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# ASYLUM LAW REFORM IN THE GERMAN CONSTITUTION

Kay Hailbronner\*

## INTRODUCTION

Before 1993, the German Constitution guaranteed an absolute right to asylum. Faced with mounting immigration pressures, however, the German legislature amended Article 16 of the Constitution in December 1992, severely restricting this previously unqualified right. Part I of this article discusses the recent amendment, including an analysis of its key provisions. Part II analyzes the effects of the amendment, concluding that it has reduced effectively the number of immigrants. Part III addresses the new provisions commentators deem consistent with Germany's domestic law and international obligations. Part IV offers recommendations.

## I. THE RECENT AMENDMENT TO THE GERMAN CONSTITUTION

### A. BACKGROUND

The amendment to the German Constitution modified Article 16, that had allowed "[a]nybody persecuted on political grounds . . . the right of asylum." This right, that refugees held sacred because of their reliance on it to escape the Nazi regime, took several years to revise, primarily due to the difficulty in achieving the requisite two-thirds majority vote of the legislature. The greatest challenge to the revision was the argument that legislative and administrative measures could resolve the problem of uncontrolled immigration, thereby preserving the traditional individual right of asylum.

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In spite of numerous legislative changes in asylum procedure during the past ten years, all of which attempted to expedite asylum procedures in cases of manifestly unfounded or abusive asylum claims, the number of asylum seekers continued to climb, reaching 438,000 in 1992. Moreover, Germany harbored approximately 100,000 *de facto* refugees from the former Yugoslavia. On the whole, Germany admitted almost 70 percent of all asylum seekers registered in the European Community in 1992.

## B. THE NEW ARTICLE 16A

### 1. Overview

Following negotiations, the major political parties of Germany reached a compromise in December 1992, whereby the Constitution would maintain the individual right of asylum and an Amendment would restrict manifestly unfounded asylum applications and asylum seekers entering from safe third countries.<sup>1</sup> The parties passed the following amendment to the Constitution:<sup>2</sup>

#### Article 16a (Asylum)

(1) Anybody persecuted on political grounds shall enjoy the right of asylum.

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

(3) Legislation requiring the consent of the Bundesrat may be introduced to specify countries where the legal situation, the application of the law and the general political circumstances justify the assumption that neither political persecution nor inhumane or degrading punishment or treatment takes place there. It shall be presumed that a foreigner from such a coun-

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1. Andreas Zimmermann, *Asylum Law in the Federal Republic of Germany in the Context of International Law*, 53 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 49, 51; Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT'L L. 503, 517 (1993).

2. BGBl.I 1002 (1993).

try is not subject to persecution on political grounds so long as the person concerned does not present facts supporting the supposition that, contrary to that presumption, he or she is subject to political persecution.

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

(5) Paragraphs 1 to 4 do not conflict with international agreements of member states of the European Communities among themselves and with third countries which, with due regard for the obligations arising from the Convention relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms, whose application must be assured in the contracting states, establish jurisdiction for the consideration of applications for asylum including the mutual recognition of decisions on asylum.

In accordance with the constitutional amendment, the German legislature passed a law amending the alien asylum procedure.<sup>3</sup> Following the legislature's enactment of the amendment, it passed a law revising benefits for asylum applicants, limiting government assistance to housing, food, and clothing.<sup>4</sup>

## 2. The Safe Third State Principle

Article 16a(2) of the Basic Law represents a fundamental shift from the unqualified right to seek asylum in Germany. Article 16a(2) precludes recourse to the right of asylum in the case of applicants arriving from safe third states.

By definition, safe third states include members of the European Community, the Council of Europe, and countries guaranteeing the application of the UN Convention relating to the Status of Refugees (1951 Refugee Convention) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950 European Convention). The Bundestag has also included the following states in the list of safe

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3. Gesetz zur Änderung Asylverfahrens—Ausländer—und Staatsangehörigkeitsrechtlicher Vorschriften, BGBl. I 1062 (1993) (the asylum procedure law).

4. Gesetz zur Neuregelung der Leistungen an Asylbewerber, BGBl. I 1074 (1993) (law on subsidies granted to asylum seekers).

third states: Austria, the Czech Republic, Finland, Norway, Poland, Sweden, and Switzerland.<sup>5</sup> In order for German authorities to reject an asylum application under the safe third state clause, an asylum seeker must have had actual contact with the territory of the safe third country and must have had the opportunity to apply for asylum in that country. A simple transit is sufficient to meet this requirement.

Therefore, Article 16a(1) only covers those refugees who did not enter Germany by way of a safe third country. This coverage would include primarily those persons who arrive by plane directly from a persecuting country. The amendment restricts the definition of "political refugee," eliminating the ability of aliens who enter Germany from a safe third country to invoke Article 16a(1).

In its third sentence, Article 16a(2) provides for the possibility of terminating an applicant's residency regardless of any pending appeals. Article 34a of the Law on Asylum Procedures interprets this provision as an exclusion of any judicial stay of execution. Thus, Article 16a(2) not only eliminates the suspensive effect of an applicant's request for legal redress while courts would still have the power to stay execution, but also, empowers authorities to immediately take measures without considering an asylum seeker's objections depending upon whether Germany considers the country to which it will deport the refugee a safe third country.

Legislators hotly debated this interpretation of the amended law based on a plain reading of the statutory language and the legislative intent. A minority of the members of the legislature, because they maintained that one could not interpret the third sentence of Article 16a(2) as a limitation on the Administrative Courts' power to stay execution, proposed to retain the option for a judicial stay of execution with respect to deportation.<sup>6</sup> A large majority of deputies passed both acts simultaneously, however, making it clear that they endorsed the interpretation of the third sentence of Article 16a(2) on which the new law on asylum procedure was based.<sup>7</sup>

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5. Gesetz zur Änderung Asylverfahrens—Ausländer—und Staatsangehörigkeitsrechtlicher Vorschriften, art. 1, sec. 26a annex I, BGBl. I 1070 (1993).

EC ministers designated these states safe third states based on the conditions and criteria agreed upon in their resolution on host third countries on November 30 and December 1, 1992.

6. Cf. Bundestagsdrucksache (proceedings of Parliament of the 12th period) No. 4984, p. 39.

7. In the final vote, 521 deputies voted in favour of the amendment, 496 in

### 3. The Safe Country of Origin Principle

Under Article 16a(3), German immigration authorities must refuse an application for asylum of applicant from a safe country of origin as manifestly unfounded. The only exception to this policy is when the facts or evidence the alien provides justify the assumption that, despite the general situation in the country of origin, he remains in danger of political persecution. Using this method, German immigration authorities process applications under a shortened and accelerated asylum procedure.

According to the criteria Article 16a articulates, safe countries of origin are countries in which, on the basis of their legal situations, their application of the law, and their general political environment, practice neither political persecution nor inhumane or degrading treatment. The law does not explicitly describe the conditions for determining safety. The draft bill, however, did indicate the following list of criteria:

- recognition rates for asylum applicants in previous years;
- general political situation (e.g. democratic structure of the state);
- observance of human rights (such as compliance with the International Covenant on Civil and Political Rights);
- readiness of the state of origin to allow independent international human rights organizations access in its territory; and
- stability of the country.<sup>8</sup>

The legislature designated the following countries as safe states of origin: Bulgaria, the Czech Republic, Gambia, Ghana, Hungary, Poland, Romania, Senegal, and the Slovak Republic.<sup>9</sup>

The German system is based on a comprehensive concept of safety that encompasses political and factual respect for human rights. One might prefer, however, a more differentiated and flexible solution. Germany need not determine safety from persecution in the same manner for all segments of the population. It could also assess safety differently

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favour of the law on the revision of rules on asylum procedure, the law concerning aliens and the law on citizenship *cf.* Protocols of the Bundestag 160th session on 26th May 1993, pp. 13699, 13705.

8. Bundestagsdrucksache 12/4450 (Mar. 2, 1993). These criteria conform with those the EC immigration ministers passed in London on November 30 and December 1, 1992, with respect to countries in which "there is generally no serious risk of persecution."

9. Gesetz zur Änderung Asylverfahrens—Ausländer—und Staatsangehörigkeitsrechtlicher Vorschriften, art. 1, section 29a annex II, BGBl. I 1070 (1993).

for disparate categories of persons based on ethnic, religious, or linguistic characteristics. Additionally, Germany could consider the existence of internal flight alternatives.

Objections to a list of safe countries of origin find no sufficient basis in the Refugee Convention or the European Convention. With respect to countries Germany deems safe, a refutable presumption requires an applicant to provide facts challenging the presumption of safety. Judicial review, although only to a limited degree, determine whether an applicant has offered relevant facts. These procedures fulfill the minimum requirements of the Refugee Convention, thereby ensuring that Germany does not violate the non-refoulement clause.<sup>10</sup>

German Administrative Courts, however, have largely neglected to apply this new concept. The legislative presumption of safety has not significantly changed the individual case procedure. As before, claims of individual persecution are examined intensively if precise facts are presented to the courts. Preliminary rulings of the Constitutional Court, to some extent, have supported this practice. Administrative Court decisions have been quashed for not sufficiently examining individual claims of persecution in safe countries of origin based on illegal participation in demonstrations and police harassment.<sup>11</sup>

This practice misinterprets the constitutional amendment. A refutable presumption of safety raises the threshold for demonstrating a probability of political persecution. It is not sufficient, therefore, to present facts which, if true, would constitute political persecution. As a result, one must construe the general presumption of safety to require an inexistence of political persecutions due to ordinary political activities, such as participating in a political demonstration, a political party, or any other political activity that the freedom of expression and demonstration usually covers. In order to refute the presumption of safety, an asylum seeker must present, therefore, evidence that clearly distinguishes his or her individual case from any other cases. Thus, an asylum seeker would have to demonstrate exceptional circumstances to make his or her special case credible.

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10. See JOCHEN ABR. FROWEIN & ANDREAS ZIMMERMANN, *DER VOLKERRECHTLICHE RALMEN FÜR DIE REFORM DES DEUTSCHEN ASYLRECHTS* 39 (1993). See generally, Kay Hailbronner, *The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective*, 5 INT'L J. REFUGEE L. 31 (1993) [hereinafter Hailbronner, *European Perspectives*].

11. See *supra* note 18.

#### 4. Time Limits for Administrative and Judicial Proceedings

Article 16a accelerates asylum procedure by prescribing time limits for administrative decisions and judicial control. This procedure applies when the Federal Office for the Recognition of Alien Refugees rejects the alien's application for asylum. In that case, the office will issue an expulsion warning and the alien will need to leave the country within one week. The alien may apply within one week to the Administrative Court for provisional legal protection, and, as a rule, the Administrative Court must make a decision within one week. In interlocutory legal protection proceedings, the Administrative Court may set aside the expulsion decision only where there remain serious doubts as to the legality of the decision. According to section 30, Paragraph 3 of the asylum procedure law, one must reject an application for asylum as manifestly unfounded if:

- essential points of an alien's claim are unsubstantiated or the claim is contradictory or is based on forged or false evidence;
- an alien gives false information about his identity or nationality or refuses to provide such information in asylum proceedings; or
- an applicant for asylum frequently fails to comply with the obligation to cooperate in asylum proceedings.<sup>12</sup>

#### 5. Airport Procedure Regulations

The rapidly growing number of asylum seekers arriving at airports led to the inclusion of a special airport procedure for cases where asylum applicants from safe countries of origin arrive via an international flight. Under section 18a of the asylum procedure law, Germany must carry out the asylum proceedings before the applicant enters the country. The same procedure applies to aliens requesting asylum at the airport who are unable to establish their identity with a valid passport or other documentation.

The authorities accommodate the asylum seeker at the airport during the proceedings, and the asylum seeker is not allowed to leave the transit area. He or she may apply for provisional legal protection within three days of a Federal Office decision rejecting the application. The Administrative Court must rule on such an appeal within fourteen days,

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12. These criteria again correspond to the criteria listed in a resolution of the EC immigration ministers on manifestly unfounded asylum applications of November 30 and December 1, 1992.



and, if it fails to do so within this time frame, the government must allow the alien to enter the country. This rule also applies when the Federal Office for the Recognition of Refugees has not taken a decision on the asylum application within two days of the time the applicant lodges his or her application.

## II. THE AMENDMENT IN PRACTICE

### A. THE IMPACT OF THE SAFE THIRD COUNTRY RULE

Due to these new regulations, the number of asylum seekers declined from 224,000 for the period between January and July 1993 to 98,500 for the period between July 1993 and January 1994.<sup>13</sup> The number of applicants from Romania dropped to 9,898 for the second half of 1993, compared to 61,827 in the first six months of 1993. The number of applicants from Bulgaria dropped from 20,109 to 2,438, those from Algeria dropped from 8,125 to 3,137, those from Vietnam fell from 7,497 to 3,463, and those from the Russian Federation fell from 3,754 to 1,526. Due to a substantial increase in the administrative and personnel resources of the Federal Office for the Recognition of Refugees in the second half of 1993, it deemed 267,791 applications manifestly unfounded, compared to 110,018 in the second half of 1992. By the end of 1993, 296,300 applicants still had proceedings pending.

Asylum claims hopelessly overburden Germany's Administrative Courts. More than fifty percent of all Administrative Court proceedings concern asylum applications. Between January and July 1993, there were 60,699 asylum proceedings registered at Administrative Courts, in addition to 35,016 applications for preliminary injunctions. From July 1993 to December 1993, the number of court proceedings increased sharply in most states (*länder*).<sup>14</sup> During that same period, however, the average length of procedure to render a decision of the merits had decreased from between twelve and eighteen months to between five and ten months, depending on the judicial administration of the state (*land*) and

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13. Deutsches Bundesministeriums des Inneren: Asyl-Erfahrungsbericht 1993 (February 25, 1994) (report on the experience with the 1993 asylum reform) (on file with the Interior Ministry of the Federal Republic of Germany).

14. See REPORT OF THE FEDERAL MINISTRY OF INTERIOR 79 (Feb. 25, 1994) (reporting that in Baden-Württemberg, 17,773 new cases were reported, as compared to 7,724 between January and July 1993). *Länder*, the division of the country in Germany, can be compared to the states within the United States.

that state's (*land's*) ability to increase its number of Administrative Court judges.

Although many predicted the restriction Germany introduced in July 1993 would lead to a significant increase in illegal entries, the statistics indicate otherwise. From January 1993 to July 1993, there were 35,000 illegal entries. In the first six months after the new law, Germany reported only 19,200 illegal entries. The German asylum reform of 1993, however, has had some repercussions on neighboring countries. In Switzerland and the Netherlands, the number of asylum seekers increased considerably, prompting the Dutch government to introduce new restrictive asylum regulations.<sup>15</sup>

Additionally, the safe third country rule did not always function as observers originally envisaged. In a considerable number of cases, Germany did not apply the clause because safe third states refused to take back asylum seekers, either due to a lack of proof that the applicant had entered German territory from that safe country or because the applicant could not meet formal requirements, such as time limits for filing a re-admission request. Frequently, asylum seekers make false statements concerning their journey, or they apply for asylum a few weeks after illegal entry, thereby making deportation difficult due to formal requirements. Generally, to prevent readmission, other countries frequently apply readmission agreements restrictively. Although Germany has recently concluded readmission agreements with Poland and Romania that provide for the readmission of asylum seekers who entered German territory illegally, the agreements have not always functioned properly. As a result, Germany cannot always apply the safe third country clause. The Federal Office for the Recognition of Refugees, therefore, must base its decision on the merits of asylum claims by applicants entering from safe third countries, instead of engaging in protracted and difficult attempts to achieve readmission under the readmission agreements. Germany has yet to report an instances where refugees it returned to safe third countries have become so-called "refugees in orbit," whereby they are sent from one state to another without these states affording them a fair chance to present their asylum case. In cases where third states refuse readmission, Germany grants entry.

In spite of these difficulties with the application of re-admission agreements, the number of deportations by air transport increased considerably from 15,408 in 1992 to 16,494 in 1993, amounting to 16.8 percent of all deportations in 1993. Despite this increase, there is no

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15. Amendment of the Dutch Aliens Act (1993).

guarantee that rejected or deported aliens will not return to Germany or any other EC country. In an effort to prevent this, Germany, for example, introduced a reasonably effective system of data collection based on finger prints. There are, however, considerable legal and practical obstacles to overcome in order to establish an EC-wide data collection and data exchange system, which is one of the reasons why the Convention of Schengen of 1990 between nine EC member states has not yet come into force. It is clear that with the abolition of internal border controls, member states will have to solve these problems.

Objections against the safe third country concept on the grounds of an expected breakdown of the administrative resources of third states did not turn out to be justified. Although the German-Polish readmission agreement of May 7, 1993<sup>16</sup> did provide for substantial financial assistance (120 million German marks each year in 1993 and 1994) to implement a program to bolster the infrastructure for asylum proceedings and to strengthen border protection, very few asylum seekers Germany returned to Poland or the Czech Republic actually applied for asylum in those countries. The rejected applicants usually returned to their home countries or "disappeared" elsewhere. According to information from the Polish authorities, only twenty persons readmitted under the agreement subsequently applied for asylum in Poland between May and October 1993. Another reason for the somewhat hesitant application of the safe third country clause is the lack of experience and legal certainty caused by preliminary injunctions from the Constitutional Court stalling the execution of expulsion orders. In some of these cases, a chamber of the Constitutional Court indicated doubts as to the constitutionality of the safe third country clause without deciding on the merits of the case.

#### B. THE IMPACT OF THE SAFE COUNTRY OF ORIGIN RULE

The safe country of origin clause of Article 16a(3) has led to a substantial decrease in asylum applications from the designated safe third countries. The number of applicants from Bulgaria dropped in the second half of 1993 from 20,109 to 2,438, and those from Romania declined from 63,827 to 9,890. Applications from Gambia dropped from 470 to 137, while those from Ghana fell from 1,747 to 224.<sup>17</sup>

In practice, the clause has met some difficulties concerning the evidence required to refute the presumption of safety. Administrative Courts

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16. BULLETIN OF THE FEDERAL GOVERNMENT 326 (1993).

17. REPORT OF THE FEDERAL MINISTRY OF INTERIOR 22 (Feb. 25, 1994).

have frequently requested that authorities thoroughly examine assertions of individual persecution, in spite of the general presumption of safety of a country of origin. A chamber of the Constitutional Court has upheld this interpretation of the law, holding in preliminary injunction proceedings that the individual right of asylum, maintained in Article 16a(1) implies a right to present concrete assertions of individual persecution which an Administrative Court will have to examine.<sup>18</sup>

It is doubtful whether this interpretation of the constitutional amendment conforms with the legislative intent. In practicality, it makes the instrument of a rebuttable presumption almost useless. If it is sufficient to present concrete facts which, if true, would constitute persecution, such a situation would easily frustrate the legislature's intention of establishing a binding precedent of safety. The courts should oblige themselves to delve into the substance of the applicant's claim only if the applicant presents evidence indicating that, in his special case, the general assumption of safety does not apply. The Constitutional Court will probably resolve this issue in late 1994.

#### C. THE IMPACT OF THE AIRPORT PROCEDURE REGULATIONS

On the whole, the new airport regulations have had an impact on the number of asylum applications, which decreased at German airports from 4,539 in the first half of 1993 to 1,582 in the second half of 1993. From July 1993 to January 1994, the Frankfurt airport received 1,206 asylum applications. Of these, 153 were returned and 1,027 were admitted based on the new airport regulations. Of the 1,027 admitted applicants, 673 applications could not be decided upon in a two day period, while 240 applicants arrived from countries in which the presumption of safety was not applicable. Ninety-eight were admitted as a result of Administrative Court orders, twelve were accepted pursuant to a Constitutional Court order, and the remaining four were admitted on orders of the German Ministry of the Interior.

#### D. GENERAL ASSESSMENT OF THE AMENDMENT

Because of the limited period of actual implementation, it is difficult to make a final evaluation of the impact of the new regulations. Although there has been a slight increase from 10,478 asylum seekers in

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18. Judgment of July 22, 1993, *Senatsentscheidung des Bundesverfassungsgerichts* [BVerfG], 2 BvR (F.R.G.) 1507, 1508, *reprinted in* 8 *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT* [NVwZ], Supplement No. 1/93, at 1-2 (1993).

February 1994 to 12,181 in March 1994, the most recent figures of April 1994 show a substantial reduction. This reduction becomes most apparent when it is compared to the March 1992 figure, in which 43,731 people sought asylum in Germany. In the first three months of 1994, 35,822 aliens applied for asylum in Germany. Most of these applicants came from Serbia and Montenegro (10,915), Turkey (4,529), Romania (3,098), Bosnia-Herzegovina (2,477), Afghanistan (1,237), Vietnam (1,292), Sri Lanka (964), and Bulgaria (784).<sup>19</sup>

Switzerland, Norway, Denmark, the Netherlands, Spain, and Belgium, on the other hand, have experienced a sharp increase in the number of asylum seekers.<sup>20</sup> Exact information on the extent to which rejected or deported asylum seekers have turned to other European states is unavailable. Due to deportation, more than 50 percent of the asylum seekers disappear before an order can be carried out. Because there is no transnational data collection system, there are a considerable number of successive or duplicative applications for asylum in western Europe. Remarkably, a Swiss study comparing 100,000 randomly selected finger prints of asylum seekers in Switzerland and Austria revealed that more than more than 10 percent were successive or duplicative applications.<sup>21</sup>

### III. LEGAL ANALYSIS OF THE REGULATIONS

#### A. DOMESTIC LEGAL CHALLENGES

Many asylum applicants rejected by Germany have filed complaints with the Supreme Constitutional Court, arguing that the asylum reform of 1993 and its application to their individual case infringes upon their rights under the Basic Law. In 13 of the 59 such cases decided between July and December 1993, the Constitutional Court granted temporary injunctions suspending the execution of return or expulsion orders.

Asylum applicants have generally repeatedly attacked the airport regulations on several grounds.<sup>22</sup> They have argued that the general situa-

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19. See Press Release by the Federal Ministry of Interior of April 6, 1994.

20. For the Swiss figures in 1993, see Asylon, Federal Office for the Recognition of Refugees, March 1994, p. 7.

21. Asylon, *supra* note 20, at 9.

22. See *supra* note 18 (noting that prior decision not to accept asylum application of a Ghanaian citizen at the Frankfurt airport because she came from a safe third country fails to consider relevant evidence of the applicant's individual circumstances in Ghana). See also Judgment of July 27, 1993, *Senatsentscheidung des Bundesverfassungsgerichts* [BVerfG] 2 BvR (F.R.G.) 1516, *reprinted in* 8 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [N.V.w.Z], Supplement No. 1/93, at 1-2 (1993).

tion at the airport, characterized by the restrictions on their freedom of movement, the limited judicial control, and the possibility of enforcing harmful decisions without proper judicial proceedings, abridges their substantive rights under Article 16a, Article 19(4), and Article 1.

Airport procedure, the safe third country clause, and the provisions on the restriction of judicial protection are currently under constitutional review. In three cases pending before the court, Iraqis, attempting to enter Germany via Greece, challenged Greece's status as a safe third country.<sup>23</sup> The applicants argued that the safe third country clause is not consistent with Germany's obligations under the Refugee Convention and the European Convention because, under the law, the applicants would face expulsion from Greece to third states and eventually back to Iraq. Greece, therefore, would not supply adequate protection to persons who fled to Greece through Turkey. According to the preliminary order issued in this matter, the Court will have to decide whether asylum applicants have a constitutional right to be protected against expulsion or returned under Article 16a and Article 1 of the Basic Law in the case of insufficient protection in a safe third country.

In a second complaint filed in the Constitutional Court, an Iranian asylum seeker challenged his return to Austria. The applicant came to Austria via Hungary, a country considered a safe third country by the Austrian authorities.<sup>24</sup> In this case the applicant also challenged Germany's legislative designation of Austria as a safe third country due to Austria's practice of returning asylum seekers who entered Austria from a safe third country to the applicant's country of origin.

#### B. ARE THEY CONSISTENT WITH INTERNATIONAL LAW?

At the core of legal and political criticism of the revised rules lies the concept of safe third countries. Some have criticized an asylum seeker's immediate rejection at German borders based solely on whether the refugee was staying in a legally established "safe third country" as, first, a violation of the Refugee Convention and the European Conven-

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(reversing prior court ruling not to accept asylum application from citizen of Togo due to possibility of encountering inhumane treatment upon his return to Togo).

23. 2 BvR 1938/93; 2 BvR 1953/93; 2 BvR 1954/93; the preliminary injunction of the Court of September 13, 1993 is published in *Deutsches Verwaltungsblatt* 1994, 44.

24. Judgment of October 26, 1993, *Entscheidung des Bundesverfassungsgerichts* [BVerfG], 2 BvR 2315, *reprinted in* 1 *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT* [N.V.w.Z.] 3 (1993).

tion; second, a doubtful shifting of responsibilities to Eastern European states which may be ill-equipped to deal with asylum procedures on a large scale; and, third, as an inefficient and counterproductive solution which fosters illegal immigration. Furthermore, commentators have perceived the disparate treatment of asylum seekers from safe third countries who suffer immediate deportation and those from safe countries of origin who have the possibility of rebutting the presumption of safety from persecution in the course of an accelerated asylum procedure as arbitrary and distinguishing only on the basis of an asylum seeker's escape route and not on the basis of the motivations for flight.

In the context of public international law, objections to the return or expulsion of asylum seekers are based primarily on Article 3 of the Refugee Convention and Article 3 of the European Convention. The objections of the UN High Commissioner for Refugees (UNHCR) are directed against the concept of safety from persecution on which Article 16a(2) is based. An applicant, UNHCR has argued, must have had at least a right of residence in a third country for the assumption of safety to arise. Therefore, transit itself is not considered a sufficient enough reason for referring a person in need of protection to a "safe" third country.<sup>25</sup> An applicant's automatic return or expulsion to a third country which is declared to be safe is also viewed as a potential violation of the prohibition of refoulement because the person concerned may be exposed to a danger of successive deportation. Concerning procedures, UNHCR relies on the minimum standards recommended by the UNHCR Executive Committee, which are not fully met since not every asylum seeker is given a chance to have his claim examined.

The objection that an applicant's referral to a safe third country does not always guarantee sufficient protection against persecution points in the same direction. It is argued that at least some of those countries listed as safe third countries in Annex I of Article 26a of the Law on Asylum Procedures are unable to provide rejected asylum applicants with adequate protection and access to an asylum procedure.

Objections against the concept of safe third countries under international law are unfounded as long as general determinations are based on reasonably reliable assumptions of safety. The concept of safety from persecution, established by UNHCR, is not mandatory under international law. State practice of referring refugees to safe third countries that are ready to accept them varies. A number of treaty signatories perceive

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25. Cf. Koisser, written statements on parliamentary hearings of 11th March 1993, protocol of 55th session of the Legal Committee of March 11, 1993, p. 29.

an applicant's referral to safe third countries as clearly consistent with the Refugee Convention. State practice, therefore, does not help establish a prohibition of refoulement to those countries classified as generally safe from persecution based on substantive criteria.<sup>26</sup> It is true that an applicant's safety from political persecution in a third country must be sufficiently clear. It must be kept in mind, however, that the prohibition of refoulement does not require the state in which protection is sought to carry the burden of proving that an asylum seeker is safe in a third state through which he entered illegally. The Refugee Convention does not provide for an individual right of asylum or for a right of individual procedure. In terms of procedural law, an individual examination of an applicant is not necessary as long as the criteria used for assuming an applicant's general safety from persecution is adequate. The concept of safe third countries is essentially based on an extension of the system of exclusive jurisdiction already developed in the Schengen and Dublin Conventions to that accepted by signatories of the Refugee Convention and the European Convention. In the case of a corresponding European integration of these other signatory states, their adherence to the treaty obligations can be assumed in a manner comparable to their legal status after the Dublin Convention and the Schengen Convention of 1990.

However, to fulfill their obligations under the Refugee Convention, states must provide for an examination procedure for asylum seekers who claim to be subject to political persecution, in case such states choose to repatriate them. A complete lack of procedure for determining whether someone is in danger of political persecution would not meet the requirements of the Convention, though the Convention does not explicitly provide detailed principles on the necessary procedural rules. One may deduce certain minimal standards of fair treatment and efficiency from general principles of international law.

Immediate rejection or return of applicants from safe third countries under Article 16a(2) of the Basic Law is not prohibited by the principle of non-refoulement under international law. It is doubtful whether the prohibition of refoulement is applicable to an applicant who seeks protection at the border and is denied entrance. European state practice clearly points towards an extended interpretation of the prohibition of refoulement, including the rejection of asylum seekers at the border. If the principle of non-refoulement is applied to applicants seeking protection at the border, an individual determination for asylum seekers enter-

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26. See FROWEIN & ZIMMERMANN, *supra* note 10, at 45-47 (discussing the framework provided by the revision of the German asylum law by international law).



ing from safe third states is generally not required if one accepts that the constitutional qualification of EC member states or the legislative qualification of other Council of Europe member states as safe third countries guarantees that neither political persecution nor inhumane treatment or deportation to a country of persecution does occur. Arguments questioning the soundness of general determinations of safety are supported by individual cases in which a violation of the Refugee Convention is claimed.

From this perspective, Austria, Greece, Switzerland, Britain, and recently Germany may appear as unsafe countries. Commentators argue that the referral of asylum seekers to third states requires a comprehensive harmonization of asylum law in substance as well as in procedure, including a supervisory machinery to ensure full and effective compliance with the Refugee Convention and the European Convention.

The gist of this argument, however, questions the general idea of a European system of coordination and cooperation in matters of asylum policy. While it may be true that the case-by-case determinations reflect the original idea of refugee protection under the Refugee Convention, it should be kept in mind that the Convention deliberately did not provide for an individual right of asylum. In a situation of mass movement of refugees, the interpretation of the principle of non-refoulement should be based on a delicate balance between the legitimate expectations of asylum seekers and the interest of states in controlling illegal immigration. State practice clearly does not indicate that only an individual procedure will guarantee sufficient compliance with the principle of non-refoulement. Basically, a test of reasonableness will have to be applied. Provided that certain requirements as to the reliability of the legislative determination are fulfilled, the concept of a general determination of safe third countries, limited as it is under the Basic Law to EC member states and other Council of Europe member states, does meet such a test of reasonableness.

Objections based on the prohibition of refoulement under Article 3 of the European Convention are therefore also unfounded. "Safety," within the meaning of Article 16a(2), is based on the assumption that the application of the European Convention is in fact guaranteed. Mere ratification of the European Convention is not sufficient. There must be a sufficient guarantee that the states will actually adhere to the principles laid down by the European Convention, which are to be tested by a list of criteria<sup>27</sup> established by the Bundestag.

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27. Cf. Bundestagsdrucksache No. 12/4450.

Critics have also challenged the amendment on the grounds that it does not sufficiently rule out the danger of successive deportation to persecuting countries or the so-called "refugee in orbit situation." Very little state practice, however, exists on the conditions under which successive expulsion may constitute inhumane treatment. In cases in which an applicant is stateless, where there is clearly no competent state to deal with an asylum request, a state may not close its eyes and openly deliver a refugee to an unknown destiny where the possibility of persecution and inhumane treatment exists. A state's general obligation not to aid in persecution by a third state may be inherent in the non-refoulement principle, but it does not imply a state's comprehensive responsibility for the welfare of refugees in third states. Under general principles of public international law, third states are responsible for their own behavior. A system of distributing responsibilities for dealing with asylum seekers is in accordance with the Refugee Convention's and the European Convention's obligations towards refugees. It should be kept in mind that the new German regulations, in accordance with the recommendations passed by the European immigration ministers in London in December 1, 1992, limit the safe third country rule to member states of the European Convention and of the Refugee Convention of 1951. Member states in which the factual application of both conventions is not ensured, in spite of the generally well-functioning supervisory machinery of the European Convention, are not included in the list of safe third countries.

The assumption of safety is not called into question because neither the German regulations nor the agreements of Schengen II and Dublin require a more substantial harmonization of asylum law and procedure, although it is considered desirable. Although the criteria for interpreting the Refugee Convention and the procedural standards differ widely among the member states included in the system of safe third countries, the reasoning behind the concept is not undermined. The system is based on common human rights obligations, which may leave some room for interpretation, and on the perception that every refugee is offered a fair chance in the first country of reception. All member states can safely be assumed to unanimously respect the basic principles of fairness and justice. The harmonization of specific national aims and perceptions of refugee policy should not be considered a precondition unless the entire concept of common responsibility in a larger European Community is to be deferred indefinitely. The amount of protection due every alien seeking shelter would stretch too far if exclusively harmonized European standards of justice and procedural fairness would be

taken as a decisive yardstick for determining whether someone is in a situation which requires immediate and unconditional protection.

Article 16a(5) acknowledges Germany's obligations under international law. The clause is intended to prevent collisions with treaty obligations, particularly from the Schengen Implementing Convention (II) and the Dublin Convention which did not yet enter into force.<sup>28</sup> A European supervisory machinery using existing legal instruments of the Maastricht Treaty, perhaps including the use of the European Court of Justice, would be preferable.

The clause also might produce a number of successive problems. Future international agreements relating to asylum law may be challenged as irreconcilable with obligations existing under the Refugee Convention. In this case, the conclusion of such an agreement might also become a matter of constitutional legal action. Questions of interpretation of the Refugee Convention might thus turn into constitutional disputes. In addition, the clause explicitly demands not only respect of the Refugee Convention and the UNHCR, but it also demands a guarantee of their factual application. This may amount to a supervisory function of the German Constitutional Court for the correct application of these conventions in other signatory states, which could be considered as unusual in international relations and even more so in the European Community.

Even more ominous from the point of legal policy is the exclusive reference to "rules on jurisdiction for the examination of asylum applications" and "mutual rules on recognition." As such, the clause is clearly necessary to participate fully in the Schengen and Dublin system of exclusive competence for asylum proceedings. Without the existence of the clause, an asylum seeker might request an alternative or successive asylum procedure based on the constitutional right of asylum in Article 16a(1), in addition to an asylum procedure in any other EC member state which is considered as primarily responsible under the rules of the Schengen or Dublin agreement.

The clause, on the other hand, constitutionally restricts German asylum policy from participating in further efforts to harmonize substantive asylum law and asylum procedure. The minimum standards of harmonization achieved by the Convention of Schengen and Dublin are thus constitutionally fixed.

Another objection is based on the assumption that most safe third states are unable to cope with increasing immigration pressure. The dan-

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28. V. GIESLER & D. WASSER, *DAS NEUE ASYLRECHT* 67 (1993).

ger of an unbearable immigration pressure on Eastern European neighbors and the threat of the substantial deterioration of their economic and administrative situation should not, however, be exaggerated. Due to the substantially lower economic condition of some of these states, uncontrolled immigration of persons who are not really in need of protection should decrease considerably. Recent experiences with the readmission agreement between Germany and Poland clearly supports this theory. According to information from Polish officials, few asylum seekers who were turned back under the readmission agreement actually applied for asylum in Poland. Nevertheless, there is a clear need to include first countries of reception in a European network of cooperation extending beyond the aspect of return and readmission.

#### IV. RECOMMENDATIONS

The safe third country concept will prove successful only if a sufficient number of cooperation treaties with third states are concluded. These agreements must provide for judicial and administrative assistance, including a more effective border control. In addition, rules on European burden sharing are necessary and should be accorded priority. Border controls alone, however, will not suffice because only a small percentage of claims are filed at that point. In spite of enhanced border surveillance methods, it can be expected that a large number of asylum seekers will enter into Germany illegally. A perfect border control may be neither desirable nor feasible. The functioning of the safe third state concept, therefore, is closely connected to a network of bilateral and multilateral agreements with corresponding financial commitments, preferably on a common European basis.

Even if such treaties can be concluded, Article 16a(2) and the new rules on asylum procedure raise a number of problems. First, the list of safe third countries is to be established by the legislature. However, the legislative chambers are ill-equipped for this function. The executive power is better equipped to deal with an analysis of information on foreign countries due to its information channels and more flexible ways of action. This advantage also applies to establishing a list of countries of origin which are safe from persecution. For this reason, governments of countries which practice a safe country concept have the authority to determine safety from persecution on a general level.<sup>29</sup> The reason that

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29. See Kay Hailbronner, *The Concept of Safe Country and Expedient Asylum Procedures*, Report to the Council of Europe, CAHAR (91) 2; see also *European*

a legislative determination has been preferred in Germany lies in the judicial system. Legislative decisions can be challenged by administrative courts only by referring a law to the Constitutional Court, which can declare a law unconstitutional. On the other hand, an executive determination of safety would be subject to judicial review in any individual case by Administrative Courts, thus permitting a diverse jurisdiction until the Federal Courts have made a final judgment on the legality of such decisions.

The effectiveness of the safe third country concept should not, however, be overestimated because of administrative and legal infirmities. In case of an immediate rejection at the border, proof is required that the alien has entered directly from that country. The efficiency of special airport and border return procedures thus essentially depends on the length of the process. If less time is spent examining whether an asylum seeker can be returned safely, the chance of return to a safe third country increases. In most cases, however, asylum seekers will try to enter illegally and then apply for asylum only after some time has lapsed, making the travel route and identification of an asylum seeker more difficult. Recent trends indicate an increase in undocumented asylum seekers or asylum seekers with forged documents. In addition, travel routes are disguised in attempts to prevent the application of the safe third country rule. In most cases, Administrative Courts have held that the safe country clause also applies if it is clear that the asylum seeker has entered Germany via a third safe country, even if the exact travel route cannot be determined. Nevertheless, expulsion or deportation under international regulations will only be possible if a specific safe third country is willing to accept an asylum seeker.

It must be realized, though, that European efforts for a harmonization of asylum laws, such as a uniform statement of criteria on safety from persecution, joint establishment of third safe countries and safe countries of origin, or a more far-reaching harmonization of substantive refugee law in the sense of a unification of criteria for recognition, are in contradiction to the concept of an individual constitutional right to asylum. As long as the supremacy of a constitutional right of asylum based on and determined exclusively by the Basic Law exists, the questions of what is political persecution and under what conditions the right of asylum for the politically persecuted can be exercised will always have

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*Perspectives*, *supra* note 29, at 36-45 (discussing the safe country practices of several European states).

to be decided on the basis of criteria directly derived from the Basic Law.<sup>30</sup>

Exclusively national concepts of asylum, however, are no longer adequate to deal with the phenomenon of large scale migration. The European Community, to some extent, recognized in the Maastricht Treaty the need for a harmonized European asylum and immigration policy, though there is still a long way to go.

### CONCLUSION

The amendment of the German Constitution marks a change in German asylum policy. The change has been highly successful, stemming the burgeoning immigration into Germany. Furthermore, the amendment and the related statutory alterations are not inconsistent with German domestic law or Germany's international obligations. To guarantee a continuing control of immigration, the nations of Europe should provide for a harmonized asylum system.

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30. See Kay Hailbronner, *Asylum and Immigration Law in the European Community, Lectures, Speeches, and Report*, 289 EUROPA-INSTITUTS DER UNIVERSITÄT SAARLAND 19, 45 (1992).