Germany*, 10 Eur. Comm'n H.R. 26, 36 (1963) (finding that although deportation or extradition of a foreigner to a particular country might in exceptional circumstances constitute inhuman treatment, such circumstances did not exist on the facts of this case); *X v. Austria and Yugoslavia*, 14 Eur. Comm'n H.R. 15, 24, 26 (1964) (in certain circumstances, extradition might violate Article 3 of the Convention's prohibition on inhuman or degrading treatment); *X v. Federal Republic of Germany*, 32 Eur. Comm'n H.R. 87, 95 (1969) (holding application inadmissible because it failed to prove expulsion to Poland constituted inhuman treatment); *X v. Switzerland*, 24 Eur. Comm'n H.R. 205, 219 (1980) (applicant did not show that expulsion to United Arab Emirates would expose him to inhuman treatment there).

340. See, e.g., Decision of 30 June 1959, *supra* note 337.

341. See, e.g., *Amekrane v. The United Kingdom*, 1973 Y.B. Eur. Conv. on Hum. Rts. 356 (Eur. Comm'n on Hum. Rts.).

tutes inhuman treatment.³⁴² For example, the Commission held that allegations that an individual returned to his homeland would face the death sentence or a long prison term for his prior political activity state a claim under Article 3.³⁴³ Thus, under this reasoning, the turning away of refugees who face prison or death at home due to their race, religion, nationality, social group membership, or political opinion would constitute a violation of the Human Rights Convention.

One Commission decision, *Amekrane v. United Kingdom*,³⁴⁴ graphically illustrates this point. In *Amekrane* the Commission ruled that returning an asylum-seeker to his homeland constituted a violation of Article 3.³⁴⁵ Despite Amekrane's sudden arrival in a European country without permission to enter, the Commission concluded that he was protected by the Human Rights Convention.³⁴⁶

Amekrane, an officer in the Moroccan Air Force, was involved in an unsuccessful coup attempt against the Moroccan government. He immediately fled Morocco, flew to Gibraltar, and requested asylum. Approximately twenty-four hours later the British government returned Amekrane to Moroccan custody. Six months later, after a secret trial, Amekrane was executed by a firing squad in Morocco. Amekrane's widow filed a complaint with the Commission contending that the British government had violated Article 3 of the Convention.³⁴⁷

The United Kingdom argued that under international law it had the right to return an undesirable non-citizen to his homeland or to the country from which he had departed for the United Kingdom.³⁴⁸ Britain contended that it had concluded that Amekrane's presence in Gibraltar was not "conducive to the public good," and that therefore he was an undesirable alien.³⁴⁹ Furthermore, Britain pointed out that Amekrane's presence violated the local Gibraltar law, which prohibited non-Gibraltarians from entering or staying in Gibraltar without a permit.³⁵⁰ Emphasizing that the Human Rights Convention does not guarantee a right to political asylum and does not guarantee a right to enter the territory of a country of which the applicant is not a

342. See, e.g., cases cited *supra* note 339.

343. Decision of 30 March 1966 [Application 2240/64] (unpublished).

344. *Amekrane v. The United Kingdom*, 1973 Y.B. Eur. Conv. on Hum. Rts. 356 (Eur. Comm'n on Hum. Rts.).

345. *Id.* at 382.

346. *Id.*

347. *Id.* at 370.

348. *Id.* at 372.

349. *Id.* at 372.

350. *Id.* at 374.

national,³⁵¹ the United Kingdom denied it had committed any violation of Article 3.

The Commission rejected the United Kingdom's interpretation of the treaty.³⁵² Based on the circumstances surrounding the return of Amekrane to Morocco, the Commission concluded that Britain's return of Amekrane to Morocco may have constituted inhuman treatment and thus have violated Article 3.³⁵³ Accordingly, the Commission refused Britain's plea to dismiss the complaint.³⁵⁴ Concluding that Amekrane had stated a claim under Article 3, the Commission ordered further proceedings to examine the truth of the parties' allegations and the merits of the claim.³⁵⁵ Subsequently, the United Kingdom reached a friendly settlement with Amekrane's widow.³⁵⁶ The United Kingdom paid her compensation and the case ended.³⁵⁷

Although the *Amekrane* case obviously possesses significance for asylum-seekers turned away by European countries, the clear proof available distinguishes *Amekrane* from the more typical case. Amekrane was a high-ranking officer; he was involved in clearly political activity; his political activity was easily documentable; and the proof of the misfortune he faced on return was also easily verifiable. Most refugees, in contrast to Amekrane, will not have such clear-cut proof of the dangers to their lives or freedom.

Nonetheless, the Commission's legal rulings in the *Amekrane* case should have a broad impact on the claims submitted by other refugees. In *Amekrane* the Commission refused to construe Article 3 as subordinate to a country's right to return an undesirable alien or an illegal entrant.³⁵⁸ Notwithstanding the absence from the Human Rights Convention of a right to asylum or a right to enter another nation's territory, the Commission interpreted Article 3 to limit a government's right to return a non-citizen to countries in which he

351. *Id.*

352. *Id.* at 372.

353. *Id.* at 382.

354. *Id.* at 388.

355. *Id.*

356. See European Comm'n on Hum. Rts., Report of the Commission: *Amekrane v. The United Kingdom* 4 (July 19, 1974) [hereinafter *Amekrane Report*]; Sec'y to Eur. Comm'n on Hum. Rts., Stock-taking on the European Convention on Human Rights 1954-1984, at 122 (1984) [hereinafter *Stock-taking 1954-1984*]. The enforcement procedures of the Human Rights Convention strongly encourage friendly settlements. See Human Rights Convention, *supra* note 8, arts. 28, 30, and 47.

357. In return for £37,500 Mrs. Amekrane withdrew her application to the Commission. *Amekrane Report*, *supra* note 356, at 5; *Stock-taking 1954-1984*, *supra* note 356, at 122.

358. *Amekrane v. The United Kingdom*, 1973 Y.B. Eur. Conv. on Hum. Rts. at 382.

would face threats to his life or freedom.³⁵⁹ The *Amekrane* case thus provides support for the view that legislative provisions that result in the return of refugees to circumstances threatening their lives or freedom violate Article 3. Accordingly, the laws of Belgium, Denmark, the Federal Republic of Germany, and the Netherlands that permit summary, virtually unappealable rejection of asylum-seekers may on many occasions run afoul of the Human Rights Convention.

2. *The Potential for Enforcement*

This collision of laws restricting entry of asylum-seekers with Article 3 of the Human Rights Convention is important because the Convention provides a potential remedy. In contrast to the 1951 Refugee Convention, the Human Rights Convention sets up enforcement mechanisms that allow individuals as well as nations to file petitions alleging violations of the Convention.³⁶⁰ Accordingly, the reluctance of one nation to sue another nation and incur the resulting ill will need not stand in the way of invoking the Convention's dispute resolution process. Not surprisingly, most petitions received by the Commission challenging government actions under the Human Rights Convention are initiated by individuals.³⁶¹ Accordingly, an individual asylum-seeker denied admission who, as a consequence, faces threats to his life or freedom can file a complaint with the Human Rights Commission alleging violation of Article 3.

Despite the availability of individual suits, the jurisprudence analyzing the protection Article 3 extends to refugees is relatively unde-

359. *Id.*

360. Article 24 of the Human Rights Convention provides: "Any High Contracting Party may refer to the Commission . . . any alleged breach of the provisions of the Convention by another High Contracting Party." Human Rights Convention, *supra* note 8, art. 24.

Article 25(1) provides in part:

The Commission may receive petitions . . . from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the Rights set forth in this Convention, *provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions.*

Id. art. 25(1) (emphasis added).

Thus, by signing the Human Rights Convention, a nation opens itself to suit by another signatory nation. Only those signatories that affirmatively confer standing on individuals who wish to challenge its observance of the Convention obligations are subject to claims by individuals. To date, 19 of the 21 signatories permit claims to be initiated by individuals. Only Cyprus and Malta have not granted individuals standing to file petitions against them with the Commission. See T. Buergenthal, *International Human Rights in a Nutshell* 89 (1988).

361. During the period 1955-1981, individuals filed 9,620 applications with the Commission. Eur. Comm'n on Hum. Rts., *Annual Review 1981*, at 49 (1982). During this same period, member states filed 10 actions. *Id.* at 36.

veloped. In terms of the numbers of asylum-seekers rejected from European countries, the Commission has received few refugee claims.³⁶² Three factors appear to explain this. First, those asylum-seekers denied entry generally have been sent away so quickly that there has been neither time nor legal assistance available for filing claims with the Human Rights Commission. Second, those asylum-seekers who have been permitted to enter and then subsequently are expelled, although under less time pressure than those denied entry at the border, often find the Commission's procedures cumbersome and onerous. In particular, the Commission's requirement that claimants demonstrate that they have exhausted all domestic remedies means that asylum-seekers may have to wait years before they can file applications with the Commission.³⁶³ Third, many refugee advocates and lawyers have been unaware that the Human Rights Convention contains potential protection for asylum-seekers and are unfamiliar with the Convention's enforcement procedures.³⁶⁴ Assisting refugees is rarely a lucrative practice for lawyers. As a consequence, there are many more refugee clients than attorneys can handle. Accordingly, refugee advocates are often overworked and underpaid. Keeping informed about the many developments in their national law is often all they can manage to do. Learning about a whole new procedure for a Commission based in another country — and a procedure that is technical and can only be invoked after all national remedies have been exhausted — may seem a luxury that they cannot afford.³⁶⁵

Nonetheless, although it has been a relatively rare occurrence, asylum-seekers have filed claims with the Commission seeking protection from expulsion.³⁶⁶ Many of the claims alleging that returning an asy-

362. Lecture by Andrew Drzemczewski, Staff of European Commission on Human Rights, in Strasbourg, France, (Nov. 14, 1986); see also R. Plender, Problems Raised by Certain Aspects of the Present Situation of Refugees from the Standpoint of the European Commission on Human Rights 26 (European Commission Human Rights Files No. 9, 1984).

363. Article 26 of the Human Rights Convention provides: "The Commission may only deal with the matter after all domestic remedies have been exhausted" Human Rights Convention, *supra* note 8, art. 26.

364. See, e.g., Interview with Gunnar Homann, Hamburg, Federal Republic of Germany (Nov. 30, 1986) (busy lawyers juggling private practice and *pro bono* refugee cases often not familiar with enforcement potential and procedures of Human Rights Convention).

365. To remedy this situation the European Legal Network on Asylum (ELENA), a group of lawyers in Europe who represent refugees, organized a conference on the Human Rights Convention. The conference, held at the Human Rights Commission headquarters in Strasbourg, France from June 26-29, 1987, focused on the Convention provisions applicable to refugees and on the jurisdiction and practice of both the Commission and the Court.

366. See 1 Dig. Strasbourg Case Law § 3.0.3.4 (Eur. Comm'n Hum. Rts. 1984) (collected decisions regarding Article 3 of the Convention and the expulsion of aliens).

lum-seeker to his homeland violates the prohibition of Article 3 against inhuman treatment have been dismissed for lack of substantial evidence of a serious threat to life or freedom.³⁶⁷ As *Amekrane* shows, this need not always be the case.

Although *Amekrane* signifies that successful invocation of the Human Rights Convention by asylum-seekers protesting *refoulement* is possible, in most cases the Human Rights Convention does not furnish a practical remedy. This is due to two factors: (1) the enforcement mechanisms established by the Convention do not contemplate providing routine relief to individuals; (2) most asylum-seekers do not possess the resources necessary to resort to the Convention to protect their rights.

To ensure the observance of its provisions, the Convention establishes both a European Commission of Human Rights and a European Court of Human Rights. All complaints must first be presented to the Commission.³⁶⁸ Furthermore, many of the claims presented to the Commission are dismissed for failure to exhaust domestic remedies.³⁶⁹ For those claims that survive the exhaustion requirement, the enforcement process moves slowly. The Commission places great emphasis on threshold admissibility questions.³⁷⁰ The Commission procedure is heavily weighted toward encouraging the parties to reach a friendly settlement of their dispute.³⁷¹ It is the extraordinarily rare case that ever emerges from the Commission and reaches the Court.³⁷² In short, the enforcement process is a slow bureaucratic one. It bears little resemblance to a court of first instance, in which litigants routinely file suit and seek speedy resolution of their individual claims.

367. See Plender, *supra* note 362, at 26.

368. Article 47 provides: "The Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement" Human Rights Convention, *supra* note 8, art. 47.

369. See *supra* note 361 and accompanying text.

370. Articles 26 and 27 list various threshold issues that warrant dismissal of a claim as "inadmissible." Grounds of inadmissibility include anonymous filings, prior adjudication, statute of limitations (6 months), manifestly ill-founded claims, failure to exhaust domestic remedies, abusive claims, and claims incompatible with the terms of the Convention. Human Rights Convention, *supra* note 8, arts. 26 and 27.

371. For example, Article 28 provides: "In the event of the Commission accepting a petition referred to it . . . it shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter" Human Rights Convention, *supra* note 8, art. 28. Article 30 details procedures to be followed after friendly settlement reached and Article 47 provides that the European Court of Human Rights may deal with a case only after attempts at friendly settlement have failed. *Id.* arts. 30 and 47.

372. See T. Buergenthal, *supra* note 360, at 98-101.

This is not surprising because the Commission and the Court are international tribunals. The litigation before them does not concern private disputes; all claims challenge a national law or policy. Therefore, the decisions they reach often have diplomatic implications. Accordingly, the process is deliberate and slow. Despite the frustrations of the process, the decisions of the Commission and Court are important. Although for most asylum-seekers the hope of receiving an individual remedy under the Convention is illusory, the few cases in which asylum-seekers are successful are likely to have a significant impact far beyond the individual claimants.

Being prepared to persevere through a lengthy, deliberate process does not obviate the second problem, the lack of adequate resources to pursue effectively applications filed with the Commission. It is, of course, obvious that simply filing a strongly worded complaint will not be sufficient. It is also obvious that only an asylum-seeker who has managed to find some protection from threats to his freedom will be able to muster the necessary attention to present his claim adequately. Respite from persecution is not sufficient, however. Only an asylum-seeker with additional other resources will be able to frame an application that is sufficiently strong to lead to an inquiry into the merits. An asylum-seeker must have access to fairly compelling proof of his claims. As a practical matter, he must also have access to skilled legal assistance in order to have any chance of success under the Human Rights Convention. These requirements mean that there will be few asylum-seekers who will be able to prepare a credible claim and present it to the Commission. Of those who file a credible claim, few will ultimately prevail. Thus, for most asylum-seekers rejected entry at the border or prohibited from boarding airplanes bound for European countries, the European Convention on Human Rights will not provide solace.

Nonetheless, the Convention has the real potential to provide a powerful tool with which to challenge the recent laws restricting entry. A test case strategy may yield positive results that far exceed the beneficial results gained by the individual litigants. To pursue such a strategy, several cases must be carefully selected. The cases must then be thoroughly prepared in order to expose the deficiencies in the summary procedures and the hardship that results from erroneous decisions. They must be presented to the Commission and to the Court, if they proceed that far, by skilled advocates. One or two successful test cases challenging the inhuman treatment that results when asylum-seekers are sent away by border guards and police officers

who turn a deaf ear to reports of the threats to lives or freedom that await the asylum-seekers at home would have a powerful impact.

A decision that these procedurally inadequate legislative provisions result in violations of Article 3 might lead to the enactment of more suitable procedures. Short of new legislation, nations might administratively revise their practices to ensure a more accurate decision-making process. They could provide competent officials trained in refugee law at airports and other main entry points, for example. Whether accomplished legislatively or administratively, if the procedures applied to asylum-seekers in airports and at the borders are improved so that there is far less chance of arbitrary and summary decisions, the rights of refugees will be better protected in Belgium, Denmark, the Federal Republic, and the Netherlands. Moreover, because the imposition of restrictive entry criteria and summary border procedures appears to constitute a European trend, a positive response from the European Human Rights Commission would probably also improve the situation of asylum-seekers in many other European countries.

IV. CONCLUSION

The great increase in the number of asylum-seekers from Asia and Africa reaching Europe in the 1980's generated fears that European countries would soon become inundated with Third World refugees. These fears, in turn, led to legislative action in Belgium, Denmark, and the Federal Republic of Germany restricting the entry of asylum-seekers. Administrative, rather than legislative, changes in the Netherlands resulted in similar restrictive policies.

Two provisions commonly recur in the newly restrictive laws. Greater authority has been delegated to border guards and regular police officials to deny entry to asylum-seekers. Financial penalties have been imposed on airlines and other companies that transport improperly documented asylum-seekers. Both measures share common failings. They ensure that the initial decision concerning admission of an asylum-seeker is generally made after a cursory interrogation by an official untrained in international or municipal refugee law. The lack of an adequate record of the initial decision, the inability to obtain legal assistance, and the time pressures that prevent gathering evidence to support further the asylum-seeker's claim ensure that any appeal that is permitted fails to provide a meaningful opportunity for review. Thus, snap decisions of border guards and airline personnel are virtually unreviewable. Such inadequate and

unfair procedures necessarily will result in a number of erroneous decisions.

Erroneous decisions may return refugees to countries in which their lives or freedom are threatened. Such errors constitute a violation of Article 33 of the 1951 Refugee Convention and Article 3 of the European Convention on Human Rights. Although Article 33 of the 1951 Refugee Convention explicitly prohibits the return of refugees whose lives or freedom are threatened, the lack of an enforcement mechanism that can be initiated by an individual refugee undercuts any effective protection the 1951 Refugee Convention offers asylum-seekers improperly rejected in a summary proceeding at the border. The possibility of individual enforcement action provided by the Human Rights Convention, however, allows these restrictive procedures to be challenged. Although the remedial procedures set forth by the Human Rights Convention do not promise relief to the routine individual litigant, cases concerning asylum-seekers denied entry despite strong proof of threats to life and freedom may well be adjudicated as violations of Article 3's prohibition of inhuman treatment. Several carefully selected test cases challenging the summary rejection procedures as inconsistent with Article 3 should be initiated with the Human Rights Commission. A successful result would likely have a strong negative impact on the recent European trend of turning away asylum-seekers based on a procedure that lacks the minimal safeguards necessary to ensure correct and fair decisions.