Asylum Law in the Federal Republic of Germany in the Context of International Law

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Abbreviations: AVR = Archiv des Völkerrechts; AWR-Bull. = AWR-Bulletin; BBl. = Schweizerisches Bundesblatt; BGBl. = Bundesgesetzblatt für die Bundesrepublik Deutschland; BGE = Schweizerisches Bundesgericht Entscheidungssammlung; BT-Drs. = Bundestagsdrucksache; BVerfGE = Bundesverfassungsgericht (Entscheidungen); BVerwGE = Bundesverwaltungsgericht (Entscheidungen); CMLR = Common Market Law Review; DÖV = Die Öffentliche Verwaltung; D.R. = Decisions and Reports (of the European Commission of Human Rights); ECHR = European Convention on Human Rights; E.H.R.R. = European Human Rights Reports; EPIL = Encyclopedia of Public International Law; EuGRZ = Europäische Grundrechte-Zeitschrift; FAZ = Frankfurter Allgemeine Zeitung (Deutschland-Ausgabe); GYIL = German Yearbook of International Law; ICJ = International Court of Justice; ICLQ = International and Comparative Law Quarterly; IJRL = International Journal of Refugee Law; ILM = International Legal Materials; InfAuslR = Informationsbrief Ausländerrecht; J.D.I. = Journal du Droit International; Mich. J. Int'l L. = Michigan Journal of International Law; NVwZ = Neue Zeitschrift für Verwaltungsrecht; RdC = Recueil des Cours de l'Académie de Droit International de la Haye; RFDA = Revue Française de Droit Administratif; R.G.D.I.P. = Revue Générale de Droit International Public; Schweiz. Jb. Int. R. = Schweizerisches Jahrbuch für Internationales Recht; Stanf. J. Int'l L. = Stanford Journal of International Law; UNHCR = United Nations High Commissioner for Refugees; UNTS = United Nations Treaty Series; Va. J. Int'l L. = Virginia Journal of International Law; Y.B. Eur. Conv. Hum. Rts. = Yearbook of the European Convention on Human Rights; Yb. Int. Inst. Hum. L. = Yearbook of the International Institute of Humanitarian Law; ZAR = Zeitschrift für Ausländerrecht; ZRP = Zeitschrift für Rechtspolitik.

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I. Introduction

In 1991 more than 250,000 foreigners sought asylum within the Federal Republic of Germany. Since then, the numbers have increased significantly[2]. Against this background, the political discussion in the Federal Republic has recently focused on the question whether and, if so, to what extent the admission practice concerning asylum-seekers in Germany should be modified. In particular there has been a certain tendency towards limiting the right of asylum as contained in Art. 16 (2) of the German Constitution[3].

The present text of Art. 16 (2) of the Basic Law stipulates that "persons persecuted on political grounds shall enjoy the right of asylum". This constitutional provision, resulting from the country's experience with National Socialism, is unique in the sense that it grants an individual right to enjoy asylum. Furthermore, it also protects persons claiming to be politically persecuted before they have entered the Federal Republic of Germany, i.e. when they present their application at the German border. According to the jurisprudence of the Federal Supreme Administrative Court[4], even persons who want to enter the Federal Republic by plane are already within the scope of protection of Art. 16 at the airport of departure. Moreover, under Art. 19 (4) of the Basic Law, any person who claims that his rights, in our case the basic right to enjoy political asylum granted by Art. 16 (2), were violated by a public authority may have recourse to judicial review.

These two provisions taken together with the large number of persons seeking asylum in the Federal Republic of Germany and a somewhat insufficient administrative structure and procedure have had the effect that

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[2] As of September 30, 1992 319,674 persons had already sought political asylum in the Federal Republic of Germany in 1992, see BT-Drs. 12/3551 of October 30, 1992, 1 et seq. (2).

[3] Basic Law of the Federal Republic of Germany, as amended up to and including August 31, 1990.

[4] BVerwG, NVwZ 1992, 682 et seq. (683); also E. Kreßel, Sichtvermerkspflicht und Asylrecht, DÖV 1988, 501 et seq. (507).

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the determination process as to whether a person is indeed politically persecuted takes a significant period of time.

Under these circumstances proposals have been brought forward to speed up asylum procedures by *inter alia* amending both the Constitution and the relevant procedural provisions of the law on asylum[5]. Some of these proposals have had the intention of introducing the concept of "safe countries" into the German law on asylum, of having administrative decisions in the field of refugee law no longer reviewed by the judiciary and of recognizing asylum decisions rendered by other Western European States.

On December 7, 1992 the major German political parties, representing more than two-thirds of the seats in the Federal Parliament, adopted a compromise according to which Art. 16 (2) of the Basic Law would be replaced by a new Art. 16 (a). This text, the essence of which will very probably be adopted in the near future, stipulates:

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

(2) Para. 1 may not be invoked by persons who enter from a member state of the European Communities or from a third state where the adherence to the Geneva Convention and the European Convention on Human Rights is secured. The states outside the European Communities to which sentence 1 applies shall be determined by law subject to the approval of the Bundesrat. In cases falling under sentence 1, deportation measures can be carried out regardless of a pending appeal.

(3) A law, which is subject to the approval of the Bundesrat, can determine the states in which there would appear to be a guarantee in view of the legal climate, the application of the law and the general political situation, that there is no political persecution or inhuman or degrading treatment or punishment.

An alien originating from such a state is not considered to be politically persecuted unless he brings forward reasons which demonstrate that he is politically persecuted contrary to the presumption of sentence 1.

(4) In cases arising under Para. 3, deportation measures will only be suspended by a court if there are serious doubts as to the legality of the measure. This also applies to deportation measures in other manifestly unfounded cases. In that regard the scope of review can be limited and subsequent pleadings can be disregarded. Details shall be regulated by a statute.

(5) Paras. 1 to 4 are without prejudice to treaties between member states of the European Communities and with third states which, with due regard to

[5] A new law on asylum procedure, "Gesetz zur Neuregelung des Asylverfahrens", was enacted on June 26, 1992, BGBl. 1992, 1126 et seq.; see R. Marx, Zum Entwurf eines Gesetzes zur Neuregelung des Asylverfahrens, InfAuslR 1992, 109 et seq.; B. Huber, Das neue Asylverfahrensrecht, NVwZ 1992, 749 et seq.

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the obligations under the Convention Relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms, the application of which is secured in the member states, make arrangements for the examination of applications for asylum, including the reciprocal recognitions of asylum decisions".

Some of the international law implications involved in this amendment have not yet been fully explored. Since the Federal Republic of Germany is a party to both the Convention Relating to the Status of Refugees[6] and the European Convention on Human Rights[7], it has to be determined what the limits are for any such reform in the light of these commitments. While this article focuses primarily on the problems involved from a German point of view, it is recognized that similar proposals are currently under consideration or have already been implemented in other Western European countries, such as e.g. Switzerland and Belgium. Therefore, this article does not deal specifically with the relevant German provision presently under consideration, but takes a more general approach.

For this purpose, attention should first be given to the exact extent of obligations incurred by member states of the Geneva Convention under the principle of *non-refoulement* contained in Art. 33 of this treaty.

II. The Obligation of Non-Refoulement

A. Geneva Convention

It might well be that regardless of German municipal law, the Federal Republic of Germany is, according to Art. 33 of the Geneva Convention, under an obligation to admit persons who – when about to enter the Federal Republic of Germany – claim that non-admittance would expose them to persecution. It is, however, doubtful whether persons who have not yet been able to enter the territory of a specific member state of the Geneva Convention are already protected by this provision[8].

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[6] Convention on the Status of Refugees of 28 July 1951, BGBl. 1953 II, 559 et seq., 189 UNTS 150 as amended by the Protocol relating to the Status of Refugees of 31 January 1967, BGBl. II, 1294 et seq.; in force for the Federal Republic of Germany since November 5, 1969, BGBl. 1970 II, 194 et seq.; 606 UNTS 267.

[7] 213 UNTS 221.

[8] As to the notion of *non-refoulement* see generally W. Kälin, Das Prinzip des Non-Refoulement (1982); G.-H. Gornig, Das Refoulement-Verbot im Völkerrecht (1987); G. Stenberg, Non-Expulsion and Non-Refoulement (1989). As to the question whether

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1. Wording of Art. 33 of the Geneva Convention

According to Art. 31 (1) of the Vienna Convention on the Law of Treaties[9], a provision of a treaty shall be interpreted in accordance with the ordinary meaning of the terms of that treaty[10]. Art. 33 of the Geneva Convention stipulates:

"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories (...)".

The French text, which is equally authentic, stipulates:

"Aucun des Etats contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un refugié sur les frontières (...)".

Since the English text also uses the term *refouler*, the meaning of this term is of decisive importance. While the French notion of *refoulement* can also embrace non-admittance at the border, an *argumentum e contrario* might be drawn in view of the fact that the Geneva Convention does not contain an express provision as to the question of admittance at the border. This contradicts the provisions of other international law intruments such as the Declaration of the General Assembly of the United Nations on Territorial Asylum[11] and the Convention of the Organization on African Unity Governing the Specific Aspects of Refugee Problems in Africa[12], both of which expressly deal with the question of rejection at the frontier[13]. Thus most of the authors discussing Art. 33 take the word-

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Art. 33 of the Convention contains only a state obligation or whether it creates an individual right see Kälin, ibid., 137; M. Marugg, Völkerrechtliche Definitionen des Ausdrucks "Flüchtling" (1990), 245, and the decision of the German Federal Constitutional Court, BVerfGE 80, 313 et seq. (346).

[9] Of 23 May 1969, BGBl. 1985 II, 926, ILM 8 (1969), 679–735.

[10] Although this provision is, according to Art. 4 of the Vienna Convention on the Law of Treaties, not directly applicable since the Geneva Convention entered into force before the Vienna Convention was adopted, Art. 31 still enshrines existing customary law; see e.g. the decision of the Arbitral Tribunal for the London Agreement on German External Debts of 16 May 1980, GYIL 1980, 414 et seq. (437), which applied Art. 31 of the Vienna Convention on the Law of Treaties in regard to the London Agreement on German External Debts of February 27, 1953.

[11] Res. 2312 (XXII); the text of the resolution can also be found in R. Plender, Basic Documents on International Migration Law (1988), 115.

[12] ILM 1969, 1288 et seq.; as to the refugee problem in Africa see most recently R. Hofmann, Refugee Law in the African Context, ZaöRV 1992, 318 et seq.

[13] The OAU Convention refers to "le refus d'admission à la frontière"; see also the (non-binding) Recommendation of the Committee of Ministers of the Council of Europe of June 21, 1967, Consultative Assembly of the Council of Europe, 20th Session, 1968/69, Doc. 2359 of March 7, 1968, 187, which stipulates: "They (i.e. the Member States) should (...) ensure that no one shall be subjected to refusal of admission at the frontier (...)".

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ing of Art. 33 as an indication of a more restrictive view as to the provision of *non-refoulement*[14].

Still, the wording of a treaty is not the sole method of interpretation, but must be read in connection with the object and purpose of the treaty, the drafting history and subsequent state practice.

2. *Object and purpose of the treaty*

Under Art. 31 (1) of the Vienna Convention on the Law of Treaties every treaty must be interpreted in the light of its object and purpose. In our context one may refer to the preamble of the Geneva Convention, according to which the High Contracting Parties considered the task of the United Nations to assure refugees the widest possible exercise of fundamental rights and freedoms. At the same time it can be argued that any instance of non-admittance at the border of persons who have a well-founded fear of being persecuted would indeed run counter to this task[15]. A further argument for a wide interpretation of the prohibition of *refoulement* can be derived from the fact that the Convention also expressly refers to refugees who have already entered the territory of a signatory state[16]. By not mentioning such refugees within the context of Art. 33, it might be inferred that all refugees fall within the scope of application of this guarantee, regardless whether or not they have been able to cross the border.

3. *Travaux préparatoires*

As a supplementary means of interpretation recourse may also be made to the preparatory work of the Geneva Convention. When drafting the treaty, the Swiss delegate mentioned that the term "return" should only include such refugees who have already entered the territory of the ac-

[14] See e.g. A. Grahl-Madsen, The Status of Refugees in International Law, Vol. II (1972), 108; I. v. Pollern, Das moderne Asylrecht (1980), 131; for further references see Stenberg, *supra* note 8, 176 notes 15–17.

[15] This argument was recently confirmed by the US Court of Appeals for the 2nd Circuit, Decision of July, 29, 1992, *Haitian Centers Council et al.* v. *G. McNary, INS-Commissioners et al.*, F2d 969, 1350.

[16] See e.g. Art. 4 (referring to "refugees within their territories"), Art. 27 ("refugee in their territory") and Arts. 15, 17 (1), 18, 19 (1), 21, 24 (1), 26 and 28 of the convention, which only refer to "refugees lawfully staying in their territory".

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cepting state[17]. This understanding, which however only referred to cases of mass migration of refugees, was entered into the official record[18]. Furthermore, the formal proposal to include an express obligation of admittance of refugees was not agreed upon[19]. Finally one has to take into consideration the fact that Part D of the Final Act of the Conference only "recommends that Governments continue to receive refugees in their territory (...)"[20].

4. Subsequent state practice

In accordance with both Art. 31 (3) of the Vienna Convention on the Law of Treaties and the jurisprudence of the International Court of Justice the subsequent attitude of states members to a convention has to be taken into consideration when interpreting a treaty provision[21]. As a practical matter, most countries have admitted refugees who apply at the borders and claim political persecution[22]. Notwithstanding this fact, it is nevertheless doubtful that this practice expresses a sense of legal commitment under the Geneva Convention to behave in this way rather than purely humanitarian motives[23]. This is confirmed by the fact that the Final Act of the conference which drafted the 1951 Convention urged states to grant asylum to refugees on humanitarian grounds. Further-

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[17] UN Doc. A/CONF.2/SR 16.6.

[18] UN Doc. A/CONF.2/SR 25.21; for details see Gornig, *supra* note 8, 21. The importance of the drafting history is stressed by N. Robinson, Convention Relating to the Status of Refugees (1953), 163; O. Kimminich, Der internationale Rechtsstatus des Flüchtlings (1962), 327; compare further K. Hailbronner, Möglichkeiten und Grenzen einer europäischen Koordinierung des Einreise- und Asylrechts (1989), 39.

[19] K. Zink, Das Asylrecht in der Bundesrepublik Deutschland nach dem Abkommen vom 28. Juli 1951 über die Rechtsstellung der Flüchtlinge unter besonderer Berücksichtigung der Rechtsprechung der Verwaltungsgerichte (1962), 191; Kälin, *supra* note 8, 108 note 5, correctly mentions, however, that this proposal contained a comprehensive obligation to grant asylum and would have thus been much wider than the pure obligation of *non-refoulement*.

[20] Emphasis added.

[21] *ICJ Corfu Channel*, ICJ Rep. 1949, 1 (25); ICJ Military and Paramilitary Activities (*Nicaragua* v. *USA*), ICJ Rep. 1984, 392 (411).

[22] For a detailed survey of recent state practice in that regard see Frowein/Zimmermann, *supra* note 1, 20 et seq.; for state practice of African states see E. Jahn, Die Praxis der Asylgewährung in den europäischen Ländern, mit einem Überblick über die Praxis in Afrika, den Vereinigten Staaten von Amerika (USA), in Kanada und Australien, in: W. Beitz/M. Wollenschläger, Handbuch des Asylrechts (1981), 143 et seq. (169 et seq.)

[23] K. Hailbronner, Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?, Va. J. Int'l L. 1986, 857 et seq. (863–864).

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more, one has to take into consideration that during the United Nations Conference on Territorial Asylum of 1977, the proposal submitted by the Federal Republic of Germany to commit states to grant refugees the right of entry based on an extensive interpretation of the principle of *non-refoulement* was defeated by a large majority[24]. While some states[25] might be under an obligation according to their internal law not to refuse entry to refugees, such behaviour based on purely internal reasons cannot be regarded as an expression of the belief of this state to be obliged to behave in this way according to international law[26]. Finally, some states have expressly stated that they support the more restrictive interpretation of the prohibition of *non-refoulement* as contained in Art. 33 of the Geneva Convention. An example may be found in a recent statement of the Legal Adviser of the United States State Department:

> "I am writing to provide you with the formal opinion of the Department of State on the question whether the *non-refoulement* obligation of Art. 33 of the 1951 U.N. Convention Relating to the Status of Refugees (...) imposes obligations on the United States with respect to refugees outside United States territory. We have previously and publicly taken the position that the obligation applies only to persons within the territory of a Contracting State. This remains our firm view"[27].

Against this background, one might doubt whether refugees presenting themselves at the border are, under the present state of the law protected by the prohibition of *non-refoulement* enshrined in Art. 33 of the Re-

[24] See K. Hailbronner, Das Refoulement-Verbot und die humanitären Flüchtlinge im Völkerrecht, ZAR 1987, 3 et seq. (4); A. Grahl-Madsen, Territorial Asylum (1980), 61. This proposal was only supported by the Holy See, Norway and Sweden, Report of the United Nations Conference on Territorial Asylum, UN Doc. A/Conf. 78/12 (1977).

[25] Such as e.g. the Federal Republic of Germany.

[26] But see the above-mentioned decision of the German Federal Supreme Administrative Court, *supra* note 4, which states, that under Art. 33 of the Geneva Convention, states are under an obligation not to refuse entry to refugees, who present themselves at the border. But see also in contrast thereto the decision of the Swiss Federal Supreme Court, which in 1990 underlined that taking into consideration its fundamental importance, "the principle of non-refoulement has been incorporated into Swiss Law and its scope of application has been extended to persons presenting themselves at the border" (emphasis added), judgment of April 27, 1990, published in ASYL 1990, 21; cited by A. Achermann/C. Hausamann, Handbuch des Asylrechts (2nd ed., 1991), 176.

[27] Cited in a decision of the U.S. Court of Appeals for the 2nd Circuit of July 29, 1992, *Haitian Centers Council et al.* v. *G. McNary, INS-Commissioners et al.*, F2d 969, 1350 (1364); see also the decision of the US District Court for the 11th Circuit, *Haitian Refugee Center* v. *Baker*, 953 F. 2d 1498, and US District Court for the D.C. Circuit, *Center* v. *Gracy*, 809 F. 2d 794 (840).

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fugee Convention, especially in light of the fact that states do not lightly devest themselves of the right to control their borders, which they consider to be a fundamental aspect of state sovereignty[28]. This view is further confirmed by the holding in the *Lotus* case in which the Permanent Court of International Justice determined, that in case of doubt, a limitation of sovereignty of states cannot be presumed but, to the contrary, must be construed restrictively[29]. But even if a wider application of the principle of *non-refoulement* has not yet reached the status of a rule of law, it may nevertheless be called a norm *in statu nascendi*[30].

Notwithstanding this result, an obligation to admit refugees presenting themselves at the border may be derived from the obligations incurred under the European Convention on Human Rights.

B. European Convention on Human Rights

1. Introduction

It is common ground that the European Convention on Human Rights does not contain a right to be granted asylum[31]. This result is confirmed by an *argumentum e contrario* based on Art. 4 of the 4th Additional Protocol, according to which only mass expulsions of aliens are illegal. Despite this fact, it is generally acknowledged that a decision to expel an alien may violate Art. 3 of the Convention[32]. It is doubtful, however, whether a right to be admitted to the territory of the member states of the ECHR can be derived from Art. 3 of the ECHR, or whether only aliens

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28 Hailbronner, *supra* note 23, 866.

29 PCIJ, Ser. A, No. 24, 1 et seq. (12).

30 G. Gornig, Das Non-Refoulement-Prinzip, ein Menschenrecht in "statu nascendi", EuGRZ 1986, 521 et seq.

31 T. Einarsen, The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum, IJRL 1990, 361; BVerwGE 3, 235. In 1961, the Committee of Ministers of the Council of Europe expressly rejected including a provision on asylum in an additional protocol to the ECHR despite the fact that even the proposal of the Consultative Assembly, Recommendation No. 293 of June, 29, 1961, only provided for "a right to apply for asylum and to enjoy asylum", thus not referring to an individual right to be granted asylum. Furthermore, even the non-binding Declaration on Territorial Asylum, adopted by the Committee of Ministers of the Council of Europe, referred to a right of its member states to grant asylum; see in that regard O. Kimminich, Bonner Kommentar zum Grundgesetz (loose-leaf), Art. 16, p. 154 .

32 As to the notion of cruel and inhuman treatment or torture see J. A. Frowein/W. Peukert, Europäische Menschenrechtskonvention – EMRK Kommentar (1985), Art. 3, pp. 29–30 .

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who have already entered a certain state may not be expelled if they would otherwise be exposed to a situation endangering their rights as guaranteed by Art. 3 of the Convention.

2. *Scope of protection of Art. 3 European Convention on Human Rights*[33]

For the first time, the European Commission of Human Rights held in 1961 "that the deportation of a foreigner to a particular country might in exceptional cases give rise to the question whether there had been 'inhuman treatment' within the meaning of Art. 3 of the Convention"[34]. In 1987, the Commission held an application based on Art. 3 to be admissible where a person had been expelled by the United Kingdom to the Kingdom of Marocco[35]. In 1989, the European Court of Human Rights held that a decision to extradite also runs counter to Art. 3 if the person would thereby be exposed to a treatment itself incompatible with Art. 3 of the ECHR[36]. Two years later, the Court extended the scope of application of Art. 3 of the ECHR to decisions dealing with the expulsion of foreigners[37]. This jurisprudence has recently been confirmed by other judgments of the Court[38].

There are, however, no decisions of the Strasbourg organs dealing expressly with the question whether a state which is a member of the Convention is under an obligation to admit an alien, who presents himself at the border if this person would otherwise be exposed to an Art. 3 situation[39]. It seems to have been the view of the British Government in the

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[33] As to Art. 3 of the United Nations Convention against torture, see Z. Haquani, La convention des Nations Unies contre la Torture, R.G.D.I.P. 1986, 117 et seq.

[34] Decision of the Commission in the case *X* v. *Federal Republic of Germany* of 6 October 1962, Y.B. Eur. Conv. Hum. Rts. 1962, 256 et seq. (260), which refers to the unpublished decision concerning application 984/61.

[35] Y.B. Eur. Conv. Hum. Rts. 1973, 356. On the whole there are about forty decisions of the commission dealing with this topic, Kälin, *supra* note 8, 167 note 4.

[36] *Soering* v. *United Kingdom*, Judgment of July 7, 1989, Ser. A, Vol. 161 *passim*; as to this decision see S. Breitenmoser/G. Wilms, Human Rights v. Extradition: The Soering Case, Mich. J. Int'l L. 1990, 845 et seq.

[37] *Cruz Varaz and others* v. *Sweden*, Judgment of March 20, 1991; Ser. A, Vol. 201, 1 et seq.

[38] *Vilvarajah and others* v. *United Kingdom*, Judgment of October, 30, 1991, Ser. A, Vol. 215, 1 et seq., and most recently *Vijayanathan and Pusparajah* v. *France*, Judgment of August, 27, 1992.

[39] The majority of authors share the view that there is such an obligation, see e.g. Kälin, *supra* note 8, 169; R. Seeger, Das Asylrecht als Menschenrecht, in: T. Veiter (ed.), Asylrecht als Menschenrecht (1969), 1 (13); P. van Dijk/G. van Hoof, Theory

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case of *Vilvarajah* that such a right of entry indeed exists if the person would otherwise be exposed to inhuman treatment or torture[40]. Furthermore, it was the Court itself which declared in the *Soering* case that Art. 3 of the ECHR must be interpreted in such a manner as to render its guarantees effective[41]. It has to be further taken into consideration that the degree of danger and the possible results for the individual are the same regardless of whether a person is expelled or simply not admitted. Accordingly, Art. 3 of the ECHR must protect a person against any act which exposes somebody to torture or inhuman treatment even if this person had not yet reached the territory of the state in question. This result is confirmed by the fact that the Consultative Assembly of the Council of Europe in 1965 took the view that Art. 3 of the ECHR also contains a prohibition of rejection at the border[42].

3. Art. 3 and non-governmental persecution

The question whether Art. 3 also protects against non-governmental persecution has neither been yet dealt with by the Strasbourg organs. In its report in the case of *K. Altun* v. *the Federal Republic of Germany*[43], the Commission, however, emphasized that only the existence of an objective danger to the person to be extradited may be considered. The Commission, moreover, has taken account in cases of expulsion, of danger not caused by the governmental authorities of the receiving state[44]. The inclusion of non-governmental persecution into the scope of application of Art. 3 of the ECHR is also consistent with the ordinary meaning of the terms "inhuman or degrading treatment"[45], especially if one takes the perspective of the potential victim, whose protection is the very purpose of the Convention. For the individual, it does not make any difference who is ultimately responsible for such a treatment. Further-

and Practice of the European Convention on Human Rights (2nd ed., 1990), 236; Achermann/Hausammann, *supra* note 26, 187; K. Hailbronner, Perspektiven einer Europäischen Asylrechtsharmonisierung nach der Maastrichter Gipfelkonferenz, ZAR 1992, 51 (55), which even considers this to be "beyond doubt".

[40] Judgment, *supra* note 38, 33.

[41] Judgment in the *Soering* case, *supra* note 36, para. 87.

[42] Recommendation 434 (1965).

[43] Application 10308/83, Y.B. Eur. Conv. Hum. Rts. 1983, 164.

[44] In the proceeding 7216/75, D.R. 5, 137 et seq. (140), the Commission still left it open whether or not the dangers must result from governmental persecution; see Frowein/Peukert, *supra* note 32, Art. 3, p. 38 .

[45] Einarsen, *supra* note 31, 370 with further references.

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more, when dealing with the question of expulsions, it is important to note that it is not the home state of the individual but the expelling state which is bound by Art. 3 of the ECHR, since it is this state which by its decision would expose the person to inhuman treatment or torture. Finally, reference can again be made to the decision of the European Court of Human Rights in the *Soering* case and its holding that the guarantees of the Convention must be interpreted in a manner as to be effective[46]. In accordance with this result it was the Swiss Supreme Court which held that a person who in case of expulsion would be exposed to a danger of Vendetta has a right to *de facto* asylum under the Convention[47].

III. The Concept of "Safe Countries of Origin"

A. Compatibility with the Geneva Convention

Determining whether the concept of "safe countries of origin" is consistent with the Geneva Convention requires an examination of the recent Swiss and Belgian asylum laws and the proposal for a new Art. 16 a of the German constitution. The Belgian Law on Asylum stipulates that:

> "Le ministre de la justice (...) peut décider que l'étranger (...) sera refoulé:
> (...)
> (7) Si l'étranger est d'originaire d'un pays d'où provenait, au cours de l'année civile précédente, 5% au moins de demandeurs d'asyle, et dans la mesure où il ressort du dernier rapport annuel du Commissaire Générale aux réfugiés (...) que moins de 5% des décisions finales qui ont été prises ont attribué le statut de réfugié au demandeur, et pour autant qu'il ne founisse aucun élément indiquant un risque sérieux pour sa vie ou sa liberté, dans le sens de la Convention de Genève (...)"[48].

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[46] Judgment in the *Soering* case, *supra* note 36.

[47] BGE 111, 1 b, 71. The practice of the Swiss asylum authorities seems, however, to be different; for details see Achermann/Hausamann, *supra* note 26, 185.

[48] See also Art. 16 of the Swiss Asylum Law which stipulates: "(...) (2) Der Bundesrat kann Staaten bezeichnen, in welchen nach seinen Feststellungen Sicherheit vor Verfolgung besteht; entsprechende Beschlüsse überprüft er periodisch. Stammt der Gesuchsteller aus einem solchen Staat, wird auf sein Gesuch oder seine Beschwerde nicht eingetreten, außer die Anhörung ergebe Hinweise auf eine Verfolgung".

On October 31, 1990, March 18, 1991 and November 25, 1991 the Swiss Government decided to declare the following countries to be "safe countries of origin": Poland, Hungary, Czechoslovakia, Algeria, India, Romania and Angola.

The Austrian Asylum Law of January 7, 1991 contains a clause in para. 17 III No. 2 according to which an application by an asylum-seeker is manifestly unfounded if, according to common knowledge and the general practice in the country of origin, it can be

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When evaluating such lists of "safe countries of origin", one has to distinguish between, on the one hand, lists which automatically preclude anyone arriving from such countries from admission as a refugee and, on the other hand, lists which only contain a rebuttable presumption of freedom from persecution in these countries.

1. Lists of "safe countries of origin" from which all persons may ipso facto be excluded from admission as refugees

According to Art. 1 (3) of the Protocol on the Status of Refugees of 1967, the Contracting Parties of this instrument have to apply its provisions without any geographical restrictions. Furthermore, according to Art. 42 of the Geneva Convention taken together with Art. 7 (1) of the Protocol, reservations as to Art. 33 of the Convention or as to its territorial scope of application are inadmissible[49]. Thus, applying a system of lists of "safe countries of origin", which would automatically preclude all applicants from certain countries, would be equivalent to a territorial reservation prohibited under the system of the Geneva Convention[50].

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presumed that there is no well-founded fear of persecution in the sense of the Geneva Convention. While the Austrian Asylum Law does not contain formal lists of "safe countries of origin", it is probable that such lists will develop in day-to-day administrative and judicial practice.

[49] Furthermore, under Art. 19 of the Vienna Convention on the Law of Treaties any reservation would have had to be made before the entry of the Convention into force for the contracting state. The reference made by K. Schenk, Zum Asylrecht unter Listenvorbehalt, ZRP 1992, 102, as to the situation of Italy is misleading. Until March 1, 1990 Italy had applied the Geneva Convention only as far as events occurring in Europe were concerned. This possibility of restricting the geographical scope of application was a limited one and could only be used in accordance with Art. 1 B. I. of the Geneva Convention by way of declaration made at the time of signature, ratification or accession; but see the Italian notification of January 17, 1990, BGBl. II, 713, by which Italy has now extended its obligations under the Geneva Convention.

[50] C. D. Classen, Muß der Rechtsstaat kapitulieren?, in: K. Borgmann [et. al.] (eds.), Verfassungsreform und Grundgesetz (1992), 133 et seq. (142); this view is shared by the representative of UNHCR in Germany, see e.g. Frankfurter Rundschau of October 18, 1991.

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2. Lists of "safe countries of origin" as rebuttable presumptions of non-persecution

Apart from the automatic preclusion of all applicants from certain countries, the concept of safe countries of origin can also be understood and applied in the sense of a rebuttable presumption of non-persecution. This would mean that a person originating from a specific country in which the general political situation can be considered as stable would not be recognized as refugee unless it can be demonstrated that in his or her specific case a situation exists in which there might nevertheless be a well-founded fear of persecution.

a) The function of recognition procedures

Before considering the legality of such a system of "safe countries of origin", one has first to clarify whether the member states of the Convention can freely decide who is a refugee according to the Convention, or whether they are bound by the *rationae persone* scope of application of the Convention[51]. In order to answer this question, one has to take as a starting point Art. 1 of the Convention, which contains an embracing definition of the notion of "refugee". This definition would be meaningless if the member states could freely decide who is a refugee according to their own criteria. This observation is confirmed by the wording of Art. 9 of the Convention, according to which a contracting state can take provisional measures as to certain groups of persons, but only "pending a determination by the contracting state that a specific person is in fact a refugee"[52]. Thus, the Convention presupposes that states have to determine the refugee-status of asylum seekers according to the criteria contained in the Convention itself. But even if the Convention requires a procedure of recognition, it is unclear what standards such a procedure has to meet in order to be in accordance with the Convention.

[51] See in this regard S. Richter, Selbstgeschaffene Nachfluchtgründe und die Rechtsstellung von den Konventionsflüchtlingen nach der Rechtsprechung des Bundesverfassungsgerichts zum Grundrecht auf Asyl und dem Gesetz zur Neuregelung des Ausländerrechts, ZaöRV 1991, 1 et seq. (30–31).

[52] Emphasis added; Richter, ibid., 30–31.

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b) Minimum procedural standards for a recognition procedure

The wording of the Convention does not contain specific guidelines as to the procedural obligations of states when determining the legal status of asylum-seekers[53]. Therefore, one has to take as a starting point that each contracting party can – within the limits of its constitutional law[54] and further obligations under public international law[55] – choose its own procedure[56]. There is an obligation, however, which can be derived from the Convention, that each member state undertakes to establish some kind of determination procedure. This duty can be based on the general principle of good faith. By becoming party to a treaty, a state incurs the obligation to make an effort to reach the goals of the treaty. It would run counter to this principle of good faith if each state – by simply not applying any kind of determination procedure – could at least *de facto* dispense with any obligation[57]. Without such a procedure, the member states would not be able to identify those persons to whom they have to grant the rights contained in the treaty, in particular persons who are protected by the prohibition of *refoulement*[58]. This result is further strengthened by the idea that a complete lack of such a determination procedure would be equivalent to a denial of justice[59].

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53 Hailbronner, *supra* note 24, 6; see also R. Marx, Konventionsflüchtlinge ohne Rechtsschutz – Untersuchungen zu einem vergessenen Begriff, ZAR 1992, 3 et seq. (11).

54 As far as Germany is concerned, the relevant provisions are especially contained in Arts. 16, 19 and 20 of the Constitution.

55 Obligations under public international law can be specially derived from instruments dealing with human rights, such as the ECHR.

56 This position is shared by the UNHCR, see Handbook on Procedure and Criteria to Determine the Refugee Status according to the Convention of 1951 and the Protocol of 1967 on the Status of Refugees (1979), 55.

57 C. Avery, Refugee Status Decision-Making: The System of Ten Countries, Stanf. J. Int'l L. 1983, 235 et seq. (237); G. Goodwin-Gill, The Refugee in International Law (1983), 165.

58 R. Plender, The Present State of Research Carried out by the English-Speaking Section of the Center for Studies and Research, Académie de Droit International de la Haye (1989), 63 (83); G. Goodwin-Gill, The Determination of Refugee Status: Problems of Access to Procedures and the Standard of Proof, Yb. Int. Inst. Hum. L., 56 et seq. (1985), (60).

59 See the dictum of the International Court of Justice in the *Barcelona Traction* case, where the Court stated: "With regard (....) to human rights, (...) it should be noted that these also include protection against denial of justice", ICJ Rep. 1970, 48; furthermore Plender, ibid., 83, who relies on the principle of good administration of justice; as to this principle see ICJ Rep. 1956, 77 et seq. (86), and ICJ Rep. 1982, 325 et seq. (338). The argument based on Art. 16 (1) of the Refugee Convention that a refugee should have free access to a court of law on the territory of all contracting states, brought forward by E.

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Apart from these arguments drawn from the Convention itself, one might also consider certain essential minimum procedural standards as being part of customary international law, especially as far as the principle of fair trial in administrative procedures is concerned[60]. This principle entails the right to submit an application, to present evidence and to make statements as to evidence brought forward by the other party[61]. Furthermore, in order to avoid having the applicant become a pure object of the procedure, he or she must be kept informed about the status of his application. These minimum standards were confirmed by a declaration adopted by the Executive Committee of the UNHCR in 1977[62]. In addition, the treaty creating the International Refugee Organization already contained the following provision in its annex 1:

> "To ensure the impartial and equitable application of the above principles [regarding eligibility for refugee status] and of the terms of the definition which follows, some special system of semi-judicial machinery should be created, with appropriate constitution, procedure and terms of reference"[63].

Thus, it can be concluded that the Geneva Convention does not require judicial control of administrative decisions. On the other hand, in order to be in accordance with international law, the administrative procedure regulating the legal status of asylum-seekers must meet the above-mentioned requirements.

c) Procedural standards for applications which are "manifestly unfounded"

Even in the case of so-called manifestly unfounded applications, i.e. applications which *prima facie* are not justified against the background of the political situation in the applicant's home country, the procedures followed by the national authorities must still fulfill certain minimum re-

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Zoller, Bilan de recherche de la section française du centre d'étude et de recherche de l'académie, Académie de Droit International de la Haye (1989), 15 (33), seems to be unfounded, since this norm, according to its systematic position in the Convention, deals only with the status of the refugee who has been already recognized as such.

[60] Chr. Tomuschat, Menschenrechte als Mindeststandard für Menschen ohne Heimat, ZAR 1984, 98.

[61] Goodwin-Gill, *supra* note 58, 60; Plender, *supra* note 58, 82; Tomuschat, ibid., 101. In order to enable the applicant to exercise his procedural rights, communication must be possible, even if it be by means of translation.

[62] See also Recommendation No. R (81) 16 of the Committee of Ministers of the Council of Europe to Member States on the Harmonization of National Procedures Relating to Asylum of November 5, 1981, which contains almost identical principles.

[63] 18 UNTS 3.

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quirements. In particular, the applicant must be granted an opportunity to show that he or she is indeed persecuted. Otherwise a *de facto* reservation exists as to the territorial scope of application of the Convention, which – as demonstrated above – is incompatible with this instrument[64]. This is confirmed by the recent practice of those states which have introduced such a system of safe countries of origin into their municipal asylum procedures. In these countries, i.e. Switzerland and Belgium, there is in each case a determination made whether the application contains relevant information about persecution even if the applicant originates from one of the listed "safe countries of origin". If this were not the case, a state applying the concept of safe countries of origin would be exposed to a situation in which it would frequently act contrary to its obligations under the Convention by expelling or returning refugees to a state where they are exposed to persecution for one of the reasons referred to in Art. 33.

This means, on the one hand, that the applicant must have an opportunity to bring forward evidence that in his individual case there is persecution before he is expelled or returned. On the other hand, it is compatible with the Convention that an application originating from a country where the general political situation is free of persecution and which does not contain any specific individual evidence to the contrary may be rejected.

d) The concept of safe countries of origin and the principle of non-discrimination

The concept of safe countries of origin, even in the form of a rebuttable presumption of non-persecution, may, however, run counter to Art. 3 of the Geneva Convention[65]. Art. 3 stipulates:

"The Contracting States shall apply the provisions of this Convention to

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[64] See above III.A.1.; see also K. Hailbronner/W. Cordes, Grundstrukturen eines neuen Asylrechts, NVwZ 1991, 713 et seq. (716), who – while favouring a system of lists of "safe countries of origin" – recognize that a substantive claim of the applicant to be persecuted must be sufficient to undertake a more detailed examination as to the merits of the case.

[65] See e.g. Goodwin-Gill, *supra* note 58, 58: "Guidance on the question of access and on related procedural standards can be found in a variety of international sources, including the 1951 Convention (specifically Art. 3, calling for non-discriminatory application of its provisions)".

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refugees without discrimination as to race, religion or country of origin"[66].

This prohibition of discrimination under Art. 3 of the Convention applies to all obligations contained therein[67] and thereby also governs the question raised here. But it is doubtful whether the creation of lists of safe countries of origin and the different procedural treatment of applicants from different states of origin based upon such lists can be viewed as discriminatory. In that regard, the overall goal of the Convention to protect individual human rights has to be taken into consideration. Thus, it might well be that different treatment of an individual based solely upon his or her country of origin conflicts with Art. 3. While a presumption of non-persecution does not *ipso facto* exclude applicants from a certain country from the protection of the Convention if they are able to show that in their individual cases persecution exists, their procedural situation is worse than that of applicants arriving from other countries. This is underlined by the fact that any such system of lists can only reach its political goal if it entails certain procedural consequences especially with regard to the duration of the asylum procedure. Accordingly, the Belgian Conseil d'Etat stated that the system of lists of safe countries of origin contained in the new Belgian law on asylum is not compatible with Art. 3 of the Convention:

> "(...) Le Conseil d'Etat est de l'avis que la disposition en projèt[68] viole la Convention de Genève, en ce qu'elle permet au Ministre de la Justice, ou à son délégué, de refouler, uniquement parcequ'ils sont originaires d'un pays déterminé, des étrangers entrés illégalement sur le territoire et se déclarant réfugiés.
>
> En excluant ces étrangers de la procédure 'normale' (...), le projet méconnait le principe de non-discrimination inscrit à l'article 3 de la Convention de Genève (...)"[69].

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[66] Emphasis added. The French text stipulates: "Les Etats Contractants appliquéront les dispositions de cette Convention aux réfugiés sans discrimination quant à la race, la réligion ou le pays d'origine" (emphasis added).

[67] This view was already expressed during the drafting history of the Convention; see in that respect the opinion of the Israeli delegate A/CONF. 2/SR. 5, 7, published in: A. Takkenberg/C. Tahbaz, The Collected travaux préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees, Vol. 3 (1990), 238.

[68] As to the wording of the provision in question see above III.A.

[69] Avis du Conseil d'Etat du 28 juin 1991 sur le projet de loi modifiant la loi du 15 décembre 1980 sur l'accès aux territoires, le séjour, l'établissement et l'éloignement des étrangers, Doc. Parl. Chambre Repr. 1647/2/90/91, 1; this opinion was shared by the representative of the French-speaking Bar Association, Sénat, Sess. 1991/91, Doc. 1076/2, 77–78: "(...) discrimination contraire à la Convention Européenne des Droits de l'Homme et aux autres instruments internationaux qui font partie de notre droit (...)".

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The representative of the Belgian government, however, referring to a statement by the local representative of the UNHCR, did not share this view[70]. In order to give an answer to this question one has to decide what is meant by the term "discrimination" used in Art. 3 of the Geneva Convention. The *travaux préparatoires* are silent on this point. It should be noted, however, that the French text of Art. 3 also uses the term "discrimination" rather than "distinction". This can be seen as a hint that not every distinct treatment is illegal under Art. 3 of the Refugee Convention. This is further confirmed by the practice concerning comparable norms. The Human Rights Committee, set up in accordance with the provisions of the United Nations Covenant on Civil and Political Rights, does not consider every unequal treatment to be discriminatory in the sense of Art. 26 of the Covenant[71]. According to the jurisprudence of the European Court of Human Rights, discrimination in the sense of Art. 14 of the ECHR exists only in situations where comparable groups of persons are exposed to different treatment, without there being a justification for such a distinction and a proportional relationship between the goal to be reached and the means used[72]. Since it cannot be presumed that the contracting parties of the Geneva Convention were already willing to reach beyond this standard[73] in 1951, Art. 3 must be understood as prohibiting only a distinction which is not based on reasonable grounds.

Transferring these criteria to the problem of lists of "safe countries of origin", it should be mentioned that these lists take into consideration the extent of persecution in the relevant countries. This means that such lists make reference to a criterion, i.e. the extent of persecution, which is also used by the Convention itself. Furthermore, an applicant from a "safe country" is not *ipso facto* denied the status of a refugee. It is solely his or her procedural situation which is different from that of applicants originating in other countries. The view that the concept of safe countries of origin as a means to render asylum procedures more expedient is compatible with the Geneva Convention, is also shared by the UNHCR[74].

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[70] Doc. Parl. Chambre Retr. 1647/4/90/91, 5.

[71] B. 172 and 182/1984, Para. 12 and 15, cited by M. Nowak, UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll (1989), Art. 26, p. 504 .

[72] Frowein/Peukert, *supra* note 32, 314–318.

[73] A proposition to add "or for other reasons" or the word "particularly" to the present wording of Art. 3, was rejected, see N. Robinson, Convention Relating to the Status of Refugees (1953), 74–75.

[74] See L. Druke, Schengen in the Light of Public International Law – UNHCR's Perspectives Priorities and Proposals (unpublished working document of UNHCR), 6, see

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Finally, this view as to the consistency of lists of safe countries of origin containing a presumption of non-persecution with Art. 3 of the Geneva Convention is supported by the recent state practice of Switzerland and Belgium[75]. Any such list must, however, be frequently updated and modified in order to make sure that changes in the internal political situation of countries of origin deemed "safe" are adequately taken into consideration[76].

e) The Geneva Convention and a provisional right to stay

Before expelling or returning a person to a state in which he or she may be persecuted, a determination has to be made whether or not the person to be expelled is in fact a refugee[77]. Until the decision is rendered, the applicant must be granted a provisional right to stay, since otherwise such a decision may be superfluous[78]. This view is shared by the French Conseil d'Etat in its decision of 13 December 1991 where it is stated:

> "Considérant que ces dispositions impliquent nécessairement que l'étranger qui sollicite la reconnaissance de la qualité de refugié soit en principe autorisé a demeurer provisoirement sur le territoire jusqu'à ce qu'il ait été statué sur sa demande"[79].

But any such provisional right to stay is doubtful in the following two situations: first, if the facts submitted by the applicant – even if they were true – would not constitute a situation of persecution covered by Art. 33

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also Hailbronner/Cordes, *supra* note 64, 716; Tomuschat, *supra* note 60, expresses uncertainty in this connection.

[75] See the statement of the Swiss Government, which considers that the new Swiss Asylum Law is compatible with the obligations incurred by Switzerland under the Geneva Convention, BBl. 1990, 573 (676). But see also G. Goodwin-Gill, Ein sicheres Land? – Wer bestimmt das?, Flüchtlinge – Mitteilungsblatt des UNHCR 2/1992, 37–38.

[76] It seems problematic whether it is compatible with Art. 3 to make the inclusion of a specific country on such a list contingent on the number of applicants applying for the status of refugee; but see in this regard the Belgian asylum law, *supra* note 48 and accompanying text, and a recent proposal brought forward by the working-committee on immigration of the European Communities, FAZ of October 28, 1992.

[77] See above III.A.2.a).

[78] Classen, *supra* note 50, 21.

[79] RFDA 1992, 102–103; the French Conseil d'Etat bases its decision on Art. 31 (2) of the Convention. It is doubful, however, whether this is correct since Art. 31 (2) seems to deal only with restrictions of movements of refugees within the territory of a certain state. The Commissaire du Gouvernement has maintained that there is no such right for provisional stay in cases where the applicant would be expelled to another state party to the Schengen Agreement, ibid., 90 at seq.; B. Genevois, L'entrée des étrangers en France: le rappel des exigences constitutionnelles, RFDA 1992, 185 et seq. (192).

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of the Convention; and second, if an application has obviously no other goal than obstructing a decision to expel[80].

B. The Concept of "Safe Countries of Origin" and its Compatibility with the European Convention on Human Rights

Here again, one has to distinguish between a system of lists which exclude applicants *ipso facto* from a national asylum procedure and a concept which contains only a presumption of non-persecution.

1. *Ipso facto exclusion of certain groups of applicants*

As mentioned above[81], member states of the ECHR are, according to Art. 3 of the ECHR, under an obligation to admit persons who would otherwise be exposed to torture or to inhuman or degrading treatment or punishment. As demonstrated by the decision of the European Court of Human Rights in the *Soering* case, even the expulsion of a person to a country which is normally considered as creating no problems under Art. 3 of the ECHR might nevertheless run counter to the guarantees of the Convention. Furthermore, any such decision to expel or to return a person might also be illegal under Art. 13 of the ECHR if the person concerned has no opportunity whatsoever to claim that in his or her individual case there is a danger of inhuman treatment or torture[82].

The situation might be different if the person originates from a country which itself is bound by the ECHR and which has made declarations under both Art. 25 and Art. 46 of the ECHR[83]. One could argue that in such a case the individual could complain directly against the actions of the state to which he would be sent back[84]. On the other hand, according to the practice of the European Commission of Human Rights, the recognition of the competence of the Commission and the European Court of

[80] See in that regard the above-mentioned decision of the French Conseil d'Etat, *supra* note 79; similar Grahl-Madsen, *supra* note 14, 224. This exception would not be applicable in a case where the situation in the receiving state has changed significantly.

[81] See above II.B.

[82] For details see below III.B.2.

[83] In regard to the conditions within the member states of the Council of Europe, those in Turkey create the greatest probability of a possible violation of Art. 3 of the ECHR.

[84] See the argument of the Secretary of the European Commission of Human Rights cited in Asyl 1989/4, 19; but see also Achermann/Hausamann, *supra* note 26, 185.

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Human Rights by the state alleged to be guilty of persecution is only one among several factors to be taken into account when considering an individual complaint. Accordingly, the Commission has lately taken provisional measures under Art. 36 of the Rules of Procedure of the Commission in cases where a person would otherwise be returned to Turkey[85]. This practice is also in harmony with the jurisprudence of the European Court of Human Rights according to which a violation of Art. 3 of the ECHR in cases of expulsion may arise when the person concerned would *de facto* be exposed to torture or inhuman treatment. In such cases, Art. 3 of the ECHR would be rendered meaningless if the person is first returned to his or her country of origin. For these reasons any use of the concept of "safe country of origin" which cannot be challenged in every individual case is incompatible with the guarantees of the ECHR even if it is used in regard to other member states of the Convention.

2. The European Convention on Human Rights and the presumption of non-persecution

Notwithstanding the above analysis, the use of lists of "safe countries of origin" which contain a rebuttable presumption that there is no danger of torture or inhuman treatment or punishment in specific countries might not be compatible with the requirements of Art. 13 of the Convention[86].

[85] As to the binding effect of such provisional measures, see K. Oellers-Frahm, Zur Verbindlichkeit einstweiliger Anordnungen der Europäischen Kommission für Menschenrechte – Anmerkung zum Urteil des EGMR im Falle Cruz Varas ./. Schweden, EuGRZ 1991, 197 et seq.; R. Macdonald, Interim Measures in International Law with Special Reference to the European System for the Protection of Human Rights, ZaöRV 1992, 703 et seq. *passim*.

[86] While the Commission has recognized in the Report of the European Commission of Human Rights in the case of *East African Asians* v. *the United Kingdom*, E.H.R.R. 1981, 76 et seq., that an immigration policy which discriminates on account of race violates Art. 3, the Commission based its Report largely on the fact that the group of persons concerned were nationals of the United Kingdom, ibid., 85; but see also Einarsen, *supra* note 31, 374.

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a) Personal scope of application of Art. 13 ECHR

Since asylum procedures concern neither "civil rights and obligations" nor "criminal charges", applicants claiming to be refugees in the sense of the Refugee Convention are not protected by Art. 6 (1) of the ECHR[87]. In contrast to Art. 6 of the ECHR, which has only a limited scope of application, Art. 13 of the ECHR grants every petitioner who has an arguable claim that his or her rights under the Convention were violated, a right to have recourse to an effective remedy before a national authority[88]. As this right exists for every petitioner, it also protects refugees who have illegally crossed the border[89].

b) The standard of Art. 13 of the ECHR

Art. 13, which guarantees the right to an effective remedy, does not necessitate judicial protection[90]. It is necessary, however, that the authority referred to in Art. 13 can render a binding decision[91] and decide independently[92]. Under Art. 13 of the ECHR, every petitioner has a right to a hearing, which, however, need not take the form of an oral proceeding[93].

According to the jurisprudence of the European Court of Human Rights, the effectiveness of a remedy has to be considered in light of the facts of the individual case and the nature of the guarantees involved[94]. The fact that the rights protected under Art. 3 of the ECHR are of a

[87] See Application 7729/76, *Agee* v. *United Kingdom*, 7 D.R., 164 et seq.; Application 8244/78, *Upal and others* v. *United Kingdom*, E.H.R.R. (1981), 391 et seq.; Application 12122/86, *Lukka* v. *United Kingdom*, E.H.R.R. (1987), 552–555. But see also the recent decision of the German Supreme Administrative Court which expressly left this question open, NVwZ 1992, 890–891; as to this decision see B. Huber, Anwendbarkeit des Art. 6 I MRK auf Asylstreitverfahren, NVwZ 1992, 856–857.

[88] See e.g. as far as the jurisprudence of the European Court of Human Rights is concerned the decision *Boyle & Rice*, Judgment of 27 April 1988, Ser. A, Vol. 131, 21, para. 52; *Plattform Ärzte für das Leben*, Ser. A, Vol. 139, para. 25.

[89] See also Art. 1 of Additional Protocol No. 7, in force since November 1, 1988, which only protects aliens legally within the territory of one of the signatory states. The Protocol has not yet been ratified by the Federal Republic of Germany.

[90] Judgment in the *Klass* case, Ser. A., Vol. 28, 30.

[91] *Boyle & Rice*, Ser. A, Vol. 131, para. 24; Frowein/Peukert, *supra* note 32, Art. 13, pp. 299–300 .

[92] Frowein/Peukert, ibid., Art. 13, p. 300 .

[93] Ibid.

[94] *Boyle & Rice*, Ser. A, Vol. 131, para. 24.

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fundamental character and are not subject to state restrictions[95], and cannot be derogated from in time of public emergency[96], demonstrates that the Convention itself favours strict procedural safeguards whenever there is an arguable claim of a violation of Art. 3. This interpretation is further supported by the possible irreparable character of a violation of Art. 3 of the ECHR in case of expulsion or forcible return to a state of persecution[97].

Applying this standard found in Art. 13 of the ECHR to the concept of "countries of safe origin", the petitioner must at least be given an opportunity to bring forward arguments indicating why any such presumption of non-persecution is inadequate in his or her case. In the case of *Vilvarajah*[98], the European Court of Human Rights, in accordance with its previous jurisprudence[99], however, found that with respect to expulsions, it is also sufficient under Art. 13 of the ECHR, that the competent authority only consider the "reasonableness" of the previous decision without reviewing the complete merits of the case. But it is doubtful whether this jurisprudence also applies in the context of a system of lists of "contries of safe origin". At least where the decision of first instance only relies on the fact of a certain country of origin, the authority to be established under Art. 13 of the ECHR must also consider the arguments brought forward by the applicant. Otherwise, the applicant would have no effective possibility of ever bringing forward the evidence and arguments why in his or her case a forcible return would involve exposure to a situation incompatible with rights recognized under Art. 3 of the ECHR.

c) The suspensive effect of the remedy

In the context of Art. 26 of the ECHR, the Commission has taken the view that "if an individual claims that the execution of an expulsion measure taken against him may violate the Convention, a remedy without suspensive effect is ineffective"[100]. In one decision, the Commission explicitly states that the remedy in question "is not effective" due to its lack

[95] Contrary to Arts. 8 (2), 9 (2), 10 (2), and 11 (2) of the ECHR.
[96] See Art. 15 (2) of the ECHR.
[97] Einarsen, *supra* note 31, 379.
[98] See *supra* note 38.
[99] See e. g. its decision in the *Soering* case, *supra* note 36.
[100] See *X. v. Denmark*, Application 7465/76, 7 D.R. (1977), 153; R. Plender, Problems Raised by Certain Aspects of the Present Situation of Refugees from the Standpoint

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of suspensive effect, thereby referring to the wording of Art. 13 of the ECHR[101]. In the *Soering* case, the European Court of Human Rights considered that *de facto* no expulsion would take place and that for this reason there had been no violation of Art. 13[102]. Under these circumstances the remedy foreseen by Art. 13 has to have suspensive effect whenever there is an arguable claim of a violation of Art. 3 of the ECHR based on expulsion or forcible return[103].

On the other hand, where there is no such arguable claim, no provisional right to stay can be derived from Art. 3 of the ECHR.

IV. Forcible Return to Third Countries

A. Geneva Convention

1. General principle

An *argumentum e contrario* based on Art. 33 of the Geneva Convention demonstrates that the Contracting Parties have retained the right to forcibly return persons who have entered from a state in which they do not fear persecution[104]. States of second subsequent arrival in fact frequently return refugees to countries of "first asylum"[105]. This practice is further supported by an argument based on Art. 31 of the Geneva Convention. Art. 31 (1) only precludes penalties for refugees arriving directly

of the European Convention on Human Rights, Council of Europe, Strasbourg (1984), 18; Frowein/Peukert, *supra* note 32, Art. 26 marginal note 24.

[101] See also F. Matscher, Das Verfahren vor den Organen der EMRK, EuGRZ 1982, 489 et seq. (497), and also, Zur Funktion und Tragweite der Bestimmung des Art. 13 EMRK, in: K.-H. Böckstiegel [et al.] (eds.), Völkerrecht – Recht der Internationalen Organisationen – Weltwirtschaftsrecht: Festschrift für I. Seidl-Hohenveldern (1988), 315 et seq. (327), for the view that the notion of effective remedy in Arts. 13 and 26 of the ECHR are to be understood in an identical way.

[102] See *supra* note 36, para. 123 et seq.; cf. the holding of the Court in the case of *Vilvaranjah*, *supra* note 38, para. 125.

[103] Classen, *supra* note 50, 154; Einarsen, *supra* note 31, 381; Plender, *supra* note 100, 18; but see also K. Hailbronner, Ausländerrecht (2nd ed., 1989), marginal notes 679 and 1284; Hailbronner's reference to a decision of the German Federal Constitutional Court, EuGRZ 1984, 483, is, however, misleading, since the Court expressly stated in this decision that a danger for the life or the freedom of the petitioner in case of a forcible return was not even pleaded.

[104] J. A. Frowein/R. Kühner, Drohende Folterung als Asylgrund und -grenze für Auslieferung und Ausweisung, ZaöRV 1983, 537 et seq. (553).

[105] R. Plender, International Migration Law (2nd ed., 1988), 424.

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from a territory where their life or freedom was threatened, thus implying a distinction between those arriving directly and those doing so indirectly[106]. Furthermore, the *travaux préparatoires* of the Convention demonstrate that Art. 31 was not intended to include an obligation to admit refugees and that the term penalties found in Art. 31 did not cover expulsions[107]. The adoption of the recommendation of the Executive Committee of the UNHCR in 1977, by which criteria for determining countries of first asylum were to be harmonized[108], further demonstrates that an obligation of admittance and a prohibition against return to another country of first asylum is not yet part of positive law[109].

2. *Limits*

The right to return a refugee to another country is, however, not unlimited. On the one hand, such return is only legally possible if it can be done in accordance with international law[110]. This is the case when the return can be based either on the fact that the refugee has a valid passport for the country to which he or she will be returned or there exists a *refoulement* agreement ("Schubabkommen") between the countries in question[111]. Finally, such an obligation of readmittance is also contained in both Art. 10 of the Dublin Convention and Art. 31 of the second Schengen Agreement[112]. But even in such cases, the requirements of Art. 33 of the Geneva Convention have to be taken into consideration. This means that it must be established that the country to which the person involved will be returned is indeed safe and that the person will

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106 Ibid.

107 See the statements of the representatives of Canada and the United Kingdom, SR. 13, 12–14, and Robinson *supra* note 73, 153.

108 UN Doc. A/Ac. 96/572, Gar. 72 (2).

109 See also as an example Art. 6 (1) (a) of the asylum law of Switzerland, which refers to such a possibility.

110 Achermann/Hausamann, *supra* note 26, 156, referring to a statement of the Swiss Government, BBl. 1977 III, 119.

111 As to the notion of *refoulement* agreements see A. Grahl-Madsen, *supra* note 14, 317 et seq.; the Federal Republic of Germany has in the meantime concluded such agreements with all of its neighbouring states except Czechoslovakia, see Classen, *supra* note 50, 149 note 96.

112 Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities ("The Dublin Convention"), ILM 1991, 425ff.; Convention Applying the Schengen Agreement between the Governments of Belgium, the Netherlands, Luxembourg, the Federal Republic of Germany and France, ILM 1991, 84 et seq.; for details see below VI.

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not be returned consequently by this state to another state in which he or she will be persecuted. But even where a return is generally compatible with the principle of *non-refoulement*, the returning state must ensure that the refugee will not be exposed to a situation in which he or she will become a "refugee-in-orbit" by being continuously returned from one country to another[113]. Such a result can be regarded as a violation of the guarantees under the ECHR.

B. The Return of Persons to Countries of First Asylum and the Guarantees of the ECHR

Although the ECHR does not contain an express right of entry of aliens, the creation of a refugee-in-orbit situation may nevertheless lead to a violation of Art. 3 of the ECHR. In the case of *Dolani* v. *the Kingdom of Belgium*[114], the European Commission of Human Rights considered that the frequent return to various neighbouring countries of a petitioner, who claimed to have a well-founded fear of persecution could indeed violate Art. 3 of the ECHR[115]. In 1986, the Commission reaffirmed its position especially in cases where none of the states involved undertakes any effort to legalize the status of the petitioner[116]. Thus, at least where the petitioner cannot be held responsible for the situation[117], and where frequent forcible returns have taken place without any stabilization in the situation of the petitioner, a violation of Art. 3 of the ECHR can be assumed.

[113] See in that respect G. Melander, The Refugee in Orbit (1980); Grahl-Madsen, *supra* note 14; 95 et seq.

[114] Application 5399/72; for details see Stocktaking on the ECHR: The First Thirty Years, 1954–1984 (1984), 233; Einarsen, *supra* note 31, 374; Frowein/Peukert, *supra* note 32, Art. 3, p. 39 .

[115] Finally, the petitioner was granted the right of residency in Belgium, thus rendering the case moot. See also Application 761/76, *Manitu Giama* v. *Belgium*, Stocktaking, *supra* note 114, 314; Application 8100/77 *X.* v. *Federal Republic of Germany*, Stocktaking, ibid., 374.

[116] Application 10798/85, *Harabi* v. *Netherlands*, 46 D.R. (1986), 112 et seq. (116); up to now the European Court of Human Rights did not have an opportunity to deal with such matters.

[117] This aspect was underlined by the Commission in its decision in *Harabi* v. *Netherlands*, *supra* note 116, 117.

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V. Harmonization of European Asylum Procedures, the Geneva Convention and the European Convention on Human Rights

Both the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities ("Dublin Convention")[118] and the Convention Applying the Schengen Agreement between the Governments of Belgium, the Netherlands, Luxembourg, the Federal Republic of Germany and France ("Schengen II") contain uniform criteria for determining which of the states parties to these treaties shall have jurisdiction for dealing with applications for political asylum lodged within the territory of one of the contracting parties[119]. The contracting state responsible under these provisions must assume responsibility for the asylum seeker and shall process such an application in accordance with its national law[120]. It is doubtful, however, whether such *inter se* agreements are compatible with both the Geneva Convention and the European Convention on Human Rights.

A. The Compatibility of the Schengen and Dublin Agreements with the Geneva Convention

Neither the Schengen II Agreement nor the Dublin Convention creates an obligation for the responsible state to grant a right of residence[121]. Any application for asylum only has to be processed under to Art. 29 (1) Schengen II Agreement, whereas Art. 3 (1) of the Dublin Convention only rquires examination of such an application in accordance with the internal legal order, taking into account other commitments under international law[122]. Thus, under both instruments the contracting parties have retained their right to return an applicant to a third state. But since

[118] Text in ILM 1991, 425.

[119] Arts. 29 (3), 30 of Schengen II; Art. 4 et seq. of the Dublin Convention. The most important criteria are the granting of a residence permit, the granting of a visa, the granting of entry without a visa, illegal entry or *de facto* residence. For details as to other aspects see K. Hailbronner, Perspectives of a Harmonization of the Law of Asylum after the Maastricht Summit, CMLR 1992, 917 et seq.

[120] Art. 31 (2) of the Schengen II Agreement; Art. 11 of the Dublin Convention.

[121] J. Bolten, From Schengen to Dublin: The New Frontiers of Refugee Law, in: H. Meijers [et al.] (eds.) Schengen (1991), 8 et seq. (35).

[122] Art. 3 (3) of the Dublin Convention; see further the general provisions as to the Geneva Convention, Art. 2 of the Dublin Convention and Art. 28 of the Schengen II Agreement.

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the member states of the Geneva Convention already have the right to expel or return a refugee to a third state within the limits of the prohibition of *refoulement* under Art. 33 of the Geneva Convention, the provisions contained in the Schengen and Dublin instruments do not deteriorate the legal situation of the applicant[123]. It has to be underlined, however, that a state which under one of the two treaties is responsible for dealing with an application for asylum under either of the instruments, must also abide by the guarantees of both the Geneva Convention and the European Convention on Human Rights in order to avoid having the forcible return to this country in itself run counter to the latter treaties.

It has to be also recognized that by creating binding criteria to determine which state is responsible for an application for asylum lodged within the territory of one of the member states the problem of refugees-in-orbit is at least diminished[124]. This fact seems to have also been acknowledged by the UNHCR in the view of which the application of uniform criteria for jurisdiction would be an important step in combating refugee-in-orbit situations[125].

B. Harmonization of Asylum Procedures and the Right to Family Life

The use of uniform criteria for determining jurisdiction to process asylum applications contained in both the Schengen II agreement or the Dublin Convention may create legal problems in cases where different members of the same family enter the territory of different member states of either treaty and where the criteria require the applications to be dealt with by different states. Furthermore, the same problem arises where one of the family members already has a valid right to stay under the internal law of one of the contracting parties.

In order to resolve this problem, it has to be noted first that the Geneva Convention does not contain a specific provision as to the protec-

[123] Hailbronner, *supra* note 39, 54.

[124] P. Weckel, La convention additionnelle à l'accord de Schengen, R.G.D.I.P. 1991, 404 et seq. (417); admittedly, however, this problem is not solved in regard to third states, see Bolten, *supra* note 121, 35.

[125] Cited in A. Gerlach, Asylverträge in der Europäischen Gemeinschaft – die asylrechtlichen Regelungen des Dubliner und des 2. Schengener Übereinkommens, AWR-Bull. 1991, 34 et seq. (36); the critique of the UNHCR cited by Bolten, ibid., is not shared by the above-mentioned working-document of the UNHCR, *supra* note 74, ibid.

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tion of families. The member states to the Refugee Convention could only agree to stipulate in the Final Act that:

"The Conference,

Considering that the unity of the family (...) is an essential right of the refugee[126] (...)

Recommends governments[127] to take the necessary measures for the protection of the refugee's family, especially with the view to:

(1) ensuring that the unity of the refugee's family is maintained (...)".

The use of the formula "recommends governments" demonstrates that this stipulation does not carry binding legal effect. Similarly a later resolution of the Executive Committee of the UNHCR asks the member states to facilitate family reunification only as far as possible[128].

In contrast, Art. 8 of the European Convention on Human Rights contains a binding general obligation to respect private and family life[129]. Asylum seekers who have been granted a temporary right to stay can also rely on this guarantee[130]. Art. 8 of the ECHR protects, on the one hand, the relationship between spouses and on the other hand the relationship between parents and their children. According to the practice of the Strasbourg organs a *de facto* existing family relationship between other members of the same family, e.g. even as far as grandparents are involved, is also protected[131]. An individual can not, however, rely on Art. 8 of the ECHR in order to gain a right of permanent residence in a certain state[132]. Notwithstanding this fact, the refusal to grant a right to stay in order to undergo an asylum procedure may violate this guarantee of the European Convention on Human Rights if, in particular, one con-

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126 Emphasis added.

127 Emphasis added.

128 No. 24 (XXXII) Family Reunification – Conclusion Endorsed by the Executive Committee of the High Commissioner's Program upon the Recommendation of the Sub-Committee of the Whole on International Protection of Refugees; see in that regard Plender, *supra* note 105, 372–373.

129 For details see L. Wildhaber/S. Breitenmoser, Commentary on Art. 8 ECHR, in: H. Golsong [et al.] (eds.), Internationaler Kommentar zur EMRK (1992, loose leaf), *passim*.

130 Hailbronner, *supra* note 18, 109.

131 For references as to the practice of both the European Commission of Human Rights and the European Court of Human Rights see Wildhaber/Breitenmoser, *supra* note 129, Art. 8 *passim*.

132 See the detailed references as far as the jurisprudence of the European Court of Human Rights is concerned in Wildhaber/Breitenmoser, ibid., Art. 8 *passim*.

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siders that political refugees are not able to re-establish their family life in their home country for fear of persecution[133].

It must be noted, however, that the enforcement of immigration controls based on public safety grounds may justify an interference with the right granted under Art. 8[134]. Whether a separation of a family resulting from such a measure of immigration control can still be found necessary in a democratic society in accordance with Art. 8 (2) of the ECHR, requires that consideration be taken of the probable duration of the separation, the possible consequences for family ties, the chances to uphold the family relationship by way of visits and, finally, the age of the children[135]. In view of these factors, it must be maintained that Art. 8 of the ECHR does not grant an unlimited right of spouses to have their asylum applications dealt with by the same country[136]. In that regard, the duration of the asylum procedure and the number and age of the children are decisive. Furthermore, possible compelling state interests not to accept a certain person must also be taken into consideration. In particular, where there are minor children even a relatively short period of separation may raise questions as to the compatibility of such measures with Art. 8 of the ECHR[137].

Thus, a strict application of uniform criteria to determine which state is responsible for processing an asylum application may under certain circumstances lead to a violation of Art. 8 of the ECHR. In order to avoid this problem both the Schengen II Agreement and the Dublin Convention contain provisions which deal with situations in which families are involved (Arts. 35–36 Schengen II Agreement; Art. 4 of the Dublin Convention). But these provisions only result in granting jurisdiction to the same state if a family member has already been recognized by this state as someone who is entitled to asylum. Where several members of a family lodge an application at the same time or one family member has a right to

[133] See Hailbronner, *supra* note 103, 277 et seq., as to the question under what circumstances a return to one's home country can be generally expected.

[134] H. Storey, The Right to Family Life and Immigration Case Law at Strasbourg, ICLQ 1990, 328 et seq. (337–340).

[135] As an example of the jurisprudence of the European Court of Human Rights see the Judgment of June 21, 1988 in the case *Berrehab*, Ser. A, 138, paras. 30–31.

[136] See also the more restrictive view of Hailbronner, *supra* note 18, 110: "(...) no general right (...)".

[137] See e.g. the decision of the European Court of Human Rights in the case *Berrehab*, *supra* note 135; the Court underlined in this judgment the importance of the fact that the case dealt with the expulsion of a person who for several years had lived in the Netherlands without creating any legal problems.

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stay for some other reason, the situation is not covered by the provisions of the Dublin Convention. In this context, the Schengen Agreement only contains a provision under which another contracting party can be asked to assume responsibility for dealing with an application if an applicant so wishes based on family or cultural reasons[138]. The contracting party so requested has discretion whether or not to assume responsibility. But since all member states of the Dublin and Schengen treaties are also members of the ECHR, they have to interpret this provision in the light of Art. 8 of the ECHR. Where the processing of the asylum application of different members of the same family in different countries would lead to a violation of Art. 8, i.e. if the family ties would otherwise be severely hampered, the contracting party with jurisdiction for one family member must grant the request made by another family member. It is only under this condition that the system of jurisdiction established by the Schengen and the Dublin instruments can be considered compatible with the European Convention on Human Rights.

VI. Recognition of Foreign Asylum Decisions

One of the measures under consideration in Western European states to speed up the processing of asylum applications is the formal recognition of foreign positive and/or negative decisions as to the refugee status of an applicant. At the outset, it is useful to clarify whether or not *de lege lata* a national decision as to a person's refugee status already has extraterritorial effect in other states parties to the Geneva Convention.

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[138] Art. 36 of the Schengen II Agreement: "Any Contracting Party responsible for the processing of an application for asylum may, on humanitarian grounds based on family or cultural reasons, ask another Contracting Party to assume that responsibility insofar as the person concerned so wishes. The Contracting Party to whom such a request is made shall consider whether it can be granted".

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A. The Situation de lege lata

1. Extraterritorial effect of positive decisions

The issue here is, whether the recognition of a person as a refugee by one state has a binding effect for other states[139]. According to the text of the Refugee Convention, states are only under an obligation to recognize the validity of a travel document issued to a refugee[140]. Apart from that, only Arts. 16 and 17 of the Refugee Convention contain provisions which deal with the legal relationship between a refugee, on the one hand, and third states on the other[141]. Thus, the Convention does not give an answer to the question whether other state parties are bound by the administrative decision of one state recognizing a person as a refugee.

An *argumentum e contrario* based on Art. 16 can be made that the contracting parties did not take the view that the recognition by one state would have a binding legal effect for all other member states[142]. This interpretation is further confirmed by the *travaux préparatoires* of the Convention. During the drafting conference, the proposal to include in Art. 16 a phrase under which the other contracting states – at least for the purpose of this article – would be bound by the decision rendered by one member state was rejected. This rejection was based on the fact that the problem of the extraterritorial effects of decisions was a general one which could not be dealt with a single article. Despite the fact that the contracting parties thus recognized the necessity to regulate the problem of the extraterritorial effect of decisions reached by one state, they did not deal with this issue further[143] und thereby answered it implicitly in the negative.

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[139] See generally, P. Nicolaus, Extraterritorialität in der Genfer Flüchtlingskonvention, in: K. Barwig/K. Löcher/C. Schuhmacher (eds.), Asylrecht im Binnenmarkt – Die europäische Dimension des Rechts auf Asyl (1989), 133 et seq.; H.-J. Uibopuu, Extraterritorial Effects of the Recognition of Refugee Status by Virtue of the 1951 Convention with special Regard to European States, in: I. v. Münch (ed.), Staatsrecht – Völkerrecht – Europarecht: Festschrift für H. J. Schlochauer (1981), 71 et seq.; Bolten, *supra* note 121, 26 et seq.; W. Kälin, Grundriß des Asylverfahrens (1990), 213 et seq.

[140] Art. 28 of the Convention in connection with para. 7 of the Schedule.

[141] As to these provisions see Nicolaus, *supra* note 139, 135–136.

[142] This view was expressly confirmed by the German Federal Constitutional Court in BVerfGE 52, 391 et seq. (403).

[143] See Doc. A/Conf. 2/Ser. 8; to be found in Tackenberg/Tahbaz, *supra* note 67, 270–271.

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It would also run counter to the principle of state sovereignty to bind a state party to a treaty to decisions by another state without express provision for this in the treaty[144]. Subsequent state practice in this regard is not uniform. In 1978, the Executive Committee of the UNHCR took the view that the purpose of the Convention implies that the refugee status recognized by one contracting party has to be recognized by the other member states[145]. On the other hand, the same decision of the Executive Committee found that several provisions of the Convention enable a refugee to rely on certain rights in other member states and that reliance on these rights does not depend on a new recognition of the refugees status. This seems to imply that only the above-mentioned Arts. 14, 16 and 28 indeed have *de lege lata* extraterritorial effect.

As far as the Federal Republic of Germany is concerned, both the German Federal Constitutional Court[146] and the Federal Ministry of Justice have taken the position that a decision to recognize an applicant as being a refugee did not have extraterritorial effect[147]. Switzerland has taken the view that such a recognition may only have extraterritorial effects as far as the diplomatic protection of refugees is concerned[148]. Finally, the former High Commissioner for Refugees of the United Nations, Snyder, considered that such a municipal decision may only create extra-legal obligations for third states[149].

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[144] Bolten, *supra* note 121, 27; P. Weis, The Concept of Refugee in International Law, J.D.I. 1960, 944.

[145] No. 12 (XXIX) Extraterritorial Effects of the Recognition of Refugee Status, Doc. No. 12 A (A/33/12/ADD. 1).

[146] BVerfG, *supra* note 142, 403.

[147] Ibid., 395–396, relying on further state practice; see also the decision of the German Supreme Administrative Court BVerwGE 7, 333 et seq. (334–335), and the Bavarian Higher Administrative Court, Judgment of September 9, 1956 – 204 VIII/55; cited by Grahl-Madsen, *supra* note 14, 337–338. The Administrative Court Ansbach (see e.g. the judgment of July 8, 1958 – 3437/39 II/57; judgment of May 11, 1960 – 5202/III/59, all cited by Grahl-Madsen, ibid., and Zink, *supra* note 19, 215), which acknowledged such an extraterritorial effect, did not find a general recognition within the Federal Republic of Germany.

[148] See the practice of the Swiss government cited in Schweiz. Jb. Int. R. 1978, 111 et seq.

[149] F. Snyder, Les aspects juridiques du problème des réfugiés, RdC 1965, 369: "(...) conforme aux usages et aux règles de la courtoisie internationale (...)" (emphasis added). Similarly, the German Federal Constitutional Court took the view that it is in accordance with the obligations of the Federal Republic of Germany under the Geneva Convention to ascribe to foreign decisions regarding the refugee status of an individual only *de facto* relevance, when reaching a decision, *supra* note 142, 406.

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2. The recognition of negative decisions

The question whether and to what extent decisions denying refugee status, may have extraterritorial effect has to be answered in the same way as for positive decisions[150]. Judicial practice in several states has followed this principle[151], which leads to the result that negative decisions can only have *de facto* effect on subsequent procedures in other countries.

B. The Situation de lege ferenda

1. The recognition of positive decisions

Granting extraterritorial effect to a foreign decision recognizing a person was a refugee does not seem to create specific problems, since such a recognition leads only to an improvement in the legal situation of the applicant. This is even more true in view of the above-mentioned standpoint of the Executive Committee of the UNHCR which considered such a granting of extraterritorial effect to be another important step towards implementation of the Convention[152]. Any such recognition of refugee status would then involve the granting of all the rights and guarantees provided for in the Convention.

2. The recognition of negative decisions

Since the Convention itself does not purport to have extraterritorial effect[153], the recognition of foreign acts in the internal legal order of other member states must be based on a provision of the applicable municipal law[154]. The Convention does not contain an express prohibition on the extension of the territorial scope of application of a national decision to the legal order of another contracting party. To the contrary, it can be argued that the Convention allows such an extension because each member state can generally decide for itself as to the manner in

150 This view was confirmed by the German Federal Constitutional Court, BVerfGE 9, 174 et seq. (181).

151 See e.g. the decision of the Dutch Cour de Cassation of May 29, 1987, Nederlands Juristenblad 1988, No. 56 with note Swart, cited by Bolten, *supra* note 121, 20 note 22.

152 See above note 145 and accompanying text.

153 See above VI.1.

154 See K. Vogel, Administrative Law, International Aspects, EPIL Inst. 9 (1986), 2 et seq. (6).

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which the refugee status of applicants is determined according to its own municipal administrative structure. Provided that the state the negative decision of which is recognized has acted in accordance with the procedural guarantees of the Convention and due regard is paid to the principle of *non-refoulement*, the situation for the applicant is not worse where the recognizing state would have undertaken its own procedure to determine refugee status with exactly the same standards. Thus, the basic purpose of the Convention to protect the individual refugee by securing implementation of its substantive provisions – in particular the prohibition of *refoulement* – is not violated.

An agreement concerning the recognition of foreign decisions would also not run counter to Art. 39 of the Geneva Convention[155]. While this provision foresees that only states can become parties to the Convention, an agreement on recognition of foreign decisions does not have the effect that an international organization takes the place of the parties involved. To the contrary, the individual states, even if they are at the same time members of the European Communities for example, retain their individual member-state status in regard to the Geneva Convention.

Finally, it has been argued that recognition of foreign decisions would violate the rights of third states[156]. While it is true that such an *inter partes* agreement to recognize negative foreign asylum decisions would at least *de facto* replace multiple negative decisions with a single decision, this would nevertheless not violate legally protected interests of third states. This is due to the fact that any such decision would not have legal consequences for them, since they would not be bound by it[157]. The possibility that as a result of a uniform recognition practice asylum seekers would increasingly lodge their applications within the territory of third states is irrelevant, since this consequence cannot be considered attributable to the states which have decided to apply such a common recognition practice[158].

The conclusion that such cooperation is not prohibited by the Geneva Convention is further confirmed by regulations in other fields of international law. In this regard one may refer to Art. 12 of the Third Geneva Red Cross Convention for the Treatment of Prisoners of War, according

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155 But see Bolten, *supra* note 121, 27.

156 See Bolten, ibid., 28.

157 See above VI.1.

158 There are scarcely any comments in the relevant literature as to this issue, but see Hailbronner, *supra* note 18, 115, who seems to share our view.

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to which prisoners of war can only be brought under the jurisdiction of a third state if this state is itself a member state of the Convention and if it can be secured that this state will act in accordance with the provisions of the Convention. This particular provision demonstrates that any restriction as to the cooperation of states parties to a multilateral treaty must be expressly provided for. There is, however, no such explicit restriction on cooperation between various member states of the Refugee Convention.

Another argument in favour of the legality of such cooperation can be drawn from the practice of the Strasbourg organs. The European Commission of Human Rights has recognized that the member states of the ECHR can transfer sovereign rights to an international organization and can enforce decisions of this international organization without further control, if this organization itself guarantees an equivalent protection of the rights guaranteed by the ECHR[159]. This jurisprudence shows that, even in the field of human rights protection, the recognition and enforcement of foreign decisions must be considered to be admissible despite the fact that there is no express provision in the applicable treaty which would allow for such cooperation.

All these arguments demonstrate that it is generally possible to extend the effects of a negative decision in the field of asylum law to other states. It has to be underlined, however, that any such decision be reached in accordance with both the procedural and substantive standards of the Refugee Convention. If any member state to the Refugee Convention recognizes and enforces decisions by other states which have been reached in a manner incompatible with the Convention, it itself commits a violation of international law[160].

The general admissibility of the recognition of a foreign decision also extends to decisions which have been reached for purely procedural reasons. This is due to the fact that the member states of the Geneva Convention may enforce their own decisions in the field of refugee law, even if they are based on purely procedural grounds, e.g. if the applicant

[159] Application 13258/87, *M. & Co.* v. *Federal Republic of Germany*, text of the decision to be found also in ZaöRV 1990, 865 et seq.; see in that regard T. Giegerich, Luxemburg, Karlsruhe, Straßburg – dreistufiger Grundrechtsschutz in Europa ?, ibid., 836 et seq. (860 et seq.).

[160] See generally as to the problem of recognition of foreign acts which themselves violate international law G. Dahm, Völkerrecht, Vol. 1 (1958), 264; F. Berber, Lehrbuch des Völkerrechts, Vol. 3 (1977), 17.

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did not take legal steps to appeal a decision of first instance[161]. Thus, the fact that the applicant did not participate in the administrative procedure to decide on his or her application or failed to take measures which could have prevented a negative decision from becoming *res judicata*, cannot be considered a valid reason why further states should grant another opportunity for processing the application[162]. The situation would be different, however, if the political situation in the applicant's home country changed significantly after the negative decision of the authorities in the country of first asylum had been rendered. Continued recognition of such a decision despite changed circumstances would expose the recognizing state to a danger of violating its obligations under the Geneva Convention, in particular the obligation of *non-refoulement*.

VII. Conclusion

Considering the recent proposals under discussion in the Federal Republic of Germany to speed up asylum procedures and decrease the number of applicants applying for political asylum without having a well-founded fear of persecution in light of our previous remarks, it may be concluded that – as far as can be judged at this time – these proposals are indeed compatible with the commitments undertaken by the Federal Republic of Germany in the field of international refugee law. It has to be noted, however, that this conclusion largely depends on the practical meaning which will be given to the new provisions in day-to-day practice. In that regard some mention has, for instance, to be made of the fact that according to the political compromise recently reached in the Federal Republic, Poland and Czechoslovakia will be regarded as safe countries of first asylum, to which applicants will be sent back regardless of their claims to be politically persecuted[163].

If one considers that Poland still has to ratify the ECHR and that the legal status of both the Geneva Convention and the ECHR will be precarious in regard to the newly independent states existing on the territory of former Czechoslovakia, the legality of forcible returns to these countries may be doubted.

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[161] But only if the procedure followed in general adheres to the minimum standard described above, see *supra* III.A.2.

[162] S. Wehrenfels, Der Begriff des Flüchtlings im schweizerischen Asylrecht (1987), 346.

[163] FAZ of December 8, 1992, 2.

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Furthermore, it must be scrutinized whether Poland, despite being a party to the Geneva Convention, will indeed abide by its obligations of *non-refoulement* in case the number of applicants returned by the Federal Republic of Germany increases significantly. This is especially true as far as Romanian citizens of certain ethnicities (e.g. Roma) are concerned, who would possibly be exposed to at least non-governmental persecution in their home-country.

It also has to be noted that, where there is an arguable claim of danger of torture or inhuman treatment in the sense of Art. 3 of the ECHR, the provision that the request for judicial review against an expulsion generally does not have suspensive effect, contained in the draft of Art. 16 a (4) of the Basic Law must be interpreted restrictively.

Moreover, lists of "safe countries of origin" must be subject to alteration in cases where the political situation in a specific country changes. Pending such alteration which according to the proposed Art. 16 a (3) may only be achieved by way of legislation, any expulsion to one of these countries would be problematic in view of the obligations of the Federal Republic of Germany in the field of human rights protection.

Finally, one should not overestimate the possible effects of legislation on the extent of the influx of foreigners not only into Germany but into Western Europe in general. The numbers involved will not primarily depend on the legal situation in the accepting state but rather on the general economic and political situation in Africa and Eastern Europe.

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