

5-1-1994

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Steven Edward Grubb

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Recommended Citation

Grubb, Steven Edward (1994) "Dealing With the Hate: The Changing Face of German Asylum Law," *Penn State International Law Review*: Vol. 12: No. 3, Article 3.

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COMMENTS

Dealing With the Hate: The Changing Face of German Asylum Law

I. Introduction

Racial intolerance. Bigotry. Gang violence. Death. Destruction of property. Terror. Hate. Virtually every nation in the world can lay claim to any or all of these social dilemmas. Nevertheless, when these problems are mentioned in the context of German reunification, there is always the fear that Germans will shun their democratic traditions and resort to an ultra-conservative, fascist government as they shunned the Weimar Republic and accepted National Socialist rule in 1936. Germany's racial problems are probably no worse than any other nation's, and the probability of a rebirth of national socialism is minute. Nevertheless, the world community focuses closely on the hatred and racial intolerance that Germany today experiences because of its troubled past.

Just as the world community closely watches Germany's racial woes so to do the German lawmakers. As an established economic force and emerging world leader, Germany is becoming more and more aware of how it is perceived by the rest of the world. Its reaction to racial problems is of particular interest to foreign investors, trading partners, and all others who would offer Germany its first chance since World War II to become an influential international force.¹

Germany's rising intolerance of foreigners brought about a change in an asylum policy that was considered to be one of the most liberal in Europe. This policy, found in Article 16 of the German Constitution

1. While West Germany has exerted leadership since World War II through its participation in the North Atlantic Treaty Organization (NATO) and as an economic power, it is likely that a unified Germany will increase its military role in world events.

(also called the Basic Law or Grundgesetz),² required only a showing of political persecution for asylum to be granted to a foreigner.³ With the political and economic upheaval accompanying the collapse of Communism in Eastern Europe, vast numbers of foreigners seeking economic opportunities entered Germany under its liberal asylum law. At the same time, Germany faced its own economic, political, and social crisis in attempting to reunify with the former East Germany, which had suffered economically under Communist rule. The idealistic asylum policy soon became a bureaucratic nightmare and source of discontent for many German citizens who themselves were burdened with economic and social problems.

This Comment looks at Germany's changing asylum policy. Section II examines the former asylum policy, discussing the racial intolerance which it spawned, suggesting possible reasons for the intolerance, and examining the reaction of the German population, government, and judiciary to the intolerance. Section III reviews Germany's changing asylum law, discussing, among other things, the legality of the changed asylum policy in the context of the German Constitution and principles of international law. Section IV concludes by discussing the ramifications of the new policy.

II. The Former German Asylum Policy

A. Former Article 16

Former article 16 of the German Constitution provided:

1. No one may be deprived of his German citizenship. Loss of citizenship may arise only pursuant to a law, and, against the will of the person affected, it may arise only if such person does not thereby become stateless.
2. No German may be extradited to a foreign country. Persons persecuted for political reasons enjoy the right of asylum.⁴

The drafters of the 1949 Constitution believed they had a moral duty to include Article 16. In essence, they desired to "pay back" other countries who had taken in thousands of Germans who might have been

2. See Grundgesetz [Constitution] art. 16 (Germany) [hereinafter GG].

3. See *id.*

4. *Id.*

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killed as a result of their ethnic, religious, or social backgrounds had they remained in National Socialist Germany.⁵

Article 16 created one of the most liberal asylum policies in Europe. Under the policy, a foreigner could enter Germany with little or no proof of political persecution and could then live and work within Germany while his or her asylum application was being considered, a process that could take years. Under Paragraph 2, an asylum-seeker only had to allege that he or she was suffering political persecution in his or her home state in order to be admitted into Germany.⁶ Once in Germany, the individual entered the lengthy and expensive application process. During this process, the German government provided housing,⁷ medical care, and a cash allowance.⁸

The length of the application process resulted in part from the sheer number of applicants and also from the numerous proceedings each applicant had to go through before a final decision was made on his or her status. First, the asylum-seeker had to file an application with the local aliens police.⁹ The police interviewed the applicant to identify the general constructs of his or her claim.¹⁰ German border police could immediately turn away those asylum-seekers who had spent three or more months in another country of the European Economic Community (EEC), Austria, Switzerland, Sweden, or Norway.¹¹ In addition, if the German police believed that an asylum-seeker had received protection

5. *Politicians Condemn Attacks on Foreigners; Seek Faster Asylum Application Process*, Week in Germany, Oct. 11, 1991, available in LEXIS, Nexis Library, INT'L File.

6. GG art. 16(2).

7. *Parties Reach Agreement on Asylum Issue, Paving Way for New Asylum Law*, Week in Germany, Dec. 11, 1992, available in LEXIS, Nexis Library, INT'L File. Asylum-seekers may not hold jobs in Germany until they live in the country for at least five years. Maryellen Fullerton, *Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany*, 4 GEO. IMMIGR. L.J. 381, 390 (1990). To work, an asylum-seeker must apply for a work permit with the state government. *Id.* Work permits are generally not given during periods of high unemployment. *Id.*

8. The cash allowance is approximately \$75.00 a month in pocket money but may vary according to how much each asylum-seeker receives in services. For example, an asylum-seeker who is provided with food by the state while he awaits the outcome of his decision will get less money from the government than one who must provide food for himself. Interview with Stephan Schlegel and Michael Fischer, German LL.M. students at The Dickinson School of Law, in Carlisle, PA (Oct. 31, 1993).

9. Maryellen Fullerton, *Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights*, 29 VA. J. INT'L L. 33, 72 (1988).

10. *Id.*

11. *Id.*

from political persecution in another country, the refugee could also be denied at the border.¹²

The Federal Refugee Office handled all remaining claims after the initial screening process.¹³ The Refugee Office conducted extensive interviews with each applicant, who could have both a translator and a lawyer present.¹⁴ At this time, the asylum-seeker presented documentary evidence to support his claim of political persecution.¹⁵ The record of these proceedings could include expert opinions on the conditions of the nation from which the asylum-seeker was fleeing, the alien's police interview reports, and Federal Refugee Office interviews.¹⁶ The Office then issued an opinion either granting or denying the applicant's claim.¹⁷

The decision of the Federal Refugee Office was not final. The asylum-seeker could challenge the decision by filing an application with the administrative court in the state where the asylum-seeker resided.¹⁸ The applicant could then appeal a decision of the administrative court to the administrative appeals court.¹⁹ From there, an appeal could be made to the Federal Administrative Court.²⁰ Finally, if it was asserted that the constitutional guarantee of asylum had been violated, an appeal could be filed with the Federal Constitutional Court, Germany's highest court.²¹ Once the appeal chain was exhausted and the claim rejected,

12. *Id.* The "protection elsewhere" rule gives German border police significant, if not total, discretion in deciding whether an asylum-seeker has received protection in a third country. *Id.*

13. Fullerton, *supra* note 9, at 391-92.

14. *Id.*

15. *Id.* Refugee Office staff members have access to extensive collections of reports on refugee conditions compiled from government sources, human rights groups, non-government and voluntary agencies, and press accounts. *Id.*

16. *Id.* at 392.

17. Fullerton, *supra* note 9, at 392-93. Under the original asylum law, if the Refugee Office rejected the application as manifestly unfounded, the asylum-seeker had to challenge the decision within one month in a special summary proceeding at the State Administrative Court. *Id.* This proceeding did not stay a deportation order. *Id.* If at the Administrative Court level, the claim of political persecution is again found to be manifestly unfounded, no further appeal is permitted. *Id.* On the other hand, if the Administrative Court finds that the claim is not manifestly unfounded, the asylum-seeker will be permitted to pursue an appeal at the Administrative Appeals Court. *Id.*

18. Fullerton, *supra* note 9, at 392 n.61. The Federal Commissioner for Asylum Affairs almost always appeals a decision by the Refugee Office granting asylum, particularly when the asylum-seeker is from eastern Europe. *Id.*

19. *Id.* at 393. The right to appeal to both the Administrative Appeals Court and the Federal Administrative Court is conditioned upon the presence of an important issue of law or a conflict with a higher court decision. *Id.* The denial of an appeal can also be appealed. *Id.*

20. Fullerton, *supra* note 9, at 393.

21. *Id.*

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the asylum-seeker was deported.²² However, each German state had its own deportation policy, and some allowed applicants to stay despite the decision of the Constitutional Court if the state determined that an asylum-seeker's life would be in danger upon return to the country from which he or she had come.²³ The chain of appeal could take considerable time, and the estimated cost of caring for the asylum-seekers while they waited for their final appeal was approximately 12 billion German marks.²⁴

Obtaining a grant of asylum was difficult because of the narrow interpretation German courts gave to the words "political persecution."²⁵ The German Constitutional Court held that for political persecution to occur the persecution had to involve political or religious beliefs or other inalienable attributes retained by an individual.²⁶ Specifically, the Court objectively decided whether the persecuting state had "the intention to sanction the individual on account of race, religion, nationality, membership [in] a particular social group or political opinion."²⁷ However, if the Court determined that the state believed the individual posed a threat to its integrity or national security, the Court would find that no political persecution had taken place.²⁸

Applicants also faced a difficult burden of proof in establishing political persecution. An applicant had to prove by a clear probability that he had been persecuted in order to be granted asylum.²⁹ This determination was not based on the asylum-seeker's subjective fear, but

22. *Id.* at 391-93. Fullerton outlines the entire asylum application process in her article. *Id.*

23. *Id.*

24. *Seiters Urges SPD to Agree to Amendment of Basic Law*, DIE WELT, Aug. 5, 1992, at 4.

25. *The New Asylum Agreement*, Week in Germany, Dec. 11, 1992, available in LEXIS, Nexis Library, INT'L File. Ninety to ninety-five percent of these asylum applications are eventually turned down. *Id.*

26. Federal Constitutional Court, 80 *Collection of Decisions* 315 (1989). See also Reinhard Marx, *The Criteria for Determining Refugee Status in the Federal Republic of Germany*, 4 INT'L J. REFUGEE L. 151 (1992) (compiling Constitutional Court decisions on cases concerning refugee status).

27. Federal Administrative Court, 62 *Collection of Decisions* 123 (1981); 67 *Collection of Decisions* 184 (1983). The Constitutional Court first introduced the more rigid objective standard in 1977. See Marx, *supra* note 26, at 155. Prior to that time, political persecution was based on a much more permissive "well-founded fear" test, which was internationally recognized. *Id.* Using that test, the court would determine if the applicant's fear of political persecution was strong enough and the persecution objectionable enough to warrant asylum. *Id.* at 154.

28. Federal Administrative Court, 62 *Collection of Decisions* 123 (1981).

29. Marx, *supra* note 26, at 165. Relating this standard to an American burden of proof, the applicant must prove to the examiner that he or she was more likely than not politically persecuted. *Id.*

rather on whether a reasonable person would feel politically persecuted if he or she were in the asylum-seeker's position.³⁰

Examples of individuals found to have been politically persecuted under the asylum law include the following: entrepreneurs in communist Poland;³¹ Iranian homosexuals;³² Chinese landowners;³³ Romanian land-owners with emigre family members;³⁴ Ugandan members of the Bagandan people;³⁵ an Afghani wife of a guerrilla arms dealer;³⁶ and a Kurdish Wife who was persecuted for the actions of her husband.³⁷ Those found not to have been politically persecuted include the following: an Indian womens rights activist who married out of caste;³⁸ a corrupt Ghanian government official;³⁹ sports figures and individuals with tattoos;⁴⁰ an Afghani wife of a man who was granted refuge in Germany because he lead the Afghan resistance movement;⁴¹ a Lebanese wife of a man granted asylum in Germany;⁴² and an Ethiopian wife of a man granted asylum in Germany.⁴³

B. The Attacks

Ultra-conservative neo-Nazis have instituted what many call a "return to barbarism" by attacking foreigners in Germany.⁴⁴ One of the worst examples of neo-Nazi hatred occurred in the city of Molln, Schleswig-Holstein. There, neo-Nazis firebombed an apartment building housing asylum-seekers, incinerating a Turkish woman and two girls.⁴⁵ The attack injured nine others and destroyed the housing of forty-five individuals.⁴⁶ Eleven days prior to this attack, skin heads in the town

30. *Id.*

31. Fullerton, *supra* note 9, at 398.

32. *Id.* at 408.

33. *Id.* at 410.

34. *Id.* at 413.

35. *Id.* at 419.

36. Fullerton, *supra* note 9, at 433.

37. *Id.* at 429.

38. *Id.* at 403.

39. *Id.* at 416.

40. *Id.* at 425.

41. Fullerton, *supra* note 9, at 431.

42. *Id.* at 434.

43. *Id.* at 436.

44. Stephen Kinzer, *A Wave of Attacks On Foreigners Stirs Shock in Germany*, N.Y. TIMES, Oct. 1, 1992, at A1, A8 (quoting Cornelia Schmalz-Jacobsen, a leader of the centrist Liberal Party).

45. *Id.*

46. Stephen Kinzer, *3 Turks Killed; Germans Blame a Neo-Nazi Plot*, N.Y. TIMES, Nov. 24, 1992, at A1, A7. The "plot" in the title refers to the belief that the unknown attackers were seeking to reestablish a National Socialist dictatorship in Germany. *Id.*

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of Wuppertal beat a fifty-three-year old man, doused him with alcohol, and set him on fire because they suspected he was a Jew.⁴⁷

While the Molln incident occurred in the western part of Germany, the worst incidents of racial violence have occurred in eastern Germany.⁴⁸ For instance, a three-night binge of violence and hatred by approximately 1,000 neo-Nazis in the Baltic seaport of Rostock drove about 115 Vietnamese from their fire-bombed homes.⁴⁹ A hostel housing approximately 200 Romanian gypsies was also firebombed, resulting in the evacuation of its inhabitants.⁵⁰ In the eastern German town of Hoyerswerda, right-wing extremists forced 230 terrified Africans and Vietnamese onto buses and drove them out of town. Afterwards, the extremists took to the streets and proudly proclaimed on national television that their town was foreigner-free.⁵¹ Leah Rabin, wife of Israeli Prime Minister Yitzhak Rabin, had to replace a rental car during a visit to Berlin when Neo-Nazis scratched a swastika on it.⁵² On the German-Polish border, neo-Nazi gangs blocked border crossings and attacked Polish travelers in their automobiles.⁵³

These are only a few of the almost daily reports of racial violence in Germany. In October of 1991 alone, there were 900 reported attacks on foreign citizens, the most reported anti-foreigner violence since the Third Reich.⁵⁴

47. *Id.*

48. *Id.* In 1991 and 1992, numerically more reports of violence came from western Germany. *Id.* None of the attacks were carried out strictly by East Germans or West Germans, but usually individuals from both regions. Kinzer, *supra* note 46.

49. Ferdinand Protzman, *German Neo-Nazis Firebomb Foreigners' Housing*, N.Y. TIMES, Aug. 26, 1992, at A3 [hereinafter Protzman, *Firebomb*]. The Rostock riots set off several other incidents throughout Germany. Ferdinand Protzman, *Germany Fears Spread of Rightist Unrest*, N.Y. TIMES, Aug. 28, 1992, at A9 [hereinafter Protzman, *Spread of Unrest*]. For instance, in the town of Eberswalde, 150 members of a rightist group called "Comrades for Comradeship Eberswalde" marched with their right arms raised in the Heil Hitler salute chanting "Solidarity with Rostock." *Id.*

50. Protzman, *Spread of Unrest*, *supra* note 49, at A9.

51. Kinzer, *supra* note 44, at A8.

52. *Rabin's Wife's Car Defaced*, N.Y. TIMES, Sept. 18, 1992, at A6.

53. John Tagliabue, *The New Hitler Youth Are Troubling Germany*, N.Y. TIMES, May 15, 1991, at A6.

54. *Social Conditions*, Pol. Risk Services, Apr. 1, 1992, available in LEXIS, Nexis Library, INT'L File. There were a total of 1,438 reported acts of right wing violence in 1991. Stephen Kinzer, *Youths Adrift in a New Germany Turn to Neo-Nazis*, N.Y. TIMES, Sept. 28, 1992, at A3. German attacks have not excluded Americans. Two members of the United States luge team, including one African-American, were attacked at a bar in Oberhof. Stephen Kinzer, *Racist Attack on Americans Upsets Germany*, N.Y. TIMES, Nov. 2, 1993, at A8. German state prosecutors are also investigating reports that about 250 citizens in the city of Dolgenbrodt paid arsonists to set fire to an abandoned hostel for asylum-seekers. Stephen Kinzer, *Did a Town in Germany Pay Firebug For Attack?*, N.Y. TIMES, Aug. 25, 1993, at A6.

C. Reasons for the Attacks

Suggested reasons for these attacks are diverse. Some point to Germany's lack of strong traditions in freedom and democracy.⁵⁵ This view suggests an inherent xenophobic sense in the German people that could possibly cause German conflict with foreigners for years to come. Indeed some evidence exists of a type of hyper-nationalist or *volkisch* feeling in the German people. For instance, German citizenship is not given unless the person's line of ancestry contains at least some German blood.⁵⁶ By contrast, any person born in the United States is entitled to U.S. citizenship regardless of ancestry.⁵⁷ This policy has led to hard feelings among those who have lived in Germany all of their lives, but still receive second or third class treatment to ethnic Germans who barely know the language.⁵⁸

More than any other factor, it is likely that the recent downturn in the German economy in a large part caused by efforts to reunify with the former East Germany has given rise to anti-foreigner sentiment.⁵⁹ In particular, youths in eastern Germany have suffered as a result of reunification. Although the former Communist government curtailed

55. AMITY SHLAES, *GERMANY: THE EMPIRE WITHIN* 10-20 (1991).

56. Daniel Kanstroom, *Wer Sind Wir Wieder? Laws of Asylum, Immigration and Citizenship in the Struggle for the Soul of the New Germany*, 18 *YALE J. INT'L L.* 155, 174 n.138 (1993). Citizenship by blood is *jus sanguinis*, while citizenship by birth in a territory or state is *jus soli*. *Id.* Germany does, however, have a naturalization process for foreigners. The law controlling this process provides:

[A] Foreigner who has settled in German territory can, upon application, be naturalized by the state in whose territory he has settled, if he or she:

1. has an unlimited right to engage in employment, business and contract according to the laws of the former homeland or under German law,
2. has lived a "clean life,"
3. has obtained housing,
4. has the ability to support him/herself and the family.

Reichs-und Staatsangehörigkeitsgesetz, July 22, 1913, RGB 8. 583 [hereinafter RuStAG].

This law has created some interesting nationality situations. For example, those with German blood from Poland, Romania, and the former Soviet Union with virtually no ties to Germany (called the *aussiedler*) are by law considered German and are entitled to all the rights associated with citizenship. Kanstroom, *supra* note 56, at 167. Yet, ancestors of foreign "guest workers," who have lived their entire lives and have a strong connection to Germany, remain foreigners because they lack the proper blood line. *Id.*

57. SHLAES, *supra* note 55, at 167.

58. *A Kind of Positive Racism: Do Sociologists, Teachers and Leftist Politicians Share Responsibility for Rightist Street Violence?*, *DER SPEIGEL*, Aug. 26, 1991, at 42-51 (detailing how these foreigners have formed their own militant gangs and attacked schools where anti-foreigner violence has occurred).

59. In 1992, for instance, the unemployment rate was 7.5 percent in western Germany and 14.5 percent in eastern Germany. Craig R. Whitney, *Right Wing Gains in German Voting*, *N.Y. TIMES*, Mar. 8, 1993, at A11.

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political and social freedom, it provided steady, guaranteed employment. With reunification and the painful transition to a market economy that eastern Germany has had to undergo, these youths have been left without jobs and little prospects of finding employment in the future. Consequently, they turn to Nazism to fill the void that a steady job would provide. Nazism gives these youths a sense of purpose and belonging.⁶⁰ In addition, its guiding theme of hatred towards foreigners provides a readily available channel for them to vent their frustrations as foreigners become more and more visible in Germany.⁶¹

While not the sole cause of economic hardship in Germany, the influx of foreigners has severely burdened the welfare system. In 1991, over 250,000 asylum-seekers arrived in Germany.⁶² That number increased to over 450,000 in 1992.⁶³ The German government feeds, clothes, houses, and cares for these asylum-seekers at a cost to German taxpayers of about 2.5 billion dollars a year.⁶⁴ Germans unable to find jobs resent their government spending tax dollars on asylum-seekers while Germans openly suffer as a result of reunification.⁶⁵

D. *The General Population's Reaction*

The majority of Germans have generally condemned the violence against foreigners. While both pro and anti-foreign groups have conducted rallies, demonstrations against the attacks have been more common.⁶⁶ In some instances, these demonstrations themselves have decayed into violence, when neo-Nazis attack the numerically superior pro-foreign demonstrators and even riot police who seek to preserve the

60. Kinzer, *supra* note 54, at A3. The youth interviewed did not condone the gassing of Jews, but felt that Hitler had some good ideas, particularly in regards to putting people to work. One neo-Nazi leader said, "In the Hitler era, Germany was something good, something clean, something big and powerful. Now we're covered with dirt." *Id.*

61. *Id.*

62. Stephen Kinzer, *Last Straw? Refugees Occupy Beer's Fabled Field*, N.Y. TIMES, Mar. 19, 1992, at A4 [hereinafer Kinzer, *Last Straw*]. In that year, nearly three times more asylum-seekers entered Germany than any other country in Europe. Kinzer, *supra* note 54, at A3.

63. Whitney, *supra* note 59, at A11.

64. Kinzer, *Last Straw*, *supra* note 62, at A4.

65. Protzman, *Firebomb*, *supra* note 49, at A3.

66. Craig R. Witney, *100,000 in Bonn Protest Plan to Limit Asylum*, N.Y. TIMES, Nov. 15, 1992, at A11. Demonstrations against foreigner violence are far too numerous to be individually described in detail; the demonstrations and their popular support are exemplified by rallies in Berlin, which included 350,000 people and another in Bonn, which attracted 100,000 people. *Id.*

peace.⁶⁷ It seems that the zeal of the neo-Nazis, who resort to violence, has overshadowed the views of the majority.

Despite the majority's condemnation of anti-foreigner violence, public opinion polls in Germany show strong displeasure over the increasing numbers of foreigners entering the country. A 1991 poll, which post-dated most of the major violence of that year, showed that 88 percent of western Germans and 87 percent of eastern Germans favored the general idea of granting asylum to foreigners.⁶⁸ Only 29 percent of western Germans and 19 percent of eastern Germans felt that foreigners adversely affected their personal life-styles.⁶⁹ However, the same poll showed that 67 percent of all Germans felt that asylum-seekers abused their rights and did not belong in Germany.⁷⁰ Sixty-nine percent of west Germans and sixty-four percent of east Germans felt that the asylum laws needed to be changed.⁷¹

Most Germans feel that the majority of asylum-seekers enter Germany not to escape political persecution, but rather to obtain the economic advantages and high quality of life found in Germany.⁷² As stated by Ulrich Klose, the Social Democratic Party (SPD) Bundestag leader, "People will continue to come to Western Europe and to the FRG, because, regardless of all the problems that exist here, this part of the world is considered an island of the blessed by the people in southern, southeast, and Eastern Europe."⁷³

Perhaps the most telling indication of the German people's increasingly negative attitude toward those abusing the asylum laws came during recent elections. Election results showed increasing support for

67. *Id.* It is interesting to note that the Ku Klux Klan in the United States capitalized on the racial violence in Germany. See Stephen Kinzer, *Klan Seizes On Germany's Wave of Racist Violence*, N.Y. TIMES, Nov. 3, 1991, at A16. Members from an Oklahoma branch sought to establish links with German neo-Nazis and staged several cross burnings outside of Berlin. *Id.* While it is questionable whether the Klan took an active organizational role in the raids on foreigners, the Klan's presence brought fear of further anti-foreigner violence. *Id.* Klan groups were located in North-Rhine Westphalia, Hesse, Schleswig-Holstein, and Lower Saxony. *Id.* Explosives and chemical explosive substances were seized from Klan members. Martina Feitz, *Bonn Estimates Number of Right-Wing Extremists at 40,000*, DIE WELT, July 29, 1992, at 1.

68. Dr. Renate Koecher, *Apprehension, Not Radicalization — The Population Favors Change in the Asylum Law: The Monthly Allensbach Report*, FRANKFURTER ALLGEMEINE, Oct. 9, 1991, at 5. Despite unification, most German public opinion polls still report results in terms of east and west. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Social Conditions*, *supra* note 54.

73. *SPD's Klose Speaks* (ARD television broadcast, Apr. 30, 1992) (transcript on file with the Foreign Broadcast Information Service (FBIS)).

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anti-foreign political parties. For instance, in 1991 in the northwestern town of Bremerhaven, the little-known German People's Union (GPU) party, which is openly hostile towards foreigners, won more than 10 percent of the popular vote in the election.⁷⁴ The strong showing of this formerly powerless political party was surprising given that Bremerhaven previously reported no incidents of anti-foreigner violence.⁷⁵

In 1992 state elections, far-right parties fared well in the states of Baden-Wurttemberg and Schleswig-Holstein. In Baden-Wurttemberg, the ultra-conservative Republican Party won 11 percent of the vote.⁷⁶ Chancellor Helmut Kohl's Christian Democratic Union (CDU) party had previously held exclusive control of the state for twenty years.⁷⁷ In Schleswig-Holstein, the German People's Union, which had fared so well in Bremerhaven, garnered more than 6 percent of the vote with virtually no public campaigning.⁷⁸ Neither the Republican nor GPU parties had ever held seats in the state legislature before.⁷⁹

In 1993, the Republican Party made strong showings in the western German state of Hesse, particularly in the financial capital of Frankfurt. There, Republicans took 8.1 percent of the vote in the state and 9.3 percent of the vote in the city of Frankfurt.⁸⁰ Chancellor Kohl's Christian Democratic Union lost approximately 8 percent of the popular vote as compared to previous elections.⁸¹

74. Stephen Kinzer, *German Vote Raises Foreigners' Fear*, N.Y. TIMES, Oct. 8, 1991, at A14. The German People's Union ran an entirely xenophobic campaign with slogans such as "Keep Bremerhaven German" and "The Boat is full—Stop the flood of asylum-seekers." *Id.* Election leaflets claimed that continued acceptance of foreigners would lead to the "destruction of European culture." *Id.* A young Turk living in the area said, "Up to now, we've been living here pretty much normally . . . [b]ut now we know that at least 10 percent of the people here hate us." *Id.*

75. *Id.*

76. Stephen Kinzer, *Far Right Gains Sharply in German State Elections*, N.Y. TIMES, Apr. 6, 1992, at A1, A13. Xenophobic fears were once again at the forefront of the election. As stated by Gerhard Frey, the leader of the German People's Union, "We are not unfriendly to foreigners, we are friendly to Germans."

77. *Id.*

78. *Id.* at A1.

79. Stephen Kinzer, *Gains by Anti-Immigrant Parties Rattle Bonn*, N.Y. TIMES, Apr. 7, 1992, at A12. The results of these elections forced Chancellor Kohl to put the asylum policy at the top of his agenda. *Id.* The Republican Party obtained 15 of the 146 seats in the Baden-Wurttemberg state legislature, and the German People's Union gained 6 of the 89 seats in Schleswig-Holstein. *Id.*

80. Whitney, *supra* note 59, at A11. Republicans gained 10 of the 93 seats in the Frankfurt town council. *Id.* Heinrich Frank, leader of the Republicans in Frankfurt, pledged to abolish both the cash subsistence payments to foreigners and the city's office of multicultural affairs. *Id.*

81. *Id.*

Despite sentiment for changing the asylum law, some in Germany felt the asylum law should not have been changed. For instance, some argued that foreigners would be needed to fill future shortages in the work force resulting from a continuing population decline of ethnic Germans.⁸² Along the same lines, noting that more and more young Germans wish to continue their academic studies and work shorter hours each day rather than take skilled labor jobs, one commentator suggested that foreigners could ably fill such positions.⁸³ In support of his argument, he noted that there were presently 230,000 unfilled apprenticeships for the Association of German Skilled Trades.⁸⁴

Other Germans feel that they have a moral obligation to offer asylum to those experiencing political persecution. The horrors of Nazism in the World War II era forced many Germans to flee to other nations to avoid political persecution, concentration camps, and death. As one German political leader stated, "Tens of thousands of Germans managed to survive the Third Reich only because they sought and found asylum in foreign countries."⁸⁵ Accordingly, these Germans believe that Germany should repay this demonstration of humanitarianism by generously granting asylum to others in need.

E. The Government's Reaction

The German government's reaction to the hate has been fragmented.⁸⁶ On the one hand, nearly all German politicians condemned the hatred (except for those on the extreme right-wing). On the other hand, it was almost a forgone conclusion that the asylum law would have to be changed.

German President Richard von Weizsaecker, a moral leader without political power, took the lead in condemning the anti-foreigner violence.⁸⁷ Most of his speeches focused on the humanitarian aspect of

82. Konrad Handschuh, *Still Room in the Boat: Foreigners Pose No Long-Term Economic Problem: Immigrants Needed as Workers and Consumers and They Help Maintain the Social Security System*, WIRTSCHAFTSWOCHE, Aug. 16, 1991, at 18. The German birthrate has been in decline for some time, which will translate into a shortage of workers in the future. *Id.*

83. *Id.* at 19. Butchers, bakers, and construction workers are particularly hurt by this turn of events. *Id.* Handschuh asserts that foreign workers "are now working where [other Germans find it to be] too grimy, too hot or too dusty." *Id.*

84. *Id.*

85. Gerhard Schroeder, *We Need New Immigrants*, DER SPIEGEL, Mar. 9, 1992, at 59.

86. The government's changes to the asylum law will be discussed in depth later in this Comment.

87. *Christmas Appeal Urges 'Humanity' to Foreigners* (DPA radio broadcast, Dec. 23, 1991) (transcript on file with FBIS). Von Weizsaecker also stated that treatment of foreigners, or the weak, is a measure of humanity. *Weizsaecker Comments on German Xenophobia* (Cologne

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accepting foreigners.⁸⁸ For instance, during one speech he stated, "Our own behavior toward foreigners is not a question of politics, but of our humanity and not least of our own dignity. It imposes a demand on our self-respect, to meet the disadvantaged without violence and to help them, whether or not they are foreigners."⁸⁹

Chancellor Helmut Kohl's government backed up these words with action directed toward quelling neo-Nazi violence. First, German police broke up or prevented several neo-Nazi demonstrations.⁹⁰ For instance, police virtually blockaded the town of Halbe, located twenty-five miles south of Berlin, when they learned of a planned right-wing demonstration.⁹¹ In addition, in response to criticism that the police were permitting violent demonstrations, the German government created a special police force to combat neo-Nazi violence.⁹²

Second, the government outlawed some of the most extreme neo-Nazi groups in Germany. Interior Minister Rudolf Seiters banned both the Nationalist Front⁹³ and Deutsche Alternativ (German Alternative)⁹⁴ as a "warning signal" to right-wing parties who advocated violence.⁹⁵ This effort included banning neo-Nazi music that lyricized the anti-foreigner message. Specifically, the government prohibited the sale of music from *Endstufe* (Final Stage), *Noie Werte* (New Values), *Kahlkopf* (Bald Head), *Sperrzone* (Prohibited Area), and *Storkraft* (Disturbing Force).⁹⁶

Deutschlandfunk Network radio broadcast, Sept. 29, 1991) (transcript on file with FBIS). Only if Germans are humane will German Unification be successful. *Id.*

88. *Weizsaecker Comments on German Xenophobia*, *supra* note 87.

89. *Id.*

90. Stephen Kinzer, *Germany Blocks a Big Neo-Nazi Rally Near Berlin*, N.Y. TIMES, Nov. 16, 1992, at A3. Police blocked entry to the town, searched cars, questioned passengers on roads leading to the town, and blockaded the local train station to prevent non-residents from leaving the train cars. *Id.* Police confiscated clubs, air pistols, and vials of irritant gas. *Id.*

91. *Id.*

92. Stephen Kinzer, *Germany Creating Police Unit Aimed at Rightist Groups*, N.Y. TIMES, Nov. 29, 1992, at A1, A12. The force was expected to include helicopters, quick-hitting police raids, electronic eavesdropping, and computerized tracking methods. *Id.*

93. Stephen Kinzer, *Germany Outlaws a Neo-Nazi Group*, N.Y. TIMES, Nov. 28, 1992, at A1. Seiters called the Nationalist Front "an active fighting group whose goal is to destroy the democratic order." *Id.* German police raided the homes of those believed to be in the group and found propaganda material urging members to prepare for a political struggle in the streets. *Id.* Anti-Semitism drives the group, which calls for the expulsion of all foreigners to their home countries. *Id.*

94. Ferdinand Protzman, *Germany Moves to Ban a Second Neo-Nazi Party*, N.Y. TIMES, Dec. 11, 1992, at A15. German police also raided Deutsche Alternativ's headquarters. They found propaganda and crude homemade weapons. *Id.*

95. Kinzer, *supra* note 93, at A1.

96. *Germany Acts to Ban Songs By 5 Neo-Nazi Rock Groups*, N.Y. TIMES, Dec. 3, 1992, at A3. German police followed this ban with raids on the record companies that produced the music

Fourth, Germany took steps to downplay the violence in its international relations with other nations. Germany did not want the highly publicized hatred towards foreigners to discourage foreign investors from doing business in Germany. The German government was particularly concerned about Israel's reaction to xenophobic demonstrations,⁹⁷ given that Germany is Israel's second largest trading partner behind the United States. Israel became increasingly uneasy with German reunification when violence against foreigners began to increase.⁹⁸ In response, Germany quickly deployed envoys to assure Israel that the present German government bore no resemblance to the weak Weimar Republic of 1933, which gave way to Adolf Hitler's National Socialists.⁹⁹

Fifth, Germany curbed the number of foreigners entering its borders by negotiating treaties with Poland and Romania to reduce the number of immigrants coming from those countries. The treaty with Romania provided for the immediate deportation of thousands of Romanians in Germany, most of them Gypsies.¹⁰⁰ In return, Germany agreed to pay

of the banned groups and on the banned groups themselves. Police seized about 30,000 records, cassette tapes, and compact discs along with several hundred rounds of rifle ammunition and 14.9 pounds of black powder. Ferdinand Protzman, *Germans Crack Down on Right-Wing Rock Music*, N.Y. TIMES, Feb. 4, 1993, at A15.

"Kraft fur Deutschland," by the group Storkraft, provides an example of the inflammatory lyrics in the music of these groups:

We fight shaved, our fists are hard as steel,
Our heart beats true for our Fatherland.
Whatever may happen, we will never leave you,
We will stand true for our Germany,
Because we are the strength for Germany,
That makes Germany clean,
Germany awake!

Germans Charge Rock Singer With Inciting Racial Hatred, N.Y. TIMES, June 22, 1993, at A9. German authorities eventually arrested the leader of the group for inciting racist hatred and spreading Nazi ideology. *Id.* Other songs, for example the song "Turks Out," have choruses that simply say, "Turks out, Turks out . . ." Ferdinand Protzman, *Music of Hate Raises the Volume in Germany*, N.Y. TIMES, Dec. 2, 1992, at A1. One song called "Gypsy-Free Zone" states:

The flame-thrower is the only weapon
With which I can triumph
Exterminate the Gypsies
Whether child, woman or man.

Id.

97. Clyde Haberman, *A German Envoy Seeks to Reassure a Wary Israel*, N.Y. TIMES, Dec. 6, 1992, at A8.

98. *Id.*

99. Clyde Haberman, *An Anxious Israel, 2 Germans, A Riveting Tableau*, N.Y. TIMES, Nov. 19, 1992, at A3. See also, Clyde Haberman, *Israel's Cabinet Resists A Break With Germany*, N.Y. TIMES, Nov. 30, 1992, at A8.

100. Ferdinand Protzman, *Germany Reaches Deal to Deport Thousands of Gypsies to Romania*,

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Romania on a per capita basis for those deported to help the Romanian government house and educate their returning citizens.¹⁰¹ Germany reached a similar agreement with Poland, which gave it authority to deport over 10,000 Poles currently in Germany.¹⁰² In exchange, Germany agreed to pay Poland \$76.4 million to provide shelter for immigrants and to improve surveillance of its borders with technical equipment to be purchased from Germany.¹⁰³

F. *The Judicial Reaction*

German courts have reacted somewhat lightly to the violence carried out against foreigners. For example, in an incident where three men attempted to rob a Vietnamese street vendor and later bombarded with rocks an apartment housing asylum-seekers, the judge freed the individuals on probation, refusing to view the crimes in a political context and judging them only as men who had committed a common crime.¹⁰⁴

Many criticized the German judiciary for its lenient treatment of those committing crimes of hate against foreigners. For instance, Amnesty International spokesman Wolfgang Grenz openly criticized the judge in the aforementioned incident for sending a message that anti-foreigner violence would be tolerated.¹⁰⁵

N.Y. TIMES, Sept. 19, 1992, at A4. The negotiations of this treaty were kept secret because of the sensitivity associated with dealing with the Gypsies, who were exterminated during the Holocaust. *Id.* Despite their prior brutal treatment at the hands of Germans, Gypsies have not been accepted by the German people. Some describe them as being dirty, leaving garbage everywhere, sleeping outdoors, stealing from local stores, killing the dogs and cats of neighbors for food, and begging for money. *Id.*

101. *Id.*

102. Craig R. Whitney, *Germany to Return Asylum Applicants In Pact With Poland*, N.Y. TIMES, May 8, 1993, at A6.

103. *Id.*

104. Stephen Kinzer, *German Judge Frees 3 in an Attack on Foreigners*, N.Y. TIMES, Mar. 1, 1992, at A14. The three individuals received 18 months probation and 120 hours of community service. *Id.* In a later incident, a man who threw a bomb into German police during the Rostock riots received two and a half years in prison. Stephen Kinzer, *Germans Sentence Anti-Foreign Rioter to 2 1/2 Years*, N.Y. TIMES, Mar. 4, 1993, at A15.

105. *Id.*

III. The Changing Law for Asylum-seekers

A. *Proposals for Change in the Asylum Law*

Many proposals aimed at changing Germany's asylum law have been presented. One proposal advocated adding a new section to Article 16, which would have read:

(3) Those who are politically persecuted enjoy the right to asylum. Whoever enters the country from a state in which he is not subject to the danger of political persecution or of being deported to a state in which he is threatened with political persecution does not enjoy the right to asylum: a federal law regulates the details. This law may provide that asylum seekers from states to which the prerequisites of subsection 2 apply may be sent back at the border or their residence in the area in which the Basic Law is valid can be withdrawn immediately.¹⁰⁶

In addition to the amendment, the legislature would have created a list of countries deemed to be politically safe.¹⁰⁷ This list was to be composed of the countries of the European Community and Europe that uphold the Geneva Convention on Refugees.¹⁰⁸ The authorities would then be able to immediately turn away at the border an asylum-seeker coming from one of the listed nations.¹⁰⁹ Under this amendment, every asylum-seeker could have conceivably been turned away because all the countries surrounding Germany were included on the proposed list.¹¹⁰ While Chancellor Helmut Kohl's ruling Christian Democrat Party supported this proposal, the Social Democratic Party (SPD) did not, ultimately proving fatal to initial efforts to pass the amendment.¹¹¹

106. *Amendment on Right of Asylum* (ADN radio broadcast, Oct. 11, 1991) (transcript on file with FBIS). This section eventually became part of the amended Article 16 after initially being rejected.

107. *Politicians Condemn Attacks on Foreigners; Seek Faster Asylum Application Process*, Week in Germany, Oct. 11, 1991, available in LEXIS, Nexis Library, INT'L File.

108. *Id.*

109. *Id.*

110. *Id.*

111. Stephen Kinzer, *Accord on Foreigners Splits Germans*, N.Y. TIMES, Oct. 19, 1991, at A3. SPD officials, Alliance '90, and the Party for Democratic Socialism opposed the constitutional amendment, charging Chancellor Kohl's coalition with giving in to the violence. *Politicians Condemn Attacks on Foreigners, Seek Faster Asylum Application Process*, *supra* note 107. The SPD's refusal to assent to a Constitutional change drew a spirited response from the coalition lead by the Christian Democrats. One legislator stated:

Whoever wants the persecuted to find asylum in Germany also in the future, whoever does not want Germany to become xenophobic, whoever wants to achieve a uniform European solution, and whoever wants to put an end to the organizations of guides for

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Another proposal called for setting quotas on asylum-seekers entering the country. German President von Weizsacker and Cornelia Schmalz-Jacobsen, Chancellor Kohl's chief advisor on matters relating to foreigners, were its key supporters.¹¹²

Still another proposal advocated German participation in a European asylum policy.¹¹³ Many legislators believed that Article 16 put Germany at a disadvantage because it did not allow Germany to conform with European Community standards on asylum.¹¹⁴ President von Weizsacker joined Interior Minister Rudolf Seiters, who represented Germany in talks about a unified asylum policy in Europe, in advocating the establishment of a single European market that would require common action concerning both asylum and immigration policy.¹¹⁵

German officials were most determined to join the Schengen Agreement.¹¹⁶ The central purpose of this agreement is the abolition of all border controls of the signing countries.¹¹⁷ Under it, aliens may move freely in the territories of the contracting countries for up to three months.¹¹⁸ After the three month period, the alien must be returned to the nation that issued the documentation that allowed the alien to cross the border.¹¹⁹

illegal border crossings must say yes to an amendment of the Basic Law.

Appeals to Reason Regarding the Asylum Law: All Parties Confirm the Urgency of a Law Revision, FRANKFURTER ALLGEMEINE, Sept. 23, 1991, at 4.

112. Stephen Kinzer, *Kohl Aide Favors Immigrant Quotas*, N.Y. TIMES, Nov. 30, 1991, at A2.

113. See *Politicians Search for a Way to Revitalize the East Without Bankrupting the West; Violence Against Foreigners: Politicians Disagree on How to Combat It*, Week in Germany, Sept. 11, 1992, available in LEXIS, Nexis Library, INT'L File; *Seiters Wants European Standard* (ARD television broadcast, Apr. 30, 1992) (transcript on file with FBIS).

114. *Id.*

115. *Id.*

116. *Seiters Wants European Standard*, *supra* note 113.

117. Schengen Agreement on Gradual Abolition of Checks at their Common Borders and the Convention Applying the Agreement, June 19, 1990, 30 I.L.M. 68 [hereinafter Schengen Agreement].

The Schengen Agreement was the European Community's earliest attempt at a common market. Negotiators considered proposals for the removal of each signing nation's internal frontiers. See generally, Schengen Agreement, Art. 2, *id.* at 73. For example, Article 2 of the agreement provides for a simple border check on cars. *Id.* Any car displaying the proper placard (a green circular design) is only subjected to a reduced-speed visual check, but those without the placard can be stopped for a complete inspection. *Id.*

118. *Id.*

119. Schengen Agreement, *supra* note 117, at 87. Under article 5, aliens must fulfill certain conditions before being given the proper documentation permitting them to cross the border. *Id.* at 91. The alien won't be allowed to cross unless he or she:

- (a) [is] in possession of a valid document or documents permitting them to cross the border, as determined by the Executive Committee;
- (b) [is] in possession of a valid visa if required;

The Schengen Agreement also provides for a common asylum application process for all signing members.¹²⁰ That process provides that whoever issues the asylum-seeker a visa to enter another territory shall be responsible for that particular asylum application.¹²¹ If the country the asylum applicant leaves exempts the applicant from a visa, the destination territory will be responsible for the application.¹²²

While the general rule gives the country the asylum-seeker departs the responsibility for his asylum application, Article 30 of the Agreement outlines other exceptions under which the destination country must assess the asylum application.¹²³ If an applicant is illegally in another territory¹²⁴ or if the territory where the asylum-applicant is located rejects the application for asylum, the country from where the asylum-seeker came must take him or her back.¹²⁵

Under the agreement, each country creates their own standards for when asylum will be granted.¹²⁶ However, the agreement requires all

- (c) if applicable, submits documents substantiating the purpose and the conditions of the planned visit and has sufficient means of support, both for the period of the planned visit and to return to their country of origin or to travel in transit in a Third State, into which their admission is guaranteed, or is in a position to acquire such means legally;
- (d) has not been reported as a person not to be permitted entry;
- (e) is not considered to be a threat to public policy, national security or the international relations of any of the contracting parties.

Id.

Article 18 provides that visas for stays longer than three months may be issued. *Id.* These visas must comply with conditions (a), (d), and (e) but otherwise are determined by the issuing state's own legislation. *Id.*

120. Schengen Agreement, *supra* note 117, at 95.

121. *Id.* If more than one country issues a visa, the country whose visa expires last will be responsible for the asylum application. *Id.*

122. *Id.*

123. *Id.* at 96-97. Article 30 provides:

(e) If the applicant for asylum has entered the territory of the Contracting Parties without being in possession of one or more documents permitting the crossing of the border, determined by the Executive Committee, the Contracting Party across the external borders of which the applicant for asylum has entered the territory of the Contracting Parties shall be responsible.

(f) If an alien whose application for asylum is already being processed by one of the Contracting Parties submits a new application, the Contracting Party responsible shall be the one processing the first application.

(g) If an alien on whose previous application for asylum a Contracting Party has already taken a final decision submits a new application, the Contracting Party responsible shall be the one that processed the previous request unless the applicant has left the territory of the Contracting Parties.

Schengen Agreement, *supra* note 117, at 96-97.

124. *Id.* at 97.

125. *Id.* at 98.

126. *Id.*

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contracting parties to cooperate in carrying out its intended purpose, sharing the necessary national policies, rules, and measures they adopt in regards to the asylum process.¹²⁷ The contracting parties are also required to share certain information about those applying for asylum for the purposes of determining the country responsible for processing applications and implementing the obligations of the common asylum procedure.¹²⁸

The Schengen Agreement came into direct conflict with former Article 16 and prohibited Germany from complying with the European Community's policy on foreigners. Once an alien was in Germany, he or she could pursue the asylum application process under Article 16 without having to worry about the three month expiration time provided by the Schengen Agreement. Specifically, German authorities could not deport aliens without giving them their due process rights as provided under former Article 16.¹²⁹ Moreover, pursuant to old Article 16, Germany could only turn an asylum-seeker away at the border if the asylum-seeker had ended his flight from political persecution in another safe country and had stayed there for at least three months manifesting an intent to stay longer.¹³⁰

These conflicts placed Interior Minister Seiters in a difficult position when he negotiated with other European Community members about a unified policy. On the one hand, if he signed the Schengen Agreement,

127. *Id.* at 98-9.

128. Schengen Agreement, *supra* note 117, at 99. The Agreement also calls for the establishment and maintenance of the Schengen Information System (SIS). *Id.* at 123-24. This completely automated system allows contracting countries the ability to access reports on all persons and objects for the purpose of border and customs checks and controls. *Id.* While in the process of debating the proposed amendment to the Basic Law on the floor of the Bundestag, Interior Minister Seiters said:

[Under Article 16] [I]t is not sufficient that our European partner countries guarantee the foreigner who comes to us a constitutional asylum examination procedure on the basis of the Geneva refugee convention Even in cases in which our partner states would be obliged and ready to accept the foreigner and to implement an asylum procedure in line with the Schengen Agreement, we, as a result of our constitutional situation, are prevented from sending the foreigner to that state.

Seiters Wants Europe Standard, supra note 113.

129. *Seiters Wants European Standard, supra* note 113.

130. *Id.* Seiters said:

[W]e must not sacrifice European unification, of which the Schengen Agreement constitutes a first stage, on the altar of an understanding that opens the door to all those who are hoping to find a better future here, even if they are not threatened with political persecution and if this has previously been ascertained by one of our partner countries. This does not correspond to what our Basic Law says in connection with asylum but makes the crisis connected with our basic right to asylum even worse.

Id.

he would violate the German Constitution. On the other hand, he could place a German reservation on the issue of asylum, thereby sacrificing European unanimity on the matter.¹³¹

B. *The Changing Law*

The first changes in the asylum law did not involve amending Article 16. Instead, the government streamlined the application process. First, it ordered German states to set up central reception centers and assembly camps at which asylum-seekers could stay at the government's cost for at least six weeks but no longer than three months.¹³² The Federal Office for the Recognition of Foreign Refugees (Federal Office) also established an administrative court and authority at these reception centers to facilitate a faster decision on asylum-seekers' applications.¹³³

At the reception centers, the Federal Office separates the applications deemed irrelevant and unfounded and may immediately deport those asylum-seekers with such applications.¹³⁴ The process is calculated to take no longer than two weeks.¹³⁵ Asylum-seekers who submit applications deemed unfounded may appeal the summary deportation to the administrative court within one week.¹³⁶ If the administrative court affirms the apparently unfounded application, the final order for deportation is unappealable.¹³⁷

The Federal Office's administrative court evaluates applications found to be based on political persecution, and the appeal chain from that point is no different than before the new law went into effect.¹³⁸

131. When the vote on the Bundestag floor was taken, nearly all of the Social Democrats (SPD) who initially denounced the new law were in support. *Bundestag Passes Asylum Law: Deportation Now Possible After a Few Months; In Future, Asylum Seekers Can Fight Their Notice of Denial in Only One Court; Laender Must Establish Central Registration Offices and Assembly Camps*, SUEDEUTSCHE ZEITUNG, June 16, 1992, at 1 [hereinafter *Bundestag Passes Asylum Law*].

132. Heribert Prantl, *Seven Features of New Asylum Procedure*, SUEDEUTSCHE ZEITUNG, Feb. 21, 1992, at 6. Prantl, who opposes the new law, calls the reception centers refugee camps. *Id.* Should the asylum-seeker not receive his decision within that three month period, the asylum-seeker follows the previous asylum procedure.

Previously, the administrative courts and authorities were not situated at the reception centers, increasing the cost and time in the application process. *Bundestag Passes Asylum Law*, *supra* note 131, at 1.

133. *Id.*

134. Prantl, *supra* note 132, at 6.

135. *Id.* The asylum-seeker must appeal from outside of Germany. Once the Federal Office deports, the asylum-seeker may not remain in the country. *Id.*

136. *Bundestag Passes Asylum Law*, *supra* note 131, at 1.

137. *Id.*

138. The German courts define political persecution narrowly. To assure that rejected asylum-seekers do not return to a country where they face danger, the deportation order may state that an asylum-seeker cannot be deported to certain countries. *Bundestag Passes Asylum Law*, *supra*

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However, if the administrative court denies the application previously deemed relevant by the Federal Office, the asylum-seeker has only two weeks for an appeal.

The German government anticipated that the new process would render a final decision on an application in approximately six months at most, a much shorter time than under the previous law.¹³⁹ To assure that asylum-seekers do not abuse the process and continue to apply after their initial applications are rejected, the government instituted an automated finger-printing system at each reception center to check for those applying more than once.¹⁴⁰

While significantly decreasing the lengthy application process, this legislation did not satisfy the government. Law-makers wanted legislation that would not only speed up the asylum process, but also curtail the overwhelming number of applicants for asylum.¹⁴¹ Essentially, legislators sought a law that would summarily turn away asylum-seekers who came from third countries where no political persecution existed and those who had been denied asylum in other countries.¹⁴²

The desired changes became reality on May 26, 1993.¹⁴³ By a

note 131, at 1.

139. *Bundestag Passes Asylum Law*, *supra* note 131, at 1.

140. *Id.*

141. Eckhard Fuhr, *Moaning and Groaning. It's Moving--A Realistic Asylum Policy Is Slowly Gaining Ground in the Social Democratic Party*, FRANKFURTER ALLGEMEINE, May 2, 1992, at 10.

142. *Id.*

143. *German Bundestag Votes To Restrict the Right to Asylum; Bonn in a State of Siege*, Week in Germany, May 28, 1993, available in LEXIS, Nexis Library, INT'L File [hereinafter *German Bundestag Votes*]. The vote was taken in the Bundestag, Germany's lower legislative house. On July 1, 1993, 12 of the 16 German states voted to amend the 1949 Constitution. *Bonn Bars Asylum-Seekers*, N.Y. TIMES, May 29, 1993, at A3. The bill was adopted by the Bundesrat, the German Parliament's upper house, on July 1, thus finalizing the amendment. *German Parliament Votes to Restrict Right to Asylum*, Agence France Presse, May 26, 1993, available in LEXIS, Nexis Library, INT'L File.

While the Bundestag was voting on the proposed law and amendment, thousands of people protested against the change in the asylum law outside of the legislative house. Stephen Kinzer, *Bonn Parliament Votes Sharp Curb on Asylum Seekers*, N.Y. TIMES, May 27, 1993, at A1. Some wore leather jackets and black ski masks and held banners that decried the change. *Id.* One slogan read, "Deportation is Torture; Deportation is Murder." *Id.* Other protesters made it difficult for parliament members, workers, and journalists to get through police barricades erected to keep protesters from entering the parliamentary building. Steve Crawshaw, *Protests Erupt Over Vote to Limit Refugees; German MP's Forced to Run Gauntlet of Demonstrators to Enter Parliament for Debate on Constitutional Amendment*, Independent, May 27, 1993 available in LEXIS, Nexis Library, INT'L File. Several parliament members had to be brought to the building by helicopter or boat. *Id.*

Jusos (Young Socialists who support the SPD) were also disillusioned with the way the SPD voted. *Jusos See SPD Facing a Shift to the Right--National Congress Notes "Craving for Power"*

vote of 521 to 132, lawmakers fundamentally changed Germany's asylum policy by amending Article 16 of the Constitution.¹⁴⁴ Under the new amendment, those who come from or through a country listed as "safe" can be summarily turned away at the border.¹⁴⁵ The list includes all countries of the European Community as well as Austria, Switzerland, Poland, the Czech Republic, Senegal,¹⁴⁶ Liberia, Turkey, Zaire, Nigeria, Ghana, Togo, India, Pakistan, Romania and Bulgaria.¹⁴⁷

German lawmakers insisted that asylum-seekers not be permitted to pass through "safe" countries en route to Germany because asylum-seekers should not be able to choose the country in which to end their political persecution.¹⁴⁸ In their view, once an asylum-seeker arrived in a country considered safe, the danger of political persecution dissipated, and no need existed to apply for asylum in Germany.¹⁴⁹

C. *Legality of the New Asylum Policy*

1. *The German Constitution?*—Because the asylum policy is so new, the highest court in Germany, the Constitutional Court, has not reviewed the policy to determine whether it comports with the Constitution.¹⁵⁰ Regardless, the new asylum policy arguably violates

in the Parent Party, FRANKFURTER ALLGEMEINE, May 25, 1992, at 5. Prior to the vote, they threatened to review their relationship with the SPD should the party decide to amend the asylum law. *Id.*

144. *German Bundestag Votes*, *supra* note 143.

145. *Id.*

146. *Bundestag (Again) Debates Proposed New Laws on Foreigners and Asylum-seekers; Majority Support Likely*, *Week in Germany*, Mar. 5, 1993, available in LEXIS, Nexis Library, INT'L File.

147. Stephen Kinzer, *Rights Groups Attack German Plan on Refugees*, N.Y. TIMES, Feb. 7, 1993, at L11. Germany substantially reduced the number of applicants for asylum by including Poland and the Czech Republic on the "safe" list. *German Bundestag Votes*, *supra* note 143. Almost half of the asylum-seekers entered Germany through the Czech border and about 28 percent entered by way of Poland. *Id.* These asylum-seekers could now all be turned away without a hearing. *Id.*

148. Stephen Kinzer, *Germany Agrees on Law to Curb Refugees and Seekers of Asylum*, N.Y. TIMES, Dec. 8, 1992, at A1.

Preliminary indications on the success of the amendment in reducing the number of asylum-seekers show that applications dropped by nearly two-thirds in July 1993 as compared to July 1992. Judy Dempsey, *Asylum Seekers Decline*, FINANCIAL TIMES, Nov. 5, 1993 available in LEXIS, Nexis Library, INT'L File.

149. Kinzer, *supra* note 148, at A1.

150. Gerald L. Neuman, *Immigration and Judicial Review in the Federal Republic of Germany*, 23 N.Y.U. J. INT'L L. & POL. 35, 40 (1990). When the Constitutional Court does adjudicate the constitutionality of the new policy, its decision will be practically free from challenge. Unlike the United States Supreme Court, the Constitutional Court may not choose between permissible interpretations of a law. *Id.* Instead, the court's holdings are regarded as the only interpretations

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the fundamental rights guaranteed to all human beings in the German Constitution. Article 1 of the Basic Law reads:

1. The dignity of man is inviolable. To respect it and protect it is the duty of all state authority.
2. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace, and of justice in the world.¹⁵¹

Article 1 does not simply set forth a theoretical principle that is not substantively enforced.¹⁵² Rather, the German executive and judicial branches vigorously enforce its main thrust, the dignity of man.¹⁵³ The Constitutional Court believes that the Basic Law sets out an order of values that unites individuals and society in a higher synthesis, a reality "in which the individual has and enjoys his freedom on condition of his recognizing, believing in, and willing that which is common to the whole."¹⁵⁴ The principle of human dignity is the highest value of the Basic Law and the ultimate basis of constitutional order.¹⁵⁵

Two examples illustrate the importance of the inviolability of human dignity to the German High Court. First, the German Constitutional Court has held unconstitutional searching private citizens' belongings to assure they are in compliance with state law.¹⁵⁶ In doing so, the Court stated that each human person as an individual possesses spiritual

that comport with the Grundgesetz. *Id.*

151. GG art. 1.

152. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 38 (1989). Similar rights guaranteed to Germans under the Weimar Republic were merely unenforceable goals. *Id.*

153. *Id.*

154. *Id.* at 39. The German Constitution speaks of steering, integrating, and legitimizing the German community. It sets up a way of life for Germans. *Id.* at 37.

155. KOMMERS, *supra* note 152, at 37. This is not to say that the constitutionality of a law always hinges on whether human rights are being infringed. Rather, the Constitutional Court considers human rights in addition to the competing legal arguments presented in each case. Interview with Ralf Gutersloh, German LL.M. Student at The Dickinson School of Law, in Carlisle, PA (Nov. 16, 1993).

156. *Microcensus Case*, Bundesverfassungsgericht, 29 Entscheidungen des Bundesverfassungsgerichts 1 (1969) [hereinafter BVerfGE] (*cited in* KOMMERS, *supra* note 152, at 306). The German Constitution guarantees an inviolable sphere of privacy beyond the reach of public authority. *Id.*

Kommers' book compiles translated German Constitutional Court decisions. From these decisions, he interprets how the German Constitutional Court views certain aspects of the Basic Law. Normally, German Constitutional Court decisions are given by date, not by opposing parties as in the United States. "The Microcensus Case" is a surname.

autonomy and that autonomy is to be guided by social discipline and practical reasonableness, not by constant state overview.¹⁵⁷

Second, the Constitutional Court has held unconstitutional life imprisonment for anyone convicted of a crime.¹⁵⁸ The Court reasoned that human dignity penetrates the walls of a jail cell and does not allow the state to deprive someone of his freedom without giving him the chance to regain that freedom.¹⁵⁹ Human dignity was said to require the use of more humane punishments with rehabilitation as the cornerstone.¹⁶⁰

Human dignity, so important to German Constitutional law, does not extend only to Germans.¹⁶¹ According to the Constitution, certain rights are guaranteed to all human beings, including foreigners.¹⁶² These rights include: the right to the free development of personality and general free movement;¹⁶³ the right to life and the inviolability of the person;¹⁶⁴ equality before the law, including the right to be free of prejudice because of sex, parentage, race, religion, homeland, faith or religious and political opinion;¹⁶⁵ freedom of religion;¹⁶⁶ and freedom of expression.¹⁶⁷

The new asylum policy may violate many of these basic rights. For instance, it may violate the inviolability of the person by denying asylum seekers procedural fairness during the application process. Some individuals, those passing through a country listed as "safe," aren't even granted the benefit of a hearing to determine the merit of their claims of persecution. Other applicants have a heavy burden of proof in establishing that they are victims of political persecution. Again, they must prove persecution by a clear probability. Given that few asylum seekers speak German or can produce hard, documentary evidence of persecution, it is unlikely that an asylum seeker will be able to prove

157. KOMMERS, *supra* note 152, at 313.

158. Life Imprisonment Case, 45 BVerfGE 187 (1977) (*cited in* KOMMERS, *supra* note 152, at 314). The disallowance of life imprisonment occurs only if the convicted person is not a repeat offender. KOMMERS, *supra* note 152, at 316-19.

159. Life Imprisonment Case, 45 BVerfGE 187 (1977), (*cited in* KOMMERS, *supra* note 152, at 316-19).

160. *Id.*

161. GG art. 116(1). A "German" has been defined by the Grundgesetz as only a person who possesses German citizenship. *Id.* Citizenship is a subject of German statutory law. *Id.*

162. GG art. 2(1).

163. *Id.*

164. *Id.* art. 2(2).

165. *Id.* art. 3.

166. *Id.* art. 4.

167. GG art. 5.

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persecution by a clear probability. Thus, the new law gives asylum seekers little chance of obtaining asylum in Germany.

The new policy may also violate the inviolability of the person by subjecting asylum seekers to poor treatment at the central reception centers and assembly camps. Again, asylum applicants are forced to stay at reception centers and assembly camps during the application process and may not otherwise establish homes in Germany.¹⁶⁸ These reception areas have turned into dens of crime.¹⁶⁹ For example, in the state of Bavaria, 50 percent of all police investigations have involved foreign nationals.¹⁷⁰ There have also been reports of foreigners begging, using people's yards as toilets, and stealing.¹⁷¹ In not providing "adequate" living conditions to asylum applicants, the government is arguably denying these individuals the right to dignified treatment that all individuals regardless of nationality deserve under the right of the inviolability of the person.

In addition, the new asylum law may violate the right of free movement in Germany,¹⁷² which entails the right to rely upon habitation in Germany. The Constitutional Court has been reluctant to deport foreigners after they have remained in the country for lengthy periods of time.¹⁷³ It has specifically held that the legislature's change in immigration policy may not justify the expulsion of a foreign worker if the worker has reliance that he will remain in Germany¹⁷⁴ and if infringing on the foreigner's basic right to remain in the country does not

168. *German Bundestag Votes*, *supra* note 143.

169. *Id.*

170. *Id.* Other examples of violence include the attack on a refugee camp in Brandenburg by 20 Romanians with sub-machine guns and a gun battle in Hamburg among several Egyptians resulting in the death of 2 people. *Id.* Nevertheless, reports of rising crime among foreigners may be exaggerated. When asylum-seekers enter assembly centers, they may not leave without the written permission of the Refugee Office in that particular town. Interview with Stephan Schlegel, German LL.M. student at The Dickinson School of Law, in Carlisle, PA (Nov. 12, 1993). Therefore, many reports of criminal conduct may merely involve asylum-seekers leaving the centers without transit permits. *Id.*

171. *Ultrarightist Rioters in Rostock Threaten Riots Until 1 September*, FRANKFURTER ALLGEMEINE, Aug. 27, 1992, at 1-2. Concerns about the alleged abuse of German hospitality by foreigners has led some members of Chancellor Kohl's ruling coalition to urge automatic deportation for those who even attempt a crime. *Id.* Currently, asylum-seekers are deported only when they commit a serious crime that entails a prison sentence of five years or more. *Id.* Those who commit crimes that require one year in prison or less are considered for deportation, but it is not mandatory. *Id.*

172. GG art. 2(1).

173. Neuman, *supra* note 150, at 71.

174. *Id.* A foreign worker has reliance on habitation if, for example, he has a home, a job, and children enrolled in schools within Germany. *Id.*

serve a public interest.¹⁷⁵ Authorities may only abridge this fundamental right of reliance on habitation by balancing it against the public interest in deporting a foreigner, a concept known as proportionality.¹⁷⁶

Admittedly, the Constitutional Court's reluctance has so far extended only to those who legally reside in the country as temporary residents.¹⁷⁷ Moreover, most asylum-seekers would not benefit from the Constitutional Court's reliance safeguard because few integrate economically and socially. Asylum-seekers face severe restrictions on the amount of hours they may work and the type of jobs they may hold. In fact, at one point, asylum-seekers were completely barred from employment while they awaited their asylum decision.¹⁷⁸ Thus, at present it is unlikely that asylum-seekers can establish the ties to Germany through employment or social integration necessary to successfully invoke the right of habitation. However, if laws are ever relaxed in the future to allow refugee seekers to obtain more permanent employment and/or living accommodations, for instance, to fill shortages in the German work force, a viable claim for a violation of the right of habitation might arise.

2. *International Law.*—Article 25 of the German Constitution provides that international law is part of the national law of Germany.¹⁷⁹ It reads, "The General rules of public international law form part of the federal law. They take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory."¹⁸⁰ Therefore, to understand German law regarding asylum-seekers, international agreements that Germany has entered into pertaining to refugees must be considered.

The 1951 United Nations Convention Relating to the Status of Refugees (hereinafter Geneva Convention) held in Geneva¹⁸¹ was

175. *Id.* at 50 (citing Judgment of Sept. 28, 1978, 49 BVerfGE 168).

176. *Id.* at 71.

177. Neuman, *supra* note 150, at 42-43. These legal temporary resident passes come in the form of "residence passes," which usually last less than one year, or "resident entitlements," which occur after five years of habitation in Germany with economic and social integration. *Id.*

178. Interview with Stephan Schlegel, German LL.M. student at The Dickinson School of Law, in Carlisle, PA (Nov. 12, 1993).

179. GG at 25.

180. *Id.*

181. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (amended by Protocol, Jan. 31, 1967, 606 U.N.T.S. 667) [hereinafter Geneva Convention]. Germany officially ratified the Geneva Convention in 1955. See 223 U.N.T.S. 377.

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ratified by the German legislature in 1955.¹⁸² The Convention defines a refugee as one with a

well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [who] is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or whom not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁸³

According to the Geneva Convention, all refugees have due process rights in the courts of the land where they seek asylum.¹⁸⁴ The territory may not punish those who enter a contracting nation illegally if the asylum-seeker presents himself promptly to the proper authorities with good cause for his or her illegal entrance or presence.¹⁸⁵ Nor may the country expel an asylum-seeker where "his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."¹⁸⁶

Several commentators and politicians have questioned whether the more restrictive law, which features summary deportation by border police, violates provisions of the Convention.¹⁸⁷ Paragraphs 1 and 2

182. *See id.* at 377.

183. *Id.* at 152. The Convention also states the following conditions that would not warrant refugee status:

- (1) He [the potential refugee] has voluntarily re-availed himself of the protection of the country of his nationality; or
- (2) Having lost his nationality, he has voluntarily reacquired it; or
- (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
- (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.

Id. at 154.

184. The words of the convention are, "A refugee shall have free access to the courts of law on the territory of all Contracting States." *Id.* at 164. In exercising these due process rights, the refugee is given a reasonable time to submit evidence to clear himself and may receive the assistance of persons specially designated by the competent authority. *Id.* at 174.

185. *Id.*

186. Geneva Convention, *supra* note 181, at 176. The prohibition against expulsion does not extend to those who may be regarded as a danger to the country where they seek asylum, or those who flee a nation because they have been criminally convicted. *Id.*

187. SPD Bundestag floor leader Ulrich Klose feared that by creating a more restrictive asylum policy Germany would be forced to pull out of both the Geneva Convention on Refugees and the

of Article 16 of the Convention provide that a refugee shall "have free access to the courts of law in the territory of all Contracting States," and that a refugee shall enjoy in the Contracting State the same treatment as nationals of that state in regards to access to the courts.¹⁸⁸ The summary nature of border proceedings under the new asylum law seems to violate this provision. For instance, an asylum-seeker who has come to Germany through a safe country is totally denied access to the courts. Moreover, an individual whose application is deemed unfounded or irrelevant is given only one summary appeal within a two week period and often lacks adequate legal representation.¹⁸⁹

Article 33 states that no refugee may be expelled from a contracting country to the former country when his life or freedom would be threatened on account of race, religion, nationality, membership in a social group, or political opinion.¹⁹⁰ The asylum law's summary deportation policy may also violate this provision. It is possible that some individuals with valid claims of political persecution may not have the resources to prove their claim. Again, applicants must prove by a clear probability that they are victims of political persecution. In addition to not speaking German or being able to obtain adequate legal representation, providing concrete evidence of persecution is almost impossible.¹⁹¹ Most often such evidence remains in the hands of the persecutor and not the persecuted, and the applicant can do little more than vocally assert and describe the persecution.¹⁹² Accordingly, the real possibility exists that Germany will deport asylum-seekers with valid claims of political persecution in contravention to the Geneva Convention.

European Human Rights Convention. *SPD's Klose Speaks*, (ARD television broadcast, Apr. 30, 1992) (transcript on file with FBIS). See also, Prantl, *supra* note 132, at 6 (stating that the Geneva Convention is ignored by the new asylum law).

188. Geneva Convention, *supra* note 181, at 164.

189. Fullerton, *supra* note 9, at 73. Fullerton also questions whether the border police have the expertise to make quality judgments on prospective asylum applicants. *Id.* at 74. This concern is based on article 32(2) of the Geneva Convention, which states that "the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before a *competent authority* or a person or persons specially designated by the competent authority." Geneva Convention, *supra* note 181, at 174 (emphasis added).

190. Geneva Convention, *supra* note 181, at 176.

191. Fullerton, *supra* note 9, at 96-98. Fullerton asserts that refugees will almost certainly not be able to prove the sufficient likelihood that they are victims of political persecution and stresses that refugees who are in Germany illegally should, regardless, be afforded the protections of the Convention. *Id.* at 96-97. In her opinion, the "presence of a refugee in a country illegally is still presence under article 33." *Id.* at 99.

192. *Id.* at 99.

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Another problem exists where an asylum-seeker moves through a country deemed "safe" but that is not a contracting party to the Geneva Convention.¹⁹³ Under the new law, that individual could be summarily turned away without his or her claim being examined. The "safe" country might then deport the individual to the country where he was persecuted. In this manner, by summarily turning away such an individual, Germany would be denying him or her all the protections afforded in the Geneva Convention.

V. Conclusion

Those who voted to change Germany's asylum procedures asserted that individuals who have suffered political persecution will still be permitted to enter Germany,¹⁹⁴ but the obvious question is how?¹⁹⁵ About 90 percent of those seeking asylum in Germany try to enter by land.¹⁹⁶ But it would appear that land routes to Germany have been closed to most asylum-seekers. Only those fleeing the atrocities of war may enter Germany, but even they will only be permitted in limited numbers. It has been said that the only way remaining for asylum-seekers to come to Germany is to fly by private jet and parachute jump into Germany.¹⁹⁷

On the other hand, Germany, which under its old asylum laws had one of the most liberal asylum policies in Europe, simply could not continue to serve as a haven for those suffering economic hardship in their own countries. Admittedly, many of those attempting to enter Germany do so not because of political persecution, but rather because they are fleeing severe economic conditions in their own countries caused by the collapse of communism. Given the economic hardship Germany has recently encountered caused in a large part by reunification with the former East Germany, arguably Germany could not afford to continue its liberal asylum policies.

Nevertheless, the recent rise of neo-Nazism in Germany is very troubling. One can only hope that this phenomenon is more a result of

193. Kinzer, *supra* note 148, at A1.

194. *Parties Reach Agreement on Asylum Issue, Paving Way for New Asylum Law*, *supra* note 7.

195. *Germany: Growing Opposition to Changes in Asylum Law*, Inter Press Service, May 21, 1993, available in Nexis Library, INT'L File.

196. *Id.*

197. Opponents of the law see it as shuffling off the asylum problem to countries that lawmakers have designated "safe." *Id.*

the economic hardship Germany has recently endured and less a cause of the changes in Germany's asylum laws.

Steven Edward Grubb