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## The Right to Seek Asylum: A Dwindling Right?

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# BRIEF

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## The Right to Seek Asylum: A Dwindling Right?

by Fatimah Mateen and Brian Tittlemore

Article 14 of the *Universal Declaration of Human Rights* provides that “everyone has the right to seek and enjoy in other countries asylum from persecution.” The aspirational nature of the Declaration and the pervasive principle of state sovereignty have prevented Article 14 from being entrenched as a right of asylum seekers to enter the borders of countries. Rather, a rule of customary international law appears to have developed that prevents an individual from asserting a right to enter a state unless he or she is a national of the receiving country.

Nonetheless, the manner in which a state exercises its sovereignty has a direct effect upon the ability of refugees to seek protection from persecution, and without a meaningful opportunity to make a refugee application, the “right” to seek asylum is rendered illusory.

Although the media today is filled with reports of ethnic cleansing campaigns, civil wars, anarchy, and brutal dictatorships, there appears to be a trend in many industrialized countries toward restricting the ability of refugees to seek asylum. Many countries are now preventing refugees from entering at their borders, expanding the grounds for denying asylum, and denying refugees social assistance. This shift toward a more rigorous exercise of state sovereignty appears to be

in response to the recent significant increase in the number of asylum seekers around the world. Between 1990 and 1993 the number of asylum seekers in the European Community jumped from 320,000 to

*The Universal Declaration of Human Rights provides that “everyone has the right to seek and enjoy in other countries asylum from persecution.”*

560,000. The deluge of asylum applicants and the economic and social problems that often follow have, in turn, increased xenophobic attitudes in countries that previously protected those fleeing human rights violations.

### Restrictions in Europe

The significant increase in the number of asylum seekers in Germany led that country to reform its asylum laws. In June 1993, Germany enacted amendments designed to deny the right to seek asylum to persons travelling through “safe third countries” or who come from “safe countries of origin.” Under the revision, a “safe” country is one “where the legal situation, the application of the law and the general political circumstances justify the assumption that neither political persecution nor inhumane or degrading punishment or treatment takes place.” As Germany is

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## The European System for the Protection of Human Rights: A System in Motion

by Françoise Roth and Claudia Martín

Now ratified by 30 countries, the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), the Council of Europe’s most important achievement, is entering one of the most important phases in its evolution. The Convention’s control mechanism has recently experienced its most drastic wave of reforms with the adoption of Protocol No. 9—establishing the right to individual action before the Court—and of Protocol No. 11—merging the European Commission and Court of Human Rights into a single judicial authority.

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surrounded by states deemed "safe," in theory no person entering Germany by land has the right to asylum in Germany. Some politicians have argued that the asylum reforms did not go far enough and that Germany should completely abolish the right to asylum within its territory.

Likewise, in France, steps have been taken to make it more difficult for people to claim refugee status. Airports have been declared international zones where French law does not apply. In addition, the French constitution, which once obliged the country to consider all refugee claims, has now been amended to permit the government to refuse to examine the refugee requests of individuals whose refugee requests have been refused in other European Community states.

These changes in the immigration laws of Germany, France and other European countries have come about, in part, in light of the possible implementation of the Schengen Free Travel Accord. The Accord, which was to come into effect in February 1994 but has since been postponed indefinitely, lifts border controls between some European Community states and stipulates that regardless of the Contracting Party to which an alien addresses an application for asylum, only one Contracting Party shall be responsible for processing that application, namely the state that first offers the alien visa or residence status, or, for undocumented residents, the state through which the alien first entered the Community. If the Accord comes into effect, every Contracting Party will still have the option, but not the obligation, to entertain the claims of applicants whose cases have been denied by other Schengen Accord States. Thus, the potential effect of the Accord may be to severely restrict asylum prospects in the European Community.

### Canada and the United States—Closing Their Doors?

Changes that have the affect of limiting the ability to seek refugee status have also been implemented in Canada and the United States. In 1993, Canada increased the penalties imposed on transportation companies that bring people with improper documents into the country. In addition, authorities have increased "external control" measures that may prevent refugees from entering Canada. For example "Operation Shortstop" was implemented to prevent people who lacked proper travel documentation or other regulatory requirements from

boarding planes bound to Canada from airports in third countries. These changes have been effected despite the fact that refugees are often unable to obtain proper documentation from the regimes they are fleeing and hence travel with false documents, or without any at all.

Likewise, in response to anti-immigration sentiment and the continuing rise in asylum applications, the United States has

Wilson poses the question, "with no means to support themselves, who will take care of these people?"

taken steps to limit the number of asylum seekers reaching its borders. For example, the Clinton administration prohibited Cuban and Haitian asylum seekers from entering the United States to seek asylum by setting up in-country processing centers, and by creating "safe haven" areas outside of the United States for those interdicted at sea. Those picked up at sea had no possibility of resettlement in the United States, but were provided with the option of remaining indefinitely in a safe haven camp, or of repatriating voluntarily. This policy, effectively preventing Haitians and Cubans from exercising their right to seek asylum in the United States or in any other country, sent a message to the international community that it is acceptable to ignore international law when faced with a crisis close to home.

Furthermore, in-country processing centers in Haiti and Cuba were established to encourage those who wanted to apply for refugee status to do so within their country of origin. This policy, in turn, raises such issues as whether the process abrogates an asylum seeker's right to flee persecution, and whether persons going through in-country processing are able to come under the UNHCR's mandate by satisfying the definition of a refugee under the 1957 Convention and 1961 Protocol, which require a refugee to be outside his or her country of nationality.

### New United States Asylum Regulations—Further Constraints

In December 1994, the U.S. Immigration and Naturalization Service published its final asylum regulations. The reforms, among other things, institute procedural changes to speed up asylum adjudications, and restrict asylum applicants' authoriza-

tion to work. In addition, the new asylum regulations include a provision similar to Germany's safe third country restriction.

Professor Rick Wilson, Director of the International Human Rights Law Clinic at the Washington College of Law, asserts that the restrictions on work authorization have impacted the Clinic's clients more than any of the other amendments. Under the new regulations, an asylum applicant must wait 15 days after a grant of asylum, or 180 days after filing a complete petition that has not been reviewed by the authorities, before receiving work authorization required for lawful employment in the United States. Wilson describes most of the Clinic's clients as arriving in the United States indigent with no support system, and as having been forced to abandon what few assets they may have owned in their country of origin. Wilson poses the question, "with no means to support themselves, who will take care of these people?"

Wilson also has reservations about the safe third country provision implemented by the United States and many other countries. Most of the asylum seekers in the United States are from El Salvador, Guatemala and Nicaragua. These nationals must travel through Mexico in order to reach the United States. Under the revised regulations, these people could be sent back to Mexico to apply for asylum there. The problem, according to Wilson, is that Mexico has one of the worst reputations for dealing with refugees and has exhibited hostility toward immigrants.

As a result of the strain that increasing numbers of refugees are placing upon the social and legal systems of developed countries, restrictions on the ability to seek asylum in these countries are likely to continue in the future. Unfortunately, many of the measures resorted to by these countries appear to be contrary to the intent and spirit of international asylum protection. Refugees are not being permitted to seek refuge or are facing forced repatriation, such as Vietnamese refugees in Hong Kong and Haitians in Guantanamo Bay.

### The Need for a New Approach—Balancing State Sovereignty with the Protection of Refugees

The ultimate answer to this problem would be to eliminate the crises around the world that cause people to seek refugee status. In this respect, more proactive and preventative diplomatic efforts on the part of the international communi-

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## ALUMNUS PROFILE

## WCL Alumna Works on International Standards for the Internally Displaced

by Ayesha Qayyum

Since May 1994, Cecile Meijer, LL.M. '93, has worked with the International Human Rights Law Group and the American Society of International Law (ASIL) to develop legal principles for the protection of internally displaced persons. The project was undertaken at the request of Dr. Francis Deng, Repre-

sentative of the UN Secretary-General on Internally Displaced Persons. (see related story page 4). Meijer is part of a three-member team, along with Janelle Diller and WCL Professor Robert Goldman, working on this project.

In order to accurately analyze the existing law, the team is utilizing a "needs approach." This involves first determining what particular problems internally displaced persons face, and then examining how the existing international legal regime treats those needs. In particular, Meijer focuses on the sufficiency of human rights law, humanitarian law, and refugee law in meeting the needs of the internally displaced.

The team was also asked to draft principles addressing the protection and assistance needs of internally displaced persons, particularly in areas where the law is currently inadequate. As a result, Meijer, Goldman, and Diller are involved in the drafting and development of new international standards, which Meijer hopes that the United Nations will eventually adopt.

Meijer, who is originally from the Netherlands, describes the time she

spent as an LL.M. student at the Washington College of Law as "excellent preparation" for her current work. Although she was always interested in the problems of refugees and the movement

"I really learned about the issue of internally displaced persons once I came to WCL."

of peoples, "I really learned about the issue of internally displaced persons once I came to WCL," she says. In addition to her WCL education, Meijer feels that her previous experience—working in civil, comparative, and private international law in the Netherlands—provided her with the skills she is currently applying to her work on the internally displaced. ☪



Gabriel Eckstein



Cecile Meijer

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ty are required to assist in peacefully resolving many conflicts, such as ethnic or tribal-based secessionist disputes, before they develop into environments which foster well-founded fears of persecution. Unless and until such cooperative and pacific dispute resolution mechanisms become a practical reality, however, it appears that alternative measures must be taken which provide genuine asylum seekers with humanitarian assistance and protection from persecution, and at the same time take into account the financial and social pressures on states traditionally capable of accommodating refugees.

One possible approach could be for developed countries to work together to establish a centralized international immigration system to fairly allocate refugees among the developed countries according to their respective sizes, populations, and resources. Alternatively, developed

countries might consider establishing and supporting, on a multilateral basis, temporary refugee communities outside of their borders in territories of amenable third countries. Such temporary facilities would provide refugees with short term protection and assistance. Unlike past arrangements such as the strategy at Guantanamo Bay, however, future accommodations should either provide refugees with meaningful opportunities to apply for asylum in other countries, or incorporate equitable resettlement plans to prevent refugees from being placed in long term "limbo".

In the absence of concerted efforts on the part of developed countries to find a balance between domestic concerns over proliferating refugee crises and the need to provide refugees with humanitarian assistance and genuine protection from persecution, current trends suggest that the right to seek asylum is in danger of becoming a right without substance. ☪

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*jure* refugees. The OAU Convention is silent on this point. This problem, however, concerns three times as many people and is potentially even more explosive than the refugee crisis.

Although the protection of refugees in Africa is far from complete, it is at least in principle more inclusive than in many, if not all, other regional systems. One of the most significant aspects of this relatively new model of protection is that it has prompted other regional systems, in particular the Inter-American system, to emulate its positive factors and minimize its inadequacies. ☪