

Penelope Mathew
Tristan Harley



REFUGEES, REGIONALISM AND RESPONSIBILITY

ELGAR STUDIES IN HUMAN RIGHTS

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Refugees, Regionalism and Responsibility

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This book is dedicated to the asylum seekers whose lives have been affected by the failure of governments to rally together and come to their aid. We hope that better, cleverer and more humane policies will be developed in the future.

Contents

<i>Acknowledgments</i>	viii
Introduction	1
PART I REGIONALISM, RESPONSIBILITY AND RESPONSIBILITY-SHARING	
1 Regionalism and refugee protection	23
2 The responsibility of states to protect refugees	67
3 Sharing responsibility among states	94
PART II PAST AND PRESENT REGIONAL ARRANGEMENTS FOR REFUGEES	
4 The Comprehensive Plan of Action for Indochinese Refugees	143
5 The International Conferences on Assistance to Refugees in Africa	162
6 The International Conference on Central American Refugees	175
7 The Common European Asylum System	189
8 The Mexico Declaration and Plan of Action and Cartagena+	217
9 Lessons learned	234
<i>Bibliography</i>	251
<i>Index</i>	281

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Penelope Mathew, Brisbane, November 2015

Tristan Harley, Sydney, November 2015

Introduction

Regional cooperation frameworks for refugee protection and solutions are sometimes seen as the answer to refugee movements. Examples of these include the agreement on principles for a regional cooperation framework within the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime,¹ the Common European Asylum System² and arrangements in Latin America associated with the Cartagena Declaration on Refugees.³ This book critically analyses the extent to which particular regional arrangements have resulted in protection and durable solutions for refugees. It also examines how responsibility for refugees has been shared at the regional level. The book explores ideas about sharing responsibility with respect to refugees, asking who should be responsible, and why and how they should be responsible.⁴ It questions whether regional arrangements do provide answers by fairly sharing responsibility for refugees.

¹ *The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime* <<http://www.baliprocess.net>>.

² See generally Commissioner for Home Affairs, *A Common European Asylum System* (European Commission, 2013). This arrangement is discussed in detail in Chapter 7 of this book.

³ *Cartagena Declaration on Refugees* (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984) in 'Annual Report of the Inter-American Commission on Human Rights' (1984–85) OAS Doc OEA/Ser.L/V/II.66/doc.10, rev 1, 190–3. These arrangements are discussed in Chapter 8 of this book.

⁴ This book is concerned with responsibility-sharing in a proactive, prospective sense: the book concerns efforts to share more equitably the physical and financial effort involved in protecting refugees. Lawyers will be more familiar with the term responsibility in the sense of 'state responsibility' – a retrospective reckoning concerning breaches of international obligations or injuries sustained, which may also be 'shared' among several states. On the latter, see Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: a Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359.

By way of introduction, we sketch here two manifestations of regional approaches that do not equitably share responsibility for refugee protection. They are the international response to the Syrian refugee crisis and the move by Australia to use its regional neighbours for processing and resettlement of unauthorized boat arrivals. These scenarios represent two extremes in responses to refugees. On the one hand, countries neighbouring Syria bear the brunt of the Syrian refugee crisis. On the other hand, Australia has done all it can to avoid granting asylum to those arriving without a visa on boats organized by people smugglers. These two extremes informed some of our initial thinking about regionalism and responsibility and set the scene for the analysis that follows.

THE SYRIAN REGIONAL RESPONSE PLAN: SUCSESSES, CHALLENGES AND THE RISK OF CONTAINMENT

The importance of sharing responsibility for refugees is highlighted by many humanitarian tragedies. While this book was being written, the Syrian refugee crisis was prompting calls for a responsibility-sharing approach. Civil war erupted in Syria in March 2011. The ensuing conflict in Syria has led to a severe economic crisis in the country, the disruption of essential medical services and the destruction of more than 3000 schools.⁵ There has been an enormous outflow of refugees (over four million) to countries such as Jordan, Lebanon, Iraq, Turkey and Egypt as the conflict has worsened.

The United Nations High Commissioner for Refugees (UNHCR) adopted a 'regional response plan' (RRP) for the Syrian crisis. It has now been replaced by the 2015 Regional Refugee and Resilience Plan (3RP).⁶ The RRP began as a relatively small effort to deal with the 40 000 Syrians who had fled to Jordan, Lebanon, Turkey and Iraq between March 2011 and March 2012,⁷ but it has quickly escalated to become one

⁵ UNHCR, *2014 Syria Regional Response Plan: Strategic Overview* (United Nations, 2014) <<http://www.unhcr.org/syriarrp6/docs/Syria-rrp6-full-report.pdf>> 12.

⁶ United Nations, *Regional Refugee & Resilience Plan 2015–2016 In Response to the Syria Crisis: Regional Strategic Overview* (United Nations, 2015) <<http://www.3rpsyriacrisis.org/wp-content/uploads/2015/01/3RP-Report-Overview.pdf>>.

⁷ UNHCR, *Syria Regional Response Plan, March 2012* (United Nations, 2012) <<http://www.unhcr.org/4f6c80a49.html>> 4.

of the largest plans for dealing with displaced persons since the Second World War.⁸ In November 2015, the number of registered Syrian refugees had reached 4,289,792.⁹

The RRP differs from the regional arrangements discussed in this book, as it is essentially a refugee crisis response coordinated by the United Nations. Nevertheless, the crisis and response, including the regional focus, set the scene for our book. For our purposes, it is noteworthy that the RRP has served to protect refugees, but it has not generated enough by way of responsibility-sharing. This may well demonstrate that what is required in a regional refugee crisis is not simply a regional response, but a global and comprehensive response – that is, a response that involves states beyond the region of the refugee flow and opens up all of the traditional durable solutions to refugees, such as local integration in the country in which refugees first seek protection, voluntary repatriation to the country of origin and resettlement in countries beyond the immediately impacted region.

Under the RRP, hundreds of UN agencies and non-governmental organizations (NGOs) have come together to implement a coordinated response to the influx of refugees in the five main countries of asylum: Jordan, Lebanon, Iraq, Turkey and Egypt.¹⁰ The RRP was led by UNHCR, but implemented in collaboration with host governments and other UN agencies, numerous NGOs and international donors, whereas the 3RP is country-led with support from the UN and NGOs. The Syrian RRP and 3RP have utilized elements of a concept known as ‘refugee aid and development’ which was developed and implemented through some of the regional arrangements discussed in later chapters of this book, including targeting both local and refugee communities in the provision of services, and stimulating local economies through refugees’ participation in them.

The Syrian RRP has assisted Syrian refugees by bringing together relevant actors to develop a coordinated response to deal with the protection needs of refugees, by increasing services (in part through developing mobile registration units) that enable Syrians to register for refugee status, and by providing life-saving humanitarian assistance to refugees such as access to food, water and housing.

⁸ UNHCR, *2014 Syria Regional Response Plan*, above n 5, 38.

⁹ UNHCR, *Syria Regional Refugee Response* (November 2015) <<http://data.unhcr.org/syrianrefugees/regional.php>>.

¹⁰ UNHCR, *2014 Syria Regional Response Plan*, above n 5; United Nations, *Regional Refugee & Resilience Plan 2015–2016*, above n 6.

The Syrian RRP has encountered numerous difficulties. As UNHCR has documented, the dramatic increase of Syrian refugees in neighbouring countries has placed considerable pressure on the capacity of host states to absorb and protect refugees.¹¹ The International Human Rights Clinic at Boston University School of Law has described this pressure succinctly:

[c]ountries hosting the vast majority of the refugee flow out of Syria are stretched to the limits of their resources. Jordan, Lebanon and Egypt have huge refugee populations pre-dating the Syrian influx. Many, if not most, of these preexisting refugee groups live in desperate conditions, and host countries cannot meet all the refugees' assistance and protection needs. Lebanon and Egypt's unemployment rates are in the double-digits. Jordan is the fourth most water-stressed country in the world, with insufficient potable water for its own people. Lebanon and Egypt have extremely volatile political environments, and unstable governments. The Lebanese consider the Syrian conflict to have already crossed inside their territory and fear another civil war as a direct consequence if the war inside Syria is not halted soon. Turkey, the most stable host country, has already expended over \$2.5 billion on assisting refugees from Syria – a figure exceeding the entire EU contribution to the crisis thus far – and cannot by itself continue indefinitely to provide for the needs of the ever-growing refugee population coming over its long border with Syria.¹²

These host countries are experiencing difficulties providing health, education, food, water and sanitation services to refugees. For example, with respect to education, the 2014 version of the RRP documented that fewer than 40 per cent of the 735 000 school-age refugee children were enrolled in school.¹³ Further obstacles included language and curriculum differences, fears of harassment, school-related expenses, overcrowding, and certification and accreditation difficulties.¹⁴ In Egypt, the situation was particularly bad, with 90 per cent of school-age refugee children not attending school.¹⁵ The No Lost Generation strategy has been developed

¹¹ Jeff Crisp et al, *From Slow Boil to Breaking Point: A Real-Time Evaluation of UNHCR's Response to the Syrian Refugee Emergency PDES/2013/10* (UNHCR Policy Development and Evaluation Service, 2013) 3.

¹² Sarah Bidinger et al, *Protecting Syrian Refugees: Law, Policies, and Global Responsibility Sharing* (Boston University School of Law International Human Rights Clinic, 2014) <<https://www.bu.edu/law/central/jd/programs/clinics/international-human-rights/documents/FINALFullReport.pdf>> 1.

¹³ UNHCR, *2014 Syria Regional Response Plan*, above n 5, 24.

¹⁴ Ibid.

¹⁵ Ibid.

to ensure that a generation of Syrian refugee children will not suffer from lack of education while they are displaced.¹⁶

Economic difficulties affecting both refugees and citizens abound. In Lebanon, the World Bank and the UN stated that US\$1.4–\$1.6 billion were needed in 2014 alone ‘to stabilize and restore access and quality of health, education and social safety net services to pre-conflict level’.¹⁷ Health problems affect both refugees and citizens of host countries. Polio reemerged because of ‘low immunization rates among children, coupled with large population movements’,¹⁸ leading to mass immunization campaigns during 2014.¹⁹

As a consequence of these pressures, host states have at times implemented restrictive measures with regards to refugees. For example, Jordan and Iraq have insisted on opening camps in border areas.²⁰ Some host states have closed their borders, temporarily or indefinitely, and limited the assistance available to refugees residing outside the camps.²¹ Lebanon, which has a total population of four million, was hosting around 1.1 million refugees at the time of writing. The UN has warned of the serious threat this poses to Lebanon’s security and regional stability.²² As UNHCR argues, without ‘a visible and tangible demonstration of international solidarity and responsibility sharing, the protection environment for refugees can be expected to deteriorate rapidly’.²³

Funding for the Syrian RRP has also fallen short. While the 2014 RRP stated that donor support for the arrangement ‘has been generous’, with donors contributing over US\$2 billion to the regional arrangement in 2013, additional funding is needed.²⁴ In the 2014 RRP, the UN estimated that an additional US\$4.2 billion would be needed in 2014 for the Syrian RRP to work effectively.²⁵

States outside the region have been reluctant to offer resettlement places for Syrian refugees, thus limiting the options for refugees to bring

¹⁶ *No Lost Generation* <<http://nolostgeneration.org/>>.

¹⁷ UNHCR, *2014 Syria Regional Response Plan*, above n 5, 35.

¹⁸ *Ibid* 10.

¹⁹ United Nations, *Regional Refugee & Resilience Plan 2015–2016*, above n 6, 31.

²⁰ Crisp et al, above n 11, 3.

²¹ *Ibid*.

²² ‘UN warns Syrian refugee crisis could destabilize region’, *Fox News* (online), 3 July 2014 <<http://www.foxnews.com/world/2014/07/03/un-refugee-chief-warns-syrian-refugee-crisis-could-pose-serious-security-threat/>>.

²³ Crisp et al, above n 11, 3.

²⁴ UNHCR, *2014 Syria Regional Response Plan*, above n 5, 4.

²⁵ *Ibid* 6.

their displacement to an end. While Germany offered 28 500 resettlement places for Syrian refugees in 2014,²⁶ similar offers from other states are rare and small in relation to the numbers of persons displaced. A review of UNHCR's response to the Syrian crisis has argued that resettlement on a limited scale can nevertheless play an important role as it can provide protection to small numbers of particularly vulnerable refugees and serves to reassure 'host countries and communities that the international community is sharing responsibility for the Syrian refugees'.²⁷ Others have been more critical of the international community's very limited response. The Boston University School of Law International Human Rights Clinic argues that the RRP,

like the majority of reports and requests to the international community of states and donors, focuses on funneling financial resources into the countries hosting the refugees from Syria. While this aid is certainly important, we believe that it illustrates a containment paradigm that is unsustainable and dangerous, rather than an approach that more equitably shares the responsibility towards the individual refugees among the wider community of states outside the current host region. Antonio Guterres, the UN's High Commissioner for Refugees, has emphasized the critical need to change the paradigm, saying: 'it is not only financial, economic, and technical support to these States which is needed It also includes ... resettlement, humanitarian admission, family reunification, or similar mechanisms [for] refugees who are today in the neighboring countries but who cannot find a solution outside the region.'²⁸

REGIONALISM AS DETERRENCE AND RESPONSIBILITY-SHIFTING: DEVELOPMENTS IN AUSTRALIA

If the Syrian RRP may be viewed as masking regional containment of a refugee crisis through the international community's relative inaction, recent developments in Australia highlight the capacity of states to misuse regionalism in their response to refugee flows. Well before the Syrian crisis erupted in 2011, a low but rising tide of unauthorized boat arrivals in Australia and the Opposition's concerted criticism of this phenomenon provoked the Prime Minister at the time, Julia Gillard, to

²⁶ Migration Policy Centre, *Syrian Refugees: A snapshot of the crisis – in the Middle East and Europe* (October 2014) <<http://syrianrefugees.eu/>>.

²⁷ Crisp et al, above n 11, 4–5.

²⁸ Bidinger et al, above n 12, 1–2.

propose a ‘regional solution’ for boat arrivals. In announcing the proposal she noted the insignificant numbers of asylum seekers received in Australia: ‘in the context of our migration program, the number of asylum seekers arriving by boat to Australia is very, very minor. It is less than 1.5 per cent of permanent migrants each year; and indeed it would take about 20 years to fill the [Melbourne Cricket Ground] with asylum seekers at present rates of arrival.’²⁹ The contrast with a country like Lebanon, where a quarter of the population is now Syrian refugees, could not be greater. Nevertheless, the Prime Minister went on to propose ‘a regional approach to the processing of asylum seekers, with the involvement of the UNHCR, which effectively eliminates the onshore processing of unauthorized arrivals and ensures that anyone seeking asylum is subject to a consistent process of assessment in the same place.’³⁰

The backstory to this call for a regional solution is not a real refugee crisis like the Syrian crisis, but a ‘crisis’ manufactured for political purposes. The badging of various proposed solutions as ‘regional’ is also politically motivated. The arrival of refugees by boat has been a prominent focus of Australian national politics since the early 1990s, and increasingly so since the early 2000s. Prime Minister Howard (1996–2007) seized on the arrival in 2001 of 433 ‘boat people’ rescued by the Norwegian freighter *Tampa* as an opportunity to project his competence as a strong political leader. He contested and won the 2001 Australian federal election using the slogan ‘We will decide who comes to this country and the circumstances in which they come’.³¹ The government established offshore detention centres located in Nauru and Papua New Guinea, hoping that other countries would resettle those who were determined to be refugees in those centres, under a policy implemented from 2001 to 2007 known as the ‘Pacific Solution’, which suggested the Pacific region provide a solution for Australia’s problems through ‘extra-territorialisation’³² of protection responsibilities. It also implemented a

²⁹ Julia Gillard, ‘Julia Gillard’s Speech to the Lowy Institute on Labor’s New Asylum-Seekers Policy for Australia’, *The Australian* (online), 6 July 2010 <<http://www.theaustralian.com.au/archive/politics/julia-gillards-speech-to-the-lowy-institute-on-labors-new-asylum-seeker-policy-for-australia/story-e6frgczf-1225888445622?nk=92551f8d5d506223350018d42edbbce9>>.

³⁰ Ibid.

³¹ John Howard, *Election Speech Delivered at Sydney, NSW, October 28th, 2001* <<http://electionspeeches.moadoph.gov.au/speeches/2001-john-howard>>.

³² Madeline Garlick, ‘EU “Regional Protection Programmes”’: Development and Prospects’ in M Maes et al (eds), *External Dimensions of EU Migration and Asylum Law and Policy* (Bruylant, 2011) 356.

program of maritime interception to ensure that boats carrying asylum seekers would not reach Australian territory.

In 2008, when the number of people arriving by boat was low and the Howard government had wound back the Pacific Solution, the newly elected Labor government dismantled the offshore detention centres in Nauru and Papua New Guinea. During the 2010 and 2013 federal election campaigns, as the number of asylum seekers arriving by boat was on the rise, the Opposition Leader, Tony Abbott, reprised Howard's 2001 campaign mantra and pledged to 'stop the boats'.³³ In the hung parliament resulting from the inconclusive 2010 election, the Opposition used the increase in boat arrivals to force the Gillard government to change direction. Thus, by 2010, Prime Minister Julia Gillard was proposing a regional solution to boat arrivals which included the establishment of a 'processing' centre – that is, a centre at which refugee status determination was to be conducted – on Timor-Leste.³⁴ Regrettably, Timor-Leste, a small, newly independent and impoverished country, had not been properly consulted about the idea, which was essentially a pre-election pitch designed primarily for a domestic Australian audience and the proposal was rejected.

Subsequently, the Gillard government developed another concept, dubbed the 'Malaysia swap'. In exchange for resettlement in Australia of 4000 UNHCR-recognized refugees over a period of four years, Malaysia agreed to accept back from Australia 800 unauthorized boat arrivals.³⁵ However, implementation of this agreement was stymied by an action in the High Court of Australia which ruled that the determination by the Immigration Minister that Malaysia was a safe third country to which to return the 800 was invalid as it did not comply with the requirements of the *Migration Act*,³⁶ which included a legal obligation, either as a matter of international or domestic Malaysian law, to protect refugees.³⁷

Although the *Migration Act* was later changed, it took three attempts to pass amending legislation as each of the major parties had different views

³³ Tony Abbott, *Election Speech Delivered at Brisbane, Qld, August 8th, 2010* <<http://electionspeeches.moadoph.gov.au/speeches/2010-tony-abbott>>; Tony Abbott, *Election Speech Delivered at Brisbane, Qld, August 25th, 2013* <<http://electionspeeches.moadoph.gov.au/speeches/2013-tony-abbott>>.

³⁴ Julia Gillard, above n 29.

³⁵ *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* (signed 25 July 2011).

³⁶ *Migration Act 1958* (Cth).

³⁷ *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

on which destinations for returned or intercepted asylum seekers might serve their purposes. The Opposition insisted that it was appropriate to return to offshore processing on Nauru and Papua New Guinea, while the government was equally insistent on the Malaysia swap, no doubt to avoid reinstating the policies of the Howard era and thus being perceived as admitting that it had been misguided in changing from Howard's approach.

Eventually the government not only revived offshore detention and processing of refugee claims on Nauru and Papua New Guinea, but also negotiated two new 'regional resettlement arrangements'³⁸ intended to ensure that refugees were not just accommodated temporarily in these countries but permanently resettled there. Following the 2013 election, the incoming Coalition government built on this approach by adopting a new regional resettlement arrangement with Cambodia.³⁹

The use of the phrase 'regional resettlement arrangement' in this context is anomalous. It is notable that UNHCR uses the term 'relocation' rather than resettlement to describe the agreements between Australia and Papua New Guinea, Nauru and Cambodia.⁴⁰ The agreements display an upside-down approach to resettlement. Resettlement may be viewed as a discretionary process that implements a moral obligation to share some of the responsibility for refugees that is borne increasingly by the developing world. Statistics show that the proportion of the global number of refugees sheltered in the developing world has increased from

³⁸ For the versions of these arrangements current at the time of writing, see *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, 3 August 2013 <<http://www.dfat.gov.au/geo/Documents/nauru/nauru-mou-20130803.pdf>> and *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues*, 6 August 2013 <<http://www.dfat.gov.au/geo/papua-new-guinea/Documents/joint-mou-20130806.html>>.

³⁹ *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, relating to the Settlement of Refugees in Cambodia* (signed and entered into force 26 September 2014) <<http://dfat.gov.au/international-relations/themes/people-smuggling-trafficking/Documents/cambodia-australia-mou-and-operational-guidelines.pdf>>.

⁴⁰ UNHCR, 'UNHCR Statement on Australia-Cambodia agreement on refugee relocation' (Press Release, 26 September 2014) <http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=513:unhcr-statement-on-australia-cambodia-agreement-on-refugee-relocation&catid=35:news-a-media&Itemid=63>.

70 per cent to 86 per cent over the last decade.⁴¹ Australia has inverted the moral responsibility for resettling refugees by sending asylum seekers to developing countries in order to evade the hard legal obligations of allowing unauthorized boat arrivals to seek asylum in Australia.

Further problematic language use occurs with respect to the agreements with Papua New Guinea, Nauru and Cambodia in the use of the word ‘regional’, particularly in the phrase ‘regional cooperation’. For example, the memoranda of understanding (MOUs) with each of the three countries refer in their preambles to the regional cooperation framework adopted under the Bali Process on People Smuggling, Trafficking and Related Transnational Crime (Bali Process). While the focus on deterrence in these MOUs might be consistent with the original focus of the Bali Process, they do not, however, truly implement the regional cooperation framework, as the following brief synopsis of the Bali Process shows.

The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime in the Asia Pacific region began as a regional initiative to deal with the crimes of people smuggling and human trafficking.⁴² Its focus on transnational crime has been attractive to governments and, since its inception in 2002, the number of member states has increased to 45.⁴³

Despite the original focus on crime, Bali Process members agreed in 2011 to develop a Regional Cooperation Framework (RCF) to strengthen regional cooperation on irregular migration in a way that is protection-sensitive (although the word ‘protection’ was deliberately not used in the RCF). The RCF originated from a proposal UNHCR developed at a workshop on Regional Cooperation and Irregular Migration in Manila in November 2010. The proposal presented four potential initiatives for reducing irregular onward movements in the region: better data exchange to prevent use of fraudulent identity documents; more uniform and consistent asylum procedures to reduce so-called ‘forum’ or ‘venue’

⁴¹ UNHCR, *Global Trends 2013: War’s Human Cost* (UNHCR, 2014) 2; UNHCR, *Global Trends 2014: World at War* (UNHCR, 2015) 2.

⁴² See Foreign Ministers of Indonesia and Australia, *Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime: Co-Chairs Statement 26–28 February 2002* <<http://www.baliprocess.net/files/ConferenceDocumentation/BRMCI.pdf>>.

⁴³ In addition to the 48 members (45 states and 3 international organizations), another 18 states and 10 agencies participate in the Bali Process.

shopping;⁴⁴ more uniform standards of treatment for asylum seekers; and timely durable solutions for refugees to ease the burden on countries of first asylum.⁴⁵ Although UNHCR may have preferred a regional cooperation framework built solely around refugee protection issues rather than people smuggling and human trafficking,⁴⁶ it pragmatically channelled the interests of states within the Bali Process towards the enhancement of refugee protection in the region. According to UNHCR, the engagement of refugees with people smugglers would greatly decrease if states in the Asia Pacific region eradicated many of the factors that influence refugees to move onwards in search of protection, which include diversity in national responses to refugee issues, instability and unpredictability of protection for refugees, and lack of durable solutions for refugees in the region.⁴⁷

Bali Process members responded positively to UNHCR's proposals at the Fourth Ministerial Conference in March 2011 and the Bali Process Co-Chairs incorporated many of them into the RCF.⁴⁸ The Co-Chairs stated that asylum seekers should have access to consistent assessment processes in the region, that those found to be refugees should be provided with a durable solution, and that voluntary return options should be developed for those not in need of protection.⁴⁹ Furthermore, the Co-Chairs stated that any arrangement should 'promote human life and dignity' and 'reflect the principles of burden-sharing and collective responsibility'.⁵⁰

⁴⁴ We do not endorse the use of the term 'shopping' in this context, as we consider it offensive to say that a search for meaningful protection amounts to mere shopping.

⁴⁵ UNHCR, *Regional Cooperative Approach to Address Refugees, Asylum-Seekers and Irregular Movement* (Discussion Paper, November 2011) <<http://www.refworld.org/docid/4e92d7c32.html>> 5 ('*Regional Cooperative Approach*').

⁴⁶ UNHCR has not wished to focus on people smuggling and human trafficking in other regional processes. See Kristina Zitnanova, *Refugee Protection and Migration Dynamics in Central Asia* (Background paper for the Regional Conference on Refugee Protection and International Migration in Central Asia, Almaty, Kazakhstan, 15–16 March 2011) <<http://www.unhcr.org/4ddfb8459.html>>.

⁴⁷ UNHCR, *Regional Cooperative Approach*, above n 45, 5.

⁴⁸ Foreign Ministers of Indonesia and Australia, *Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, Indonesia, 29–30 March 2011*.

⁴⁹ *Ibid* [16](i)–(iv).

⁵⁰ *Ibid* [19] (i), (iii).

Although Australia, Cambodia, Papua New Guinea and Nauru are members of the Bali Process, the reference in the MOUs between Australia and each of them to the RCF endorsed by the Bali Process is misplaced. To begin with, a conception of ‘burden-sharing and collective responsibility’ that shifts protection to developing countries on the basis of monetary exchange is problematic. We explore this critique in Chapter 3 of this book.

It is clear that relocation to countries such as Nauru, Papua New Guinea and Cambodia is intended to deter future unauthorized boat arrivals and neatly fits the Abbott (and Turnbull) government’s ‘regional deterrence framework’⁵¹ which is designed to ‘stop people coming into the region and getting towards Australia’.⁵² The MOUs with Papua New Guinea and Nauru both identify deterrence as an objective of the agreement, stating that the transfer arrangements and establishment of processing centres are ‘a visible deterrent to people smugglers’.⁵³ In one sense, the deterrent is simply that people won’t be settled in Australia, but it could be argued that deterrent value also lies in the countries to which people are being relocated; so the region itself is used as a deterrent. This seems unlikely to cohere with other Bali Process members’ conceptions of regional cooperation. Furthermore, while bilateral agreements are contemplated under the RCF,⁵⁴ Australia has been prepared to ride roughshod over the concerns of at least one important regional neighbour – Indonesia. Australia has unilaterally intercepted boats and returned them to Indonesia, with Australian vessels entering

⁵¹ For the document outlining the framework announced during the 2013 election, see Liberal Party of Australia and The Nationals, *The Coalition’s Policy for a Regional Deterrence Framework to Combat People Smuggling* (August 2013) <<http://www.nationals.org.au/Portals/0/2013/policy/13-08-23%20The%20Coalition%E2%80%99s%20Policy%20for%20a%20Regional%20Deterrence%20Framework%20to%20Combat%20People%20Smuggling.pdf>>.

⁵² Scott Morrison, ‘Reintroducing TPVs to resolve Labor’s asylum legacy caseload, Cambodia’ (Press Conference, 25 September 2014) <<http://reliefweb.int/report/australia/reintroducing-tpvs-resolve-labors-asylum-legacy-caseload-cambodia>>.

⁵³ *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia*, above n 38 [1]; *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia*, above n 38, [1].

⁵⁴ Foreign Ministers of Indonesia and Australia, *Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, Indonesia, 29–30 March 2011* [17].

Indonesian waters at times, although reportedly inadvertently.⁵⁵ It also declared that it will not resettle refugees recognized by UNHCR Indonesia after July 2014.⁵⁶ Thus Australia has been engaging in selective bilateralism or unilateralism, rather than regional cooperation.

Finally, consideration of the outcomes of detention in the offshore centres and problems in the three countries selected for resettlement undermines any claim that Australia's policies are protection-sensitive and consistent with the RCF. The dire conditions in the detention centres in Nauru (which Nauru has since declared will be open centres) and Papua New Guinea have been criticized by non-governmental organizations such as Amnesty International and by UNHCR and the Australian Human Rights Commission.⁵⁷ Two people have died as a result of conditions in the Manus Island Detention Centre. A young Iranian

⁵⁵ Six incidents were the subject of a review by the Defence and Customs Departments which concluded that incursions into Indonesian territorial waters had been inadvertent. Australian Customs and Border Protection, 'Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders is Completed' (Media Release, 19 February 2014) <<http://newsroom.customs.gov.au/releases/joint-review-of-positioning-of-vessels-engaged-in-operation-sovereign-borders-is-completed>>. The public report was redacted and the Australian Senate's Foreign Affairs, Defence and Trade References Committee launched its own inquiry (see Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Breaches of Indonesian Territorial Waters* (2014)). The Committee was unable to glean much information from officials giving evidence because the Minister for Immigration claimed public interest immunity. Noting that there were two policy constraints on vessels involved in interceptions, namely that returns only be carried out where it was safe to do so and that activities were to be carried out beyond 12 nautical miles from Indonesia's archipelagic baseline, the Committee drew the following conclusion: 'Based on the paucity of evidence before it, the committee can only speculate on situations where a vessel commander, in following the first policy direction, may have inadvertently breached the second policy direction, particularly to ensure safety of life at sea.' Ibid cl 3.4.

⁵⁶ Sarah Whyte, 'Scott Morrison cuts off access to Australia for refugees in Indonesia', *The Sydney Morning Herald* (online), 18 November 2014 <<http://www.smh.com.au/federal-politics/political-news/scott-morrison-cuts-off-access-to-australia-for-refugees-in-indonesia-20141118-11p7ww.html>>.

⁵⁷ UNHCR, *UNHCR Mission to the Republic of Nauru 3–5 December 2012: Report* <http://unhcr.org.au/unhcr/images/Amended%20footnote%202012-12-14%20nauru%20monitoring%20report%20final_2.pdf>; Amnesty International, *This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (Amnesty International Australia, 2013) <http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf>; Australian Human Rights Commission,

asylum seeker, Reza Barati, was killed during a riot,⁵⁸ apparently by local detention centre workers.⁵⁹ Another young Iranian asylum seeker, Hamid Kehazaei, contracted septicaemia when he cut his foot on the island and died in an Australian hospital.⁶⁰

Similarly, the promotion of durable solutions referred to in the RCF is unlikely to be realized in Australia's resettlement arrangements with Nauru, Papua New Guinea and Cambodia; their prospects of success are dim. In Papua New Guinea, refugee resettlement is beset by problems such as a lack of private land, the largely monoracial society and high levels of violence.⁶¹ Nauru's reality is reflected in the terms of its MOU with Australia. The MOU states that the 'Republic of Nauru undertakes to enable Transferees who it determines are in need of international protection to settle in Nauru, subject to agreement between Participants on arrangements and numbers.'⁶² Further, the 'Commonwealth of Australia will assist the Republic of Nauru to settle in a third safe country all Transferees who the Republic of Nauru determines are in need of international protection, other than those who are permitted to settle in Nauru'.⁶³ The reality for Nauru is that it is a small island of 21 square kilometres, with large swathes of land rendered uninhabitable by phosphate mining and an island society that could be difficult for the few refugees who could theoretically be resettled there to adjust to. In

The Forgotten Children: National Inquiry into Children in Immigration Detention (November 2014) <https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf> ch 12.

⁵⁸ Robert Cornall, *Review into the Events of 16–18 February 2014 at the Manus Regional Processing Centre* (Department of Immigration and Border Protection, 23 May 2014). <https://www.immi.gov.au/about/dept-info/_files/review-robert-cornall.pdf>.

⁵⁹ At the time of writing, two Papua New Guinean men were on trial for the murder of Reza Barati.

⁶⁰ Max Chalmers, 'It's 145 Days Since Hamid Kehazaei Died, and the Abbott Government is Still Keeping the Final Death Report Secret', *New Matilda* (online), 28 January 2015 <<https://newmatilda.com/2015/01/28/its-145-days-hamid-kehazaei-died-and-abbott-govt-still-keeping-final-death-report-secret>>.

⁶¹ Andrea Babon, 'What life can a resettled refugee expect in PNG?', *The Conversation* (online), 23 July 2013 <<http://theconversation.com/what-life-can-a-resettled-refugee-expect-in-png-16297>>.

⁶² *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia*, above n 38, cl 12.

⁶³ *Ibid* cl 13.

September 2015, allegations of rape made by refugees cast grave doubt on the capacity of Nauru to act as a place of resettlement.⁶⁴

The situation in Cambodia is not promising either. In November 2014 Human Rights Watch interviewed a number of refugees who were in Cambodia and noted that Cambodia does not apply the provisions of its own law, which requires issuance of a Cambodian residence card,⁶⁵ thus creating problems for refugees in accessing employment and education.⁶⁶ In its MOU with Australia, Cambodia undertakes to grant permanent residence status to refugees,⁶⁷ while Australia has committed significant funds for their resettlement and additional aid funding.⁶⁸ Theoretically the Australian commitment should be sufficient incentive for the implementation of the MOU, including the granting of permanent residence under Cambodian law, but levels of corruption⁶⁹ in Cambodia give rise to pessimism about whether this will be achieved.

The refugees interviewed by Human Rights Watch described endemic corruption, discrimination against refugees and living in poverty in Cambodia. Human Rights Watch also noted the lack of mental health services, which are much needed by victims of trauma such as refugees, and criticized the requirement that after a temporary period of accommodation in the capital, Phnom Penh, refugees are to be resettled in rural locations where it will be even more difficult for refugees to integrate.⁷⁰ The MOU with Cambodia displays the same problems as Australia's 'Malaysia swap' MOU, as it has been negotiated with a view to what might happen in the future and as a financial deal, rather than with any real regard to the track record of Cambodia in the protection of refugees.

⁶⁴ Timna Jacks, 'Two Refugees allege they were raped on Nauru', *Sydney Morning Herald*, 29 September 2015.

⁶⁵ Human Rights Watch, 'Australia: Reconsider Nauru Refugee Transfers to Cambodia', *Human Rights Watch* (online), 20 November 2014 <<http://www.hrw.org/news/2014/11/20/australia-reconsider-nauru-refugee-transfers-cambodia>>.

⁶⁶ Ibid.

⁶⁷ *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia*, above n 39, cl 8.

⁶⁸ Ibid cl 12; Samantha Hawley, 'Cambodia Refugee Deal: Protests outside Australian Embassy in Phnom Penh as Scott Morrison signs agreement', *ABC News* (online), 27 September 2014 <<http://www.abc.net.au/news/2014-09-26/immigration-minister-to-sign-cambodia-refugee-deal/5770468>>.

⁶⁹ In 2014 Cambodia ranked 156th out of 175 countries in Transparency International's Corruption Perceptions Index, with a score of 21.

⁷⁰ Human Rights Watch, above n 65.

LEARNING FROM PAST AND PRESENT REGIONAL ARRANGEMENTS

The twin poles of the refugee problem described in this chapter – the largest refugee crisis since the Second World War and Australia’s response to boat arrivals, which is arguably one of the most extreme of any Western industrialized country – demonstrate the importance of close examination of the concepts of responsibility-sharing and regionalism in refugee protection. Examination of these concepts is critical to ensuring that only best practices developed in the context of regional arrangements are applied in responses to present and future refugee flows and that misuse and abuse of the concepts of regionalism and responsibility-sharing are discouraged.

This book examines past and present regional arrangements for refugees from several different regions of the world – the Comprehensive Plan of Action for Indochinese Refugees in Southeast Asia, the International Conferences on Assistance to Refugees in Africa, the International Conference on Central American Refugees, the Common European Asylum System, and the present arrangements in Latin America.

We argue that regional arrangements such as these may play a pivotal role in responding to refugee situations if they address the specific needs of refugees in the region, foster greater attention to these needs from states, and are developed in accordance with international human rights standards. The clear and fair apportioning of responsibility among states could greatly enhance protection for refugees and minimize conflict between states. However, as we have examined past and current arrangements, we have been puzzled by the description of some of them as ‘regional’ and we interrogate the conception of ‘regionalism’ that may underpin some of them. Like the authors of the Boston Human Rights Clinic’s report on the Syrian refugee crisis,⁷¹ we are concerned that regionalism may serve as a containment device that does not adequately respond to refugee protection needs. We have also been struck by the fact that as refugees are usually fleeing from, as well as sheltered in countries in the developing world which are often ill-equipped to host them, cooperation between the Global North and the Global South is essential for equitable responsibility-sharing.

⁷¹ Bidinger et al, above n 12.

AN INTRODUCTION TO THE KEY CONCEPTS EXPLORED IN THIS BOOK

When referring to a refugee, this book adopts the international legal definition contained in the 1951 Convention Relating to the Status of Refugees (Refugee Convention).⁷² Article 1A(2) of the Refugee Convention, as modified by the 1967 Protocol Relating to the Status of Refugees,⁷³ defines a refugee as someone who is outside their country of origin and unable or unwilling to return or to avail themselves of that country's protection owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Under international law, a person becomes a refugee as soon as they meet the criteria contained in the definition – not when a court or other state body declares that the person is a refugee.⁷⁴ Thus this book refers to persons as refugees if they fulfil the criteria of the definition, even if they have not undergone any process to determine their status as refugees. Nevertheless, recognizing that some persons seeking recognition as refugees may not in fact meet those criteria, the book sometimes uses the term 'asylum seekers' for potential refugees. Where appropriate the book also utilizes the regional definitions of a refugee adopted in Africa and Latin America. In both these regions an expanded definition of a refugee that includes people fleeing generalized violence has been adopted.⁷⁵

Although we use the present legal definitions, we recognize that if responsibility for refugees is to be shared equitably, it would be helpful if the broader regional definitions of a refugee/beneficiaries of protection were to be adopted universally. A fragmented definition of a refugee undermines effective cooperation between regions.

⁷² *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('Refugee Convention').

⁷³ *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

⁷⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR, 1979 re-edited 1992) 28.

⁷⁵ *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974); *Cartagena Declaration on Refugees*, above n 3.

We examine the extent to which regional arrangements for the protection of refugees have shared responsibility for refugee protection. The term responsibility-sharing refers to arrangements in which the effort regarding refugee protection and durable solutions is shared among states. This may include the demarcation of different roles and responsibilities among states with respect to refugees. Responsibility-sharing includes sharing responsibility both for physically hosting refugees and for financing refugee protection. It may also include sharing resources other than financial resources, such as specialized personnel, information or technology among states.

Finally, the book explores the notion of regionalism as implemented, whether consciously or not, through these arrangements for refugee protection. Some regional arrangements for refugee protection may be regional only in the sense that they involve states in a particular geographical part of the globe. Other so-called regional arrangements may begin as a response to a refugee flow that is regional in origin, but may draw in many states beyond that region. Some arrangements may also encapsulate various forms of regionalism that reflect an imagined sense of community or regionally distinct approaches to refugee protection, whether positive or negative.

As a starting point for unpacking the conceptions of regionalism that may be at work in these arrangements, we adopt the definition of regionalism offered by the political theorist Louise Fawcett, who suggests that regionalism involves the pursuit or promotion of common goals among a group of states that share identifiable patterns of behaviour.⁷⁶ Regionalism may involve an imagined community, a geographical relationship or a degree of mutual independence between states. Thus regionalism is broader than the mere geographic reality of states sharing a common space on the globe. With respect to refugees, regional approaches have been developed in part, we suggest, because of the regional nature of refugee movements, and in part because of external factors such as shared impacts on, and interests among states, shared cultures and traditions, and the limitations of unilateral and global responses.

⁷⁶ Louise Fawcett, 'Exploring Regional Domains: A Comparative History of Regionalism' (2004) 80 *International Affairs* 429, 433.

STRUCTURE OF THE BOOK

The book is divided into two parts. In the first part, we examine the concepts of regionalism, responsibility for refugees and responsibility-sharing with respect to refugees. Chapter 1 looks at regionalism in international politics and refugee law before considering the realities of refugee protection in the major regions of the world and the theoretical merits of regional arrangements for refugees. Chapter 2 examines the philosophical and ethical reasons why states should take responsibility for refugees. In other words, it explores why nation states should not return refugees to places of persecution and why they should respect the rights of refugees, thus establishing a basis from which the concept of responsibility-sharing can be developed. In Chapter 3 we examine why and how responsibilities for refugees should be shared amongst states.

Part II of the book looks at the regional arrangements for the protection of refugees in some detail, focusing on past regional arrangements first, and then turning to look at two regional arrangements for the protection of refugees that are presently in operation. For each of the five regional arrangements examined in Part II, we consider whether they have resulted in better refugee protection and durable solutions, the extent to which responsibility for protection of refugees was shared, in what sense the arrangement could be considered 'regional' and whether a particular kind of 'regionalism' is or was at work.

Finally, we compare and contrast all five regional arrangements for refugees and consider what lessons can be learned from these arrangements, what features of these arrangements can be utilized in future for the protection of refugees and whether regional approaches offer something valuable to the international refugee regime.

PART I

Regionalism, responsibility and responsibility-sharing

1. Regionalism and refugee protection

This book examines a number of different multilateral arrangements for refugees, all of which have been described as ‘regional’ arrangements in the literature. But are they truly regional, and do regional approaches offer something additional to or better than the universal framework for refugees? It is not immediately obvious why a regional approach should be adopted. Are refugees merely a regional problem and what role does ‘regionalism’ play in responding to the global issue of refugees? What does the term ‘regionalism’ signify, other than a geographical reference point? What might regional arrangements offer that is better than or supplemental to a global approach? And, most importantly for our purposes, how does regionalism promote or impede the protection of refugees and responsibility-sharing?

Frequently recurring features of many arrangements regarding refugees suggest that the term ‘regional’ is appropriate as a descriptor. The origin and impact of the refugee flow concerned may be largely confined to a particular geographical region of the globe; states in this region may participate in the arrangement; and the arrangement may be adopted under, or may otherwise involve a regional organization such as the European Union, the African Union or the Organization of American States.

On the other hand, some arrangements involve states from all parts of the world. States from outside the region in which the refugee flow begins may play important roles in providing durable solutions for refugees such as resettlement or financial support. Seventy-five countries were represented at the conference at which the Comprehensive Plan of Action for Indochinese Refugees (CPA) was adopted in 1989. Crucially, the CPA secured the participation of Australia, Belgium, Canada, Denmark, Finland, France, Germany, Japan, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom and the United States in resettlement.¹ Even the Common European Asylum System (CEAS), which has been adopted under EU auspices and is limited to EU

¹ W C Robinson, *Terms of Refuge: The Indochinese Exodus & the International Response* (Zed Books, 1998) Appendix 2.

members, with some participation by associated states, Norway, Liechtenstein, Iceland and Switzerland,² has an external element. The external element includes a joint EU resettlement programme and five regional protection programmes which are primarily focussed on protection and durable solutions within countries of first asylum.³

In this chapter, we look first at regionalism as a phenomenon in international politics. Second, we consider the history of regionalism in refugee law. Third, we look at five main regions of the world, examining ‘regionalism’ and the approach to asylum in those areas as context for our examination of regional arrangements. Finally, we examine possible reasons to promote regional arrangements for sharing refugees and potential downsides of regional approaches.

REGIONALISM IN INTERNATIONAL POLITICS

Regions and regionalism, Louise Fawcett explains, are contested and often fuzzy concepts.⁴ What defines a region is not simply a matter of geography, but may include identifiable patterns of behaviour, an imagined community,⁵ or a geographical relationship and a degree of mutual interdependence.⁶ Meanwhile, regionalism aims to ‘pursue and promote common goals in one or more issue areas’⁷ on a ‘geographically restricted basis’.⁸ Regionalism can manifest as ‘hard regionalism’ – institutional organizations, for example – or ‘soft regionalism’ that fosters

² See Steve Peers, *The Second Phase of the Common European Asylum System: A Brave New World – or Lipstick on a Pig?* (Statewatch, 2013) <<http://www.statewatch.org/analyses/no-220-ceas-second-phase.pdf>>. As Peers has noted, the UK, Ireland and Denmark have opted out of the second phase of the Common European Asylum System.

³ The five regional protection programmes are for the Great Lakes Region (focused on Tanzania), the Western Newly Independent States (Belarus, Moldova and Ukraine), the Horn of Africa (Kenya, Djibouti and Yemen), Eastern North Africa (Tunisia, Libya and Egypt) and the Middle East (Lebanon, Jordan and Iraq), the last of which, a ‘regional development and protection programme’ is a response to the Syrian refugee crisis.

⁴ Louise Fawcett, ‘Exploring Regional Domains: A Comparative History of Regionalism’ (2004) 80(3) *International Affairs* 429, 431.

⁵ This idea draws on Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1983).

⁶ Fawcett, above n 4, 432.

⁷ *Ibid* 433.

⁸ John Ravenhill, *APEC and the Construction of Pacific Rim Regionalism* (Cambridge University Press, 2001) 6.

a sense of community.⁹ It is not confined to states and Fawcett argues that 'a truly successful regionalist project today presupposes eventually linkages between state and non-state actors: an interlocking network of regional governance structures, such as those already found in Europe, and to some extent in the Americas, as demonstrated in the NAFTA process'.¹⁰

Many purposes may be, or have been pursued through regionalism, such as cooperation, whether in the pursuit of an imagined regional community or not, gaining economies of scale otherwise unavailable to small states wanting to be competitive, containment of a hegemon, and so on; and there are various theoretical explanations of regionalism, particularly regional integration. For example, neofunctionalism posits that states integrate in order to secure maximum welfare, while inter-governmentalism views regional integration as a series of bargains by political leaders.¹¹ As Ravenhill points out, theories of regionalism are often mutually contradictory,¹² and there may be 'more angst than joy in theorizing about regionalism.'¹³

The possibilities of regionalism and the forms it takes depend on factors such as levels of interdependence and shared identity in the region.¹⁴ Fawcett flags three issues as highly important: capacity, sovereignty and hegemony.¹⁵ As she says, lack of capacity as well as concerns about sovereignty may mean that some regional institutions are mere talking shops.¹⁶ Meanwhile strong states are able to use regional groups as a cover for their own interests.¹⁷ Conversely, however, regional groups may contain the power of the regional hegemon.¹⁸

Immediately after the Second World War, universal multilateral institutions were emphasized – the formation of the United Nations being the key example – but, as Hurrell writes, regionalism became more important because of the Cold War impact on the universal institutions. Well-known Cold War problems at the UN include the infamous deadlock of the UN

⁹ Fawcett, above n 4, 433.

¹⁰ Ibid 433.

¹¹ Walter Mattli, *The Logic of Regional Integration: Europe and Beyond* (Cambridge University Press, 1999) 10.

¹² Ravenhill, above n 8, 9.

¹³ Ibid 38.

¹⁴ Fawcett, above n 4, 435.

¹⁵ Ibid 442.

¹⁶ Ibid 443.

¹⁷ Ibid 444.

¹⁸ Ibid 445. Examples include the United States in the Americas, and Russia and Uzbekistan in Central Asia.

Security Council and the slow progress of translation of human rights into the two major treaties – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.¹⁹ Regionalism ‘gathered pace’ in the late 1980s, leading to much scholarship on the ‘new regionalism’.²⁰

The ‘old’ regionalism or the first wave that emerged in Europe in the late 1940s and led to institutional structures such as the European Economic Community was focused on integration and, as described by Söderbaum and Shaw, ‘had its roots in the devastating experience of inter-war nationalism and the Second World War.’²¹ The key debate about the old regionalism was ‘whether regionalization was a stumbling-block or a stepping-stone towards globalization and improved multi-lateralism.’²²

‘New’ regionalism is not necessarily focused on supra-national institutions,²³ though there are examples of the latter in recent times – for example, the creation of the African Union which, similarly to the EU, it is hoped, will promote peace and prosperity in the African continent through integration.²⁴ A lot of new regionalism has focused on the neo-liberal agenda of opening up economies to the global market.²⁵ There is, however, a critical scholarship of ‘new regional approaches’ which focuses on other forms of regionalism, such as bottom-up regionalism effected by non-state actors.²⁶

¹⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

²⁰ Andrew Hurrell, ‘One World? Many Worlds? The Place of Regions in the Study of International Society’ (2007) 83(1) *International Affairs* 127, 129.

²¹ Timothy M Shaw and Fredrik Söderbaum, ‘Introduction: Theories of New Regionalism’ in Timothy M Shaw and Fredrik Söderbaum (eds), *Theories of New Regionalism: A Palgrave Reader* (Palgrave Macmillan, 2003) 1, 3.

²² *Ibid* 5.

²³ J Andrew Grant and Fredrik Söderbaum, ‘Introduction’ in J Andrew Grant and Fredrik Söderbaum (eds), *The New Regionalism in Africa* (Ashgate, 2003) 1, 3–5.

²⁴ For analysis, see Olufemi Babarinde, ‘The EU as a Model for the African Union: the Limits of Imitation’ (Jean Monnet/Robert Schuman Paper Series 7 (2), Miami-Florida European Union Center of Excellence, 2007) 3.

²⁵ Grant and Söderbaum, above n 23, 8.

²⁶ *Ibid* 9; Okechukwu C Iheduru, ‘New Regionalism, States and Non-State Actors in West Africa’ in J Andrew Grant and Fredrik Söderbaum (eds), *The New Regionalism in Africa* (Ashgate, 2003) 47.

A final phenomenon worth noting is that of ‘inter-regionalism’ – put most simply, region-to-region interaction.²⁷ This phenomenon could play a role in resolving refugee flows – for example, the flow from the Middle East and North Africa to Europe. Perhaps it might also be an appropriate descriptor for schemes that propose collaboration between the Global North and the Global South.

Despite the wealth of theoretical material seeking to explain regionalism as a phenomenon, there is, disappointingly, remarkably little discussion of refugee flows, or even migration more broadly in the literature concerning the new regionalism, although some refugee lawyers have acknowledged the impact of regionalism on refugee protection.²⁸ Walter Mattli, a theorist of regionalism who does touch on migration, describes the way in which the prospect of economic migration, particularly unauthorized migration from poorer economies on the periphery of a regional union, may be handled by offering trade and investment to these states in an effort to deflect the possibility of migration.²⁹ When the European Community (as it then was) was faced with mass migration from Eastern Europe, trade concessions were offered first in an effort to stop migration.³⁰ The EU’s regional protection programmes³¹ could similarly be viewed as an attempt at containment of refugee flows.³²

In the past, however, regionalism has often been a force not for containment, but expansion in refugee protection, establishing and expanding basic norms. The next section undertakes a retrospective, underscoring the positive impact that regionalism has had for refugee protection.

²⁷ For a good discussion of inter-regionalism and a critique of the terms ‘old’ and ‘new’ regionalism, see Fredrik Söderbaum and Luk Van Langenhove, ‘Introduction: The EU as a Global Actor and the Role of Interregionalism’ (2005) 27 *Journal of European Integration* 249.

²⁸ Susan Kneebone and Felicity Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers: Challenges Ahead* (Berghahn Books, 2007); see also Ademola Abass and Francesca Ippolito (eds), *Law and Migration: Regional Approaches to the Protection of Asylum Seekers: an International Legal Perspective* (Ashgate, 2014).

²⁹ Mattli, above n 11, 95.

³⁰ *Ibid* 97–9.

³¹ See above n 3 and accompanying text.

³² For discussion of the history of the regional protection programmes and why some commentators see them as emanating from an impulse of migration control rather than a protection ethos, see Madeline Garlick, ‘The EU Discussions on Extraterritorial Processing: Solution or Conundrum?’ (2006) 18 *International Journal of Refugee Law* 601.

REGIONALISM AND REFUGEES IN HISTORICAL PERSPECTIVE

Regional efforts to protect refugees have a long heritage. The major international treaty for the protection of refugees – the 1951 Convention Relating to the Status of Refugees³³ which, together with its 1967 Protocol³⁴ now boasts 148 countries as parties – can itself be viewed as a regional document.³⁵ It was conceived as a response to refugees in Europe displaced during the course of the Second World War and those fleeing Communist countries after the war. The definition of a refugee applies to someone who is outside their country of origin and unable or unwilling to return owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion³⁶ – so it clearly captures the experiences of Jews fleeing the Nazis and responds by obliging states to provide protection.

The Refugee Convention imposes the obligation of *non-refoulement*³⁷ – the obligation not to return a refugee to a country where the person apprehends, on good grounds, that he or she will be irreparably harmed. Those who drafted the Refugee Convention were clearly of the view that to return a refugee to the prospect of irreparable harm would implicate the authorities of the country in which asylum had been sought. To return a refugee, they said, would be tantamount to delivering him into the arms of his persecutors.³⁸ In other words, we take responsibility for refugees in order to protect human dignity; if we do not, we are responsible for what eventually may befall them.

³³ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) (Refugee Convention).

³⁴ *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

³⁵ Susan Kneebone and Felicity Rawlings-Sanaei, 'Introduction: Regionalism as a Response to a Global Challenge' in Susan Kneebone and Felicity Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers: Challenges Ahead* (Berghahn Books, 2007) 4.

³⁶ Refugee Convention, above n 33, Art 1A(2).

³⁷ Ibid Art 33.

³⁸ *Report of the Ad Hoc Committee on Statelessness and Related Problems, (Lake Success, New York, 16 January – 16 February 1950)* (UN Economic and Social Council, 17 February 1950) UN Doc E/1618; UN Doc E/AC.32/5 <<http://www.refworld.org/docid/40aa15374.html>> annex II (Comments on the Draft Convention).

Any breach of the obligation of *non-refoulement* entails liability as a matter of international law. Importantly, the obligation extends to ‘chain *refoulement*’ whereby a state sends a refugee to a third state which then returns the refugee to a place of persecution, and it applies extra-territorially, meaning that states cannot intercept refugees in places beyond their territory in order to return them to a place of persecution.³⁹ The Refugee Convention also sets out a bill of rights for refugees, including rights to education (Article 22), to work (Articles 17, 18 and 19), freedom of religion (Article 4) and access to the courts (Article 16), as well as some rights that deal with particular refugee problems, such as a right to travel documents (Article 28). This compensates for the lack of protection from the state of origin.

In common with many areas of international law, the ‘universal law’ has reflected a particular European experience.⁴⁰ This does not necessarily undermine the importance of the universal norms established – in the case of refugee law, the norm of *non-refoulement* – given the widespread practice in conformity with it (discussed below) and the diverse religious and philosophical traditions that also support it (discussed in Chapter 2). However, the historically contingent nature of what has become universal law does remind us to question the interests reflected in the law, a particularly pertinent inquiry when considering the way in which responsibility for refugee protection is or is not shared amongst members of the international community.

³⁹ Concerning extra-territoriality of *non-refoulement*, see *Haitian Center for Human Rights v United States of America* (Inter-American Commission of Human Rights, Case 10.675, Report No 51/96, 13 March 1997) [156]–[158]. The extra-territoriality of the prohibition on torture and related ill-harm in the European Convention on Human Rights has been confirmed by the European Court of Human Rights in *Hirsi Jamaa and Others v Italy* (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012). The prohibition on chain *refoulement* has been confirmed in *M.S.S. v Belgium and Greece* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011).

⁴⁰ For analyses of international law’s tendency to universalize from European perspectives and experiences, see Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004); Sundhya Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011).

The Universalization of the Refugee Convention

Since the Refugee Convention was adopted back in 1951, many other human rights treaties have extended the obligation of *non-refoulement* to other forms of harm, including torture⁴¹ and forced disappearance.⁴² Even in states that have not signed up to these treaty obligations, it would be rare indeed to find a statesperson who would argue that it is permissible to return someone to these forms of harm. International lawyers argue that there is now an unwritten norm of international law – a customary international law – forbidding *refoulement* to torture and persecution.

Traditionally, the development of customary international law requires widespread and consistent⁴³ state ‘practice’ (that is, what states actually do), combined with a belief that the practice is required by law (the element known as *opinio juris*). *Opinio juris* may be gleaned from statements by state officials – for example, in diplomatic correspondence or statements justifying a vote for a resolution on the floor of the United Nations’ General Assembly. Customary international law has a particularly slippery handle because of the lack of adjudication in the international legal system. States may do things they are not supposed to do and which may be prohibited by treaty, including the United Nations Charter⁴⁴ itself, with relative impunity. In the case of human rights treaties, which may be honoured in the breach when states that violate them deny the violation or seek to justify it in some way, participation in the treaties themselves tends to be treated as the relevant practice, and

⁴¹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

⁴² *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 20 December 2006, UNTS 2715 (entered into force 23 December 2010).

⁴³ See for example the test set in the Asylum Case of ‘constant and uniform’ practice: *Asylum Case (Colombia v Peru)* [1950] ICJ Reports 266 [279].

⁴⁴ This was the dilemma faced by the International Court of Justice in the famous *Nicaragua* case where it had to ascertain the customary international legal rules relating to the use of force in international relations in the face of several breaches of the UN Charter, because the Charter was ousted from consideration as a result of the United States’ reservations to the Court’s jurisdiction: *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14.

certainly not the violations of human rights.⁴⁵ It is accepted that widely ratified treaties can codify customary international law, crystallize inchoate norms of customary international law or generate new customary international law.⁴⁶

It is well-accepted that the prohibition on torture and related ill-treatment and its ban on *refoulement* to a place where these forms of ill-treatment will occur is customary international law, and, moreover, *jus cogens*, meaning that it is non-derogable in all circumstances and binding on every single state. This is despite the frequency with which torture is carried out.⁴⁷ It is also widely accepted that the prohibition on *refoulement* to a place of persecution is customary international law.⁴⁸ In 2001, the parties to the Convention and to the Protocol declared that the obligation of *non-refoulement* contained in the 1951 Convention Relating to the Status of Refugees is customary international law.⁴⁹

Many states that are not party to the universal instruments on refugee protection or their regional counterparts have in practice accepted an obligation of temporary refuge with respect to refugees. However, some states may resist entirely the idea that they are bound not to return refugees as a matter of international law. Sri Lanka, for example, has

⁴⁵ Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law' (2001) 95 *American Journal of International Law* 757.

⁴⁶ For the principle that widely ratified treaties may generate customary international law, see *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Judgment)* [1969] ICJ Rep 3.

⁴⁷ Until the 'war on terror' it would have been possible to assert that surely no state official would ever argue that these forms of ill-treatment were justified. Infamously, the so-called 'torture memos' developed by the United States State Department do argue that ill-treatment is justified in certain circumstances. See Karen J Greenberg and Joshua L Dratel, *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005) 172, 213–4. The Obama administration voided most of these memos through Executive Order EO 13492 'Ensuring Lawful Interrogation' (signed 22 January 2009) 74 FR 4893, 27 January 2009. In any event, the arguments in the torture memos are not accepted by the majority of international legal opinion.

⁴⁸ Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: Global Consultations on International Protection* (Cambridge University Press, 2003) 87, 149.

⁴⁹ *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol Relating to the Status of Refugees* (adopted at the Ministerial Meeting of States Parties in Geneva Switzerland on 13 December 2001) UN Doc HCR/MMSP/2001/09 (16 January 2002) [4].

been strident in its opposition to protection of refugees, particularly Tamils seeking protection in other countries.⁵⁰ It is also notable that in the case of the Southeast Asian states that participated in the Comprehensive Plan of Action for Indochinese refugees,⁵¹ agreement to accord temporary refuge or first asylum was premised on the acceptance of resettlement obligations by Western states. Some of the Southeast Asian states pushed back boats, meaning that they might argue they are ‘persistent objectors’ to the prohibition on *refoulement* and therefore not bound by the customary international legal prohibition of *non-refoulement*.⁵² Thailand has pushed back boats of Rohingya⁵³ and later Malaysia and Indonesia also threatened not to accept Bangladeshi migrants and Rohingya asylum seekers.⁵⁴ On the other hand, Thailand is a member of the Executive Committee of the High Commissioner’s Programme (ExCom), which has constantly reaffirmed *non-refoulement* as customary international law.⁵⁵ Furthermore, the ASEAN Human Rights Declaration now protects a right to seek and receive asylum, although a ‘clawback’ clause that refers to applicable international agreements and the law of the state concerned needs to be read down in order to make the provision meaningful.⁵⁶

⁵⁰ See for example the first report by Sri Lanka to the UN Counter-Terrorism Committee, where Sri Lanka stated it did not grant asylum as a matter of policy: *First Report of Sri Lanka* UN Doc S/2001/1282 (27 December 2001) 6.

⁵¹ UN General Assembly, *Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees, Report of the Secretary-General* UN DocA/44/523 (22 September 1989) <www.unhcr.org/refworld/docid/3dda17d84.html>.

⁵² The principle of the persistent objector was accepted by the International Court of Justice in the *Anglo-Norwegian Fisheries Case: Fisheries Case (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116 [138]–[139].

⁵³ Human Rights Watch, ‘Thailand: Fleeing Rohingya Shot in Sea by Navy’, *Human Rights Watch* (online), 13 March 2013 <<http://www.hrw.org/news/2013/03/13/thailand-fleeing-rohingya-shot-sea-navy>>.

⁵⁴ ‘Malaysia to follow Indonesia in turning back migrant boats; thousands may face starvation at sea’, *ABC News* (online), 13 May 2015 <<http://www.abc.net.au/news/2015-05-13/malaysia-to-turn-back-migrant-boats/6466726>>.

⁵⁵ Walter Kälin, Martina Caroni and Lukas Heim, ‘Article 33, Para. 1’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: a Commentary* (Oxford University Press, 2011) 1327, 1345.

⁵⁶ *ASEAN Human Rights Declaration* (adopted by the Heads of State/Government of ASEAN Member States at Phnom Penh, Cambodia, 18 November 2012).

It is possible to conclude that despite the contrary practice by some states parties and the non-accessions by some other states, the Refugee Convention has acted as an important precedent, establishing the universal principle that there are some situations to which we will never return a person because to do so would be complicit in the harm that follows.

Regional Reactions and Refinements to the Refugee Convention

Despite its universal significance, the Refugee Convention's origins in regional history were quite obvious when it was first adopted. The Convention originally contained a deadline of 1 January 1951 and parties could choose to limit their obligations to refugees fleeing events in Europe;⁵⁷ so it was both based on and limited to the European experience during the Second World War and its aftermath. These geographical and temporal limitations were lifted by the 1967 Protocol Relating to the Status of Refugees,⁵⁸ which was itself responding to regional developments.

African countries were concerned by the narrow terms of the Convention definition, including the operation of the date line,⁵⁹ and adopted their own refugee definition. Importantly, the definition adopted by the Organization of African Unity (OAU, now the African Union) includes refugees fleeing generalized violence, as well as those fleeing persecution for reasons connected to the five established grounds.⁶⁰

⁵⁷ Refugee Convention, above n 33, Art 1A(2) and Art 1B.

⁵⁸ *Protocol Relating to the Status of Refugees*, above n 34. See Terje Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 37, 69–70, 72.

⁵⁹ Chaloka Beyani, *Protection of the Right to Seek and Obtain Asylum Under the African Human Rights System* (Martinus Nijhoff, 2013) 8–9. For a critical view on the history of the African Convention, which underscores not the issue of persecution, but the date line, and the original concerns of some states with subversive activities by African freedom-fighters, see George Okoth-Obbo, 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20(1) *Refugee Survey Quarterly* 79, 109–12.

⁶⁰ *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) <<http://www.unhcr.org/45dc1a682.html>> ('OAU Convention') Art I(1) and (2).

Since this development in Africa, other regions have also adopted expanded refugee definitions or extended a form of protection complementary to refugee status to those persons who do not fear persecution on one of the five grounds, but who still require protection from some irreparable harm. In Latin America, the Cartagena Declaration on Refugees⁶¹ also extends protection to refugees fleeing generalized violence,⁶² and many states in that region have incorporated the expanded Cartagena definition into their national law. In Europe, a status known as subsidiary status is afforded to people fleeing generalized violence,⁶³ although it is a fairly complex definition that continues to generate controversy about its precise ambit.⁶⁴ In our view, it would be highly desirable for the broader definitions of refugees or beneficiaries of refugee-like protection (minus the problematic wording contained in the European definition) to become universal norms. Responsibility-sharing between regions is hampered by insistence on the narrow definition contained in the Refugee Convention.

In two other regions, Asia and the Pacific, and the Middle East, although customary international law applies, there are many states which are not party to the universal instruments and there is also precious little by way of regional refugee law. In the Asian region, there are the Bangkok Principles on Status and Treatment of Refugees adopted by an

⁶¹ *Cartagena Declaration on Refugees* (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984) in 'Annual Report of the Inter-American Commission on Human Rights' (1984–85) OAS Doc OEA/Ser.L/V/II.66/doc.10, rev 1, 190–3.

⁶² The Cartagena Declaration states that 'the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order' (ibid III(3)).

⁶³ *Council Directive 2011/95/EU of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted* [2011] OJ L 337/9 ('Recast Qualification Directive').

⁶⁴ Francesca Ippolito, 'Establishing the Common European Asylum System: It's a long way to Tipperary' in Abass and Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ashgrove, 2014) 113, 121.

advisory body, the Asian-African Legal Consultative Organization.⁶⁵ However, this instrument does not appear to have been widely implemented in national laws in the region. The reasonably new ASEAN Human Rights Declaration⁶⁶ also recognizes the right to seek and receive asylum, but it is not binding. In the Middle East there is an Arab Convention on Regulating Status of Refugees in the Arab Countries,⁶⁷ but it is not in force, and, as with the Asia-Pacific region, we find many countries do not have national laws and procedures for the protection of refugees. On the other hand, refugees are in practice tolerated in those regions and *non-refoulement* is widely, if imperfectly, respected.

THE FIVE MAJOR REGIONS OF THE WORLD: AN OVERVIEW

Thus far, the chapter has examined the development of the universal instruments on refugee protection and regional counterparts. We now look at the five major regions of the globe, the nature of the refugee flows within those regions, and regional structures, including regional architecture for reception and protection of asylum seekers. This provides vital context for the regional arrangements examined later in this book.

Europe

Europe may be regarded as the birthplace of the modern universal refugee protection instruments, and the definition of a refugee contained in the Refugee Convention has often been described as Eurocentric.⁶⁸ Interestingly, though, European countries looked outwards to other countries to share responsibility for refugees, although the drafters could not

⁶⁵ *Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees* (adopted by the Asian-African Legal Consultative Organization in New Delhi, 40th sess, 24 June 2001).

⁶⁶ *ASEAN Human Rights Declaration*, above n 56.

⁶⁷ *Arab Convention on Regulating Status of Refugees in the Arab Countries* (adopted by the League of Arab States, 1994) <<http://www.refworld.org/docid/4dd5123f2.html>>.

⁶⁸ See, for example, Sara E Davies, 'The Asian Rejection?: International Refugee Law in Asia' (2006) 52 *Australian Journal of Politics and History* 562, 570. Davies analyses the drafting history of the Convention and Protocol and shows that the concerns of India and Pakistan were not dealt with by the drafters of the Convention.

agree to a binding burden-sharing obligation.⁶⁹ For example, Australia, although it perceived itself as European or at least British at the time, was geographically far removed from the European theatre of war. Yet it participated in the conference of plenipotentiaries which adopted the final text of the Convention and it was the sixth country to become party. Indeed, it was Australia's accession to the treaty that brought it into force.

Regionalism is well-entrenched in Europe, and continues to have an impact on refugee protection. Two regional structures, the Council of Europe and the European Union (EU), incorporate human rights and refugee protection standards. The EU is probably the most successful example of regional integration in the world. It began with economic integration, although this was clearly linked to security, while the Council of Europe was envisaged as an organization that would promote human rights and democracy in Europe.

⁶⁹ The secretariat's draft contained a chapter on admission with one article that said favourable consideration should be given to asylum seekers and that the parties 'shall to the fullest possible extent relieve the burden assumed by initial reception countries which have afforded asylum ... They shall do so, *inter alia*, by agreeing to receive a certain number of refugees in their territory.' The commentary on the draft article acknowledges the inequitable allocation of responsibility for refugee protection imposed by the vagaries of geographical location. See *Memorandum by the Secretary-General for the Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons*, E/AC.32/2 (3 January 1950). In the ensuing discussion by the committee members, those delegates who described themselves as 'initial countries of reception' (we would use the term 'countries of first asylum' today) spoke in favour of such a provision on the basis that they hoped other states parties would admit refugees in order to share the 'burden' of hosting refugees: UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Refugees and Stateless Persons, Second Session: Summary Record of the Thirty-Seventh Meeting Held at the Palais des Nations, Geneva, on Wednesday, 16 August 1950, at 3.00 p.m.*, UN Doc E/AC.32/SR.37 (26 September 1950) 2–13. As this provision was voted down, the Chair noted that there would need to be another place found for it – for example, in the preamble (*ibid* 13). One of the proponents of the defeated provision concerning admission, France, introduced a preambular paragraph into debate at the ECOSOC Social Committee, which was objected to by other states, perceiving an implicit obligation of admission and it was rejected: Ralf Alleweldt, 'Preamble 1951 Convention' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford, 2011) 225, 236–7. However, France persisted and the preamble does refer to the need for international cooperation given the 'heavy burdens on certain countries'.

The Council of Europe is composed of 47 member states, all of which are party to the European Convention on Human Rights (ECHR).⁷⁰ While the European Court of Human Rights (ECtHR) cannot rule directly on the Refugee Convention, it can rule on rights of refugees under the ECHR, including, most importantly, the prohibition on *refoulement* to a place of torture or inhuman or degrading treatment or punishment which is implied into Article 3 of the ECHR. The Court has decided many important cases of this nature, some of which are referred to in this book.

The EU is the other relevant set of regional institutional arrangements. It numbers 28 members. The EU is required to accede to the ECHR and negotiations for this to occur are ongoing.⁷¹ The EU has also adopted the Charter of Fundamental Rights of the European Union,⁷² which protects against torture or inhuman or degrading treatment or punishment in Article 4.

All members of the EU are party to the Refugee Convention and Protocol, and the EU has adopted several instruments that seek to establish a Common European Asylum System (CEAS).⁷³ The Court of Justice of the EU is able to enforce the instruments comprising the CEAS, meaning that, to the extent these instruments conform to the Refugee Convention's standards, there is an active system for enforcing the Convention.

Since the Second World War, when Europe's refugees were all Europeans, there have been major intra-regional refugee crises, with the implosion of the former Yugoslavia (which was an Eastern European

⁷⁰ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 4 January 1969).

⁷¹ The Court of Justice of the European Union declared the draft agreement for accession to be incompatible with EU law in December 2014: Opinion 2/13(2014) EU:C:2014:2425. However, the Commission remains committed to the goal of accession.

⁷² *Charter of Fundamental Rights of the European Union* [2010] OJ C 83/02.

⁷³ Recast Qualification Directive, above n 63; *Council Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection* [2013] OJ L 180/96 ('Recast Reception Directive'); *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)* [2013] OJ L 180/31 ('The Dublin III Regulation').

country and not a member of either the Council of Europe or the European Community), subsequent conflicts in Bosnia and Kosovo and, beginning in 2014, conflict in Ukraine. However, the focus of the CEAS is extra-regional refugees. All the relevant instruments are limited to ‘third country nationals’, that is, citizens of non-EU states. It is assumed that all EU countries are safe countries of origin, which is demonstrably untrue. Roma, who are theoretically EU citizens, face many forms of discrimination and even persecution.⁷⁴ Theoretically, EU citizens could just exercise their freedom of movement rights within the EU to escape persecution, but in addition to the many barriers to Roma exercising those freedoms, there have been disturbing mass expulsions of Roma from a number of EU states, which highlights the importance of refugee status for those Roma facing persecution.⁷⁵

It is also assumed that all EU countries are safe for refugees fleeing from non-EU member states, and the basic principle is that the first state entered by an unauthorized refugee is the state responsible for determining refugee status and providing protection.⁷⁶ The impact of this rule for responsibility-sharing is returned to in Chapter 7. The assumption of safety has been demonstrated to be false in the course of litigation.⁷⁷

The focus on extra-regional refugees is not surprising given the EU’s focus on policing its ‘external’ borders while bringing down barriers to the internal movement of the citizens and long-term residents of EU states. It is widely believed that a reason for soaring asylum applications in the early 1990s, particularly in Germany, is that legal channels of migration were tightened during the recession so that many asylum seekers were in fact economic migrants.⁷⁸ As will be seen in the detailed discussion of the CEAS and the external aspects of European asylum policy in Chapter 7, Europe has made only small steps towards equitable

⁷⁴ See, for example, the decision of the Irish High Court that denial of basic primary education to a Roma child from Serbia (which at the time of writing this book was not a member of the EU) was persecution: *D (a minor) v Refugee Appeals Tribunal* [2011] IEHC 431.

⁷⁵ For analysis of the legal issues concerning migration and Roma, see Claude Cahn and Elspeth Guild, *Recent Migration of Roma in Europe* (Organization for Security and Cooperation in Europe, 2nd ed, October 2010).

⁷⁶ Dublin III Regulation, above n 73, Art 13.

⁷⁷ *M.S.S. v Belgium and Greece*, above n 39; *N. S. v Secretary of State for the Home Department and M. E. and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (Court of Justice of the European Union, C-411/10 and C-493/10, 21 December 2011).

⁷⁸ Matthew J Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge University Press, 2004) 95–6.

arrangements to share responsibility for refugees who do not manage to present themselves at the borders of the EU or elude border control. However, the increase in boats of migrants and asylum seekers crossing the Mediterranean has prompted both proposals for a quota system (which were eventually adopted with respect to relocation of 120 000 asylum seekers from Italy, Greece and Hungary to other parts of Europe) and for enforcement action authorized by the UN Security Council that would focus on destroying boats prior to departure from Libya (and a Council Resolution authorizing action on the High Seas was eventually adopted).

Americas

The Americas are home to the oldest of regional organizations, the Organization of American States (OAS),⁷⁹ under the auspices of which a thriving regional human rights system has developed. The inauguration of the OAS was driven by the ideal of pan-Americanism – indicative of a sense of imagined community in this region – which is attributed to the great liberator of the Americas, Simón Bolívar.⁸⁰ There is, however, significant diversity within the Americas. Geographically, the Americas include Canada and the United States of America, but within the United Nations system, Canada and the USA belong to the ‘Western European and Others bloc’. Latin America and the Caribbean are quite distinct from Canada and the USA and from each other. There is significant diversity within Latin America too, particularly given the numerous Indigenous peoples of the region, although there is arguably strong regional identity in terms of a largely common language (Spanish) and the Catholic religion. As in any region, perceived national interests and cultures have contributed to differing refugee policies.⁸¹

Despite the many challenges confronting the OAS, it has established a vibrant set of human rights instruments, beginning with the OAS Charter

⁷⁹ Organization of American States, *Charter of the Organization of American States* (adopted at the Ninth International Conference of American States, Bogotá, Colombia, 30 April 1948).

⁸⁰ Marie Arana, *Bolívar: American Liberator* (Simon and Schuster, 2013).

⁸¹ Elizabeth Ferris’ work on the Central American refugee crisis of the late 1970s and 1980s draws attention to these important differences: Elizabeth G Ferris, *The Central American Refugees* (Praeger, 1987).

itself, the American Declaration on the Rights and Duties of Man,⁸² and the establishment of the Inter-American Commission on Human Rights. This was followed by the American Convention on Human Rights,⁸³ which established the Inter-American Court of Human Rights. Issues of refugee protection have arisen within the Inter-American human rights system, most recently in the decision by the inter-American Court in the case of the Pacheco Tineo family, the first time the Court has ruled on the inter-American human rights system's protections concerning applications for asylum and protection from *refoulement*.⁸⁴

There is also a venerable history of political asylum in Latin America – that is, the discretionary grant of asylum to particular individuals.⁸⁵ This tradition could be viewed as a safety valve for governmental systems that failed to respect human rights and diversity.⁸⁶ While there has been a small extra-regional caseload of refugees in Latin America, including from Africa and Asia,⁸⁷ which may increase in the future, refugee flows have mainly been intra-regional within Latin America as a result of conflicts involving deep political divides between left and right, and the difficulties in translating the theoretical commitment to rule of law into practice. Unfortunately, the most powerful state in the Americas,

⁸² *American Declaration of the Rights and Duties of Man* (approved by the Ninth International Conference of American States), 2 May 1948, OAS Res XXX.

⁸³ *1969 American Convention on Human Rights* (entered into force 18 July 1978), OAS Doc EA/Ser.K/XVI/1.1.doc.65, Rev 1, Corr 1 of 7 January 1970.

⁸⁴ The Court held that the expulsion of the family violated the right to seek and be granted asylum and the principle of *non-refoulement* in the American Convention on Human Rights, as well as the right to a fair hearing and to judicial protection (recourse to the judiciary). In addition, the Court found violations of the family's right to mental and moral integrity, and the rights of the family and the child: *Pacheco Tineo Family v Bolivia* [InterAmerican Court of Human Rights] (2013) Series C No 272 (25 November 2013).

⁸⁵ See *1889 Montevideo Treaty on International Penal Law* (adopted by the First South American Congress on Private International Law in Montevideo on 23 January 1889) OAS Doc OEA/Ser.X/1 34; *1954 Caracas Convention on Territorial Asylum*, OAS Doc OEA/Ser.X/1 34 (entered into force 29 December 1954).

⁸⁶ Mario Sznajder and Luis Roniger, *The Politics of Exile in Latin America* (Cambridge University Press, 2009) 8.

⁸⁷ UNHCR, 'Refugee Protection and International Migration in the Americas: Trends, Protection Challenges and Responses' (Paper presented at the Regional Conference on Refugee Protection and International Migration in the Americas: Protection Considerations in the Context of Mixed Migration, San José, Costa Rica, 19–20 November 2009) 14–15.

the United States, has frequently supported right-wing governments in the Americas, thus prolonging conflicts and refugee situations and, indeed, denying that victims of these conflicts are refugees.⁸⁸

The most recent, large-scale intra-regional flow of refugees, the Colombian refugee crisis exemplifies the political divisions that have generated refugee flows in the Americas. As Gottwald explains, the Colombian conflict began as an ideological conflict in 1948 between Liberals and Communists, transformed into a civil war, and then a period of insurgency against the government by the FARC (Revolutionary Armed Forces of Colombia) and the ELN (National Liberation Army).⁸⁹ Later, paramilitary forces were formed to protect civilians from guerilla activities,⁹⁰ which secured their funding through the drug trade.⁹¹ During the 1990s, the paramilitaries sought territorial control and civilians became a military target, while forced displacement became a military tactic,⁹² resulting in flight across the borders into Venezuela, Panama and Ecuador. The Colombian conflict has resulted in over 3 million refugees; peace negotiations commenced in 2012 appear to have resulted in a deal in late 2015, but the future is still uncertain.⁹³

The common experience of being on the receiving end of political violence and exile in other countries has arguably resulted in a strong commitment in principle to international refugee law. As Chilean President, Michelle Bachelet has said,

Thousands of women and men had to leave our land and experienced the warmth and humanity of other countries. Today it is our turn to give because we are now a democratic, free and pluralist society, with good levels of employment, social peace and human development. Today we must extend our hands to those who need us.⁹⁴

⁸⁸ For an excellent analysis of the USA's role in the Central American refugee crisis during the 1970s and 1980s, see Elizabeth G Ferris, above n 81.

⁸⁹ Martin Gottwald, 'Protecting Colombian Refugees in the Andean Region: The Fight against Invisibility' (2004) 16 *International Journal of Refugee Law* 517, 519–20.

⁹⁰ *Ibid* 520.

⁹¹ *Ibid* 521.

⁹² *Ibid* 522.

⁹³ Annette Idler, 'Colombia's deal with the FARC could bring peace – or create a power vacuum', *The Conversation*, 6 October 2015.

⁹⁴ UNHCR, 'Southern Latin America Opens its Arms to Asylum-Seekers', *News Stories* (online), 27 August 2009 <<http://www.unhcr.org/4a969d716.html>>.

The modern commitment to asylum is reflected in the inter-American human rights instruments, in adherence to the Refugee Convention and Protocol and the adoption of an expanded definition of refugee status in the form of the Cartagena Declaration on Refugees which recognizes persons fleeing generalized violence as refugees.⁹⁵ Of the 35 OAS members, only five (Cuba, Barbados, Grenada, Guyana and St Lucia) do not participate in the Refugee Convention or Protocol at all, while St Kitts and Nevis is a nominal participant, having acceded only to the Convention but not the Protocol. It is notable that most of these states are Caribbean island states, and Guyana is often viewed as part of the Caribbean rather than Latin America. Arguably, most Caribbean states lack the capacity for refugee protection on a significant scale. Although they are generally party to the Convention and/or Protocol, UNHCR is responsible for refugee status determination in many cases and must use its mandate⁹⁶ to resettle refugees from the Caribbean.

Although non-binding, the Cartagena Declaration has been translated into the national laws of 14 countries,⁹⁷ and there is a periodic review process that has resulted in further regional arrangements to improve refugee protection, such as the Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America.⁹⁸ These arrangements, and the degree to which they share responsibility for refugees within the region and the extent of engagement from states from the Global North, are discussed in Chapter 8.

⁹⁵ Cartagena Declaration on Refugees, above n 61.

⁹⁶ UNHCR's mandate stems from the *Statute of the United Nations High Commissioner for Refugees*, UNGA Res 428(V) (14 December 1950). The beneficiaries of UNHCR's mandate have gradually expanded over the years, but, as UNHCR is not a state and does not have a territory in which it can protect refugees, it must negotiate with states to secure protection and durable solutions in many situations. These situations include the case of countries that are not party to the Convention or Protocol and also situations in which countries do not implement the Convention or Protocol nationally, as in Caribbean states.

⁹⁷ Argentina, Belize, Bolivia, Brazil, Chile, Colombia, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Uruguay. See *Pacheco Tineo Family v Bolivia* [InterAmerican Court of Human Rights] (2013) Series C No 272 (25 November 2013) para 141.

⁹⁸ *Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America* (16 November 2004).

Africa

Africa's recent history is the history of colonialism and its aftermath. The key regional organization, the OAU (now the African Union) was conceived in the 1960s at the height of the decolonization movement. As pan-Africanism in the twentieth century focused on decolonization, its legacy was a commitment to sovereignty that resisted regionalism in the sense of integration.⁹⁹ Thus, the OAU was not conceived of as a vehicle for integration. Yet at the same time, African sovereignty has been weak in the face of external forces. As Shaw writes, by the mid 1990s, 'Africa's political economy and political culture were quite transformed: from economic and political colonies, to political without economic independence, and then economic "liberalization" with an increasing range of political conditionalities'.¹⁰⁰ In the 1990s, the end of the decolonization project and ongoing armed conflicts and human rights violations stimulated new thinking, evidenced by the transformation of the OAU into the African Union in 2002.¹⁰¹

While the OAU's record with respect to resolution of conflict was not impressive, it did oversee the establishment of a regional human rights system. The African (Banjul) Charter on Human and Peoples' Rights¹⁰² contains a right to 'seek and obtain asylum',¹⁰³ as well as many other rights that serve to protect refugees.¹⁰⁴ It is supervised by a Commission and a Court, and a flourishing and progressive jurisprudence has been

⁹⁹ Daniel Bach, 'The Global Politics of Regionalism: Africa' in Mary Farrell, Björn Hettne and Luk Van Langenhove (eds), *Global Politics of Regionalism: Theory and Practice* (Pluto Press, 2005) 171.

¹⁰⁰ Timothy M Shaw, 'Africa in the Global Political Economy: Globalization, Regionalization, or Marginalization?' in Björn Hettne, Andras Inotai and Osvaldo Sunkel (eds), *The New Regionalism and the Future of Security and Development* (Palgrave Macmillan/UNU/WIDER, 2000) 93, 94.

¹⁰¹ Bach, above n 99, 175.

¹⁰² *African (Banjul) Charter on Human and Peoples' Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force 21 October 1986) ('Banjul Charter').

¹⁰³ Ibid Art 12(3).

¹⁰⁴ For discussion, see Gino J Naldi and Christiano d'Orsi, 'The Role of the African Human Rights System with Reference to Asylum Seekers' in Abass and Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ashgate, 2014) 45.

established. Other organs of the African Union have also devoted some attention to refugee issues, but these have not been particularly effective.¹⁰⁵

The state with the largest economy in the region, South Africa, is now a consistently high-volume asylum state, with many claimants coming from outside the region (for example, from Bangladesh) and, of course, African refugees and migrants have embarked on dangerous journeys to the West, most visibly in small boats across the Mediterranean sea. However, refugee flows in modern Africa have primarily been intra-regional, beginning with the struggles against colonialism that led to the adoption of the broader definition of a refugee in the 1969 OAU Convention governing the specific aspects of refugee problems in Africa.¹⁰⁶

By adopting a definition that differs from the now universalizing definition in the Refugee Convention, OAU member states effectively committed to sheltering these refugees within Africa. As Beyani writes, '[i]n the prevailing struggle for decolonisation in the 1960s, the causes of flight and the corresponding lack of protection were connected to the liberation struggle against colonial rule, with the result that commitment to the protection of refugees became a solid expression of solidarity between African states.'¹⁰⁷ The region did not look to the outside world to help share responsibility, but focused instead on sharing responsibility among the members of the region. Article II(4) of the OAU Convention says,

Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU and such Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

¹⁰⁵ See Ademola Abass and Dominique Mystris, 'The African Union Legal Framework for Protecting Asylum Seekers' in Abass and Ippolito (eds), *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ashgate, 2014) 19.

¹⁰⁶ OAU Convention, above n 60.

¹⁰⁷ Beyani, above n 59, 13; James H S Milner, *Refugees, the State and the Politics of Asylum in Africa* (Palgrave Macmillan, 2009) 20. On the other hand, Abass and Mystris (above n 105, 22) draw on a more critical reading of the history of the OAU Convention and argue that it 'reflects a shift in Africa's approach to asylum-seeking from that of a protective nature to one focused more on containment.'

Unfortunately, however, the provision has not been adequately implemented. Similarly, in the 1980s there was a largely unsuccessful attempt to involve the Global North in financial responsibility-sharing for refugees in Africa. This is examined in Chapter 5.

Since the end of the decolonization period in Africa, various internal struggles, including genocidal conflict in Rwanda and Burundi, have manifested in refugee flows. When examined closely, the refugee-generating conflicts in Africa demonstrate that an internal explanation for refugee flows is frequently simplistic and that external actors often share moral culpability for refugees.¹⁰⁸ The inheritance of the post-colonial African state is a combustible mix of ethnic divisions made worse by colonial policies of divide-and-rule, weak political structures and under-development.¹⁰⁹ While particularly vile dictators must bear a great deal of moral and legal responsibility,¹¹⁰ it is also notable how often they were supported by foreign powers, particularly during the Cold War.¹¹¹

External factors also help to account for the distinct shift in asylum policy from the open, generous policy that prevailed during the struggle for decolonization to the restrictive policies of the 1990s. While one explanation for the change is that Africans may have been less sympathetic to refugees from independent states than colonized states,¹¹² commentators have also noted the role of structural adjustment programmes in creating conditions ripe for xenophobia as citizens could not avail themselves of state services, while the refugees they hosted were assisted by the international community¹¹³ (although not adequately, leading to the African critique concerning lack of ‘burden-sharing’).¹¹⁴

¹⁰⁸ B S Chimni, ‘The Geopolitics of Refugee Studies: A View from the South’ (1998) 11(4) *Journal of Refugee Studies* 350, 351.

¹⁰⁹ For analysis, see Milner, above n 107, 11; E Q Blavo, *The Problems of Refugees in Africa: Boundaries and Borders* (Ashgate, 1999) ch 1; Aristide R Zolberg, Astri Suhrke and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (Oxford University Press, 1989) ch 2.

¹¹⁰ Makau wa Mutua, ‘The Interaction Between Human Rights, Democracy and Governance and the Displacement of Populations’ (1995) Special Issue *Summer International Journal of Refugee Law* 37.

¹¹¹ Milner, above n 107, 13.

¹¹² Aderanti Adepoju, ‘The Dimension of the Refugee Problem in Africa’ (1982) 81(322) *African Affairs* 21–35.

¹¹³ See particularly the detailed analysis of six countries in Cassandra R Veney, *Forced Migration in Eastern Africa: Democratization, Structural Adjustment, and Refugees* (Palgrave Macmillan, 2007) ch 3.

¹¹⁴ See Milner’s discussion of ICARA I and II, Milner, above n 107, 26–8. These two arrangements are discussed in detail in Chapter 5 of this book.

Paradoxically, but perhaps not surprisingly, the moves to democratization – prompted by both internal voices responding to structural adjustment programmes¹¹⁵ and Western donors no longer interested in propping up African despots in order to contain the Soviet Union's influence¹¹⁶ – encouraged governments to pander to or exploit the xenophobic elements within their constituencies. Thus Veney wrote of Tanzania's turn to restrictive policies during the 1990s, that refugees' presence 'reinforced feelings of insecurity among local communities increasingly deprived of protection and provision from governments that were increasingly constrained fiscally and administratively, while at the same time the state could demonstrate its strength through the roundups, sweeps, beatings, and detention of refugees – all in the name of security.'¹¹⁷

Asia and the Pacific

Asia and the Pacific is the largest and most diverse region in the world, representing a huge number of cultures, religions and language groups, governmental systems and economic situations. It has several sub-regions: Central Asia, South Asia, Southeast Asia, Southwest Asia, and East Asia and the Pacific.

Economic and security cooperation has traditionally been more prominent in this region than promotion of human rights through regionalism. Various economic regional initiatives have sprung from the desire of Asian states, particularly Southeast Asian states, to insert themselves into the global economy and to avoid domination by great powers such as the United States.¹¹⁸ However, at the end of 2012, the Association of Southeast Asian Nations (ASEAN) adopted the ASEAN Human Rights Declaration, which includes several provisions pertinent to the rights of refugees, including the right to seek and *receive* asylum.¹¹⁹

¹¹⁵ See Veney's argument (above n 113, 66–7) about the link between structural adjustment programmes and internal demands for democracy.

¹¹⁶ Milner, above n 107, 13.

¹¹⁷ Veney, above n 113, 84–5. Related phenomena such as immigration detention are common in the Western industrialized world too, as all states negotiate the impact of globalization on their sovereignty.

¹¹⁸ For a discussion of APEC, ASEAN initiatives and the China–ASEAN free trade agreement, see Helen E S Nesadurai, 'The Global Politics of Regionalism: Asia and the Asia-Pacific' in Mary Farrell, Björn Hettne and Luk van Langenhove (eds), *Global Politics of Regionalism: Theory and Practice* (Pluto Press, 2005) 155.

¹¹⁹ Art 16 of the ASEAN Human Rights Declaration provides that 'every person has the right to seek and receive asylum in another State in accordance

Although the Declaration has been criticized for some departures from the universal human rights instruments and for the lack of NGO participation in its drafting, it is significant because, as Renshaw writes, ‘no Southeast Asian government will ever be able to deflect criticism on the basis that human rights are an “external imposition”’.¹²⁰

Prior to being eclipsed by the Syrian refugee crisis, Asia hosted the largest number of refugees in the world.¹²¹ Refugee flows have been both regional in origin, with the Indochinese refugee flow of 1975–1996 being one notable example, and, extra-regional (in the sense of a flow inwards to the region) with many refugees from the Middle East seeking asylum or transiting countries in Southeast Asia and seeking asylum in Australia over the last decade. Recent intra-regional flows have included Burmese and Vietnamese minority groups, Filipinos fleeing violence in the southern Philippines, and Hmong from Laos.¹²² Maritime arrivals of Bangladeshis and Rohingya, some of whom are refugees, rose sharply to 25 000 arrivals in the first quarter of 2015.¹²³

The Pacific island states present a very different picture from their larger Asian neighbours, generally receiving very few asylum seekers. Papua New Guinea has significant numbers of West Papuans who have crossed the border. It has also accommodated asylum seekers transferred from Australia under the so-called ‘Pacific Solution’, as has Nauru. These two countries have entered agreements with Australia to resettle refugees, as has Cambodia.¹²⁴

Very few states in the Asia-Pacific region are parties to the Refugee Convention and/or the Refugee Protocol. Significantly, Asia-Pacific countries which receive large populations of refugees, such as Pakistan,

with the laws of such State and applicable international agreements’. The ASEAN countries are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. See ASEAN Human Rights Declaration, above n 56.

¹²⁰ Catherine Shanahan Renshaw, ‘The ASEAN Human Rights Declaration 2012’ (2013) 13(3) *Human Rights Law Review* 557, 579.

¹²¹ UNHCR’s Global Trends for 2013 report documents 3 267 500 refugees in the Asia-Pacific region. The figure for the Middle East and North Africa was 2 556 500 (UNHCR, *Global Trends 2013: War’s Human Cost* (UNHCR, 2014) 12. In 2015, the number of Syrian refugees, who are predominantly hosted in the Middle East and North Africa, had reached over 4 million.

¹²² Pei Palmgren, ‘Navigating a Hostile Terrain: Refugees and Human Rights in Southeast Asia’ (2011) 5 *Sociology Compass* 323, 325.

¹²³ UNHCR, *South-East Asia Irregular Maritime Movements, January – March 2015* <<http://www.unhcr.org/554c6a746.html>>.

¹²⁴ See discussion in the Introduction to this book.

Bangladesh, India, Indonesia, Malaysia and Thailand, are not parties to either the Refugee Convention or the Refugee Protocol. The Bangkok Principles on Status and Treatment of Refugees adopted by the advisory body, the Asian-African Legal Consultative Organization, indicate some consensus concerning the Convention definition of a refugee, but some states entered 'reservations' to this non-binding instrument.¹²⁵ Customary international law is of course applicable, and some states in the region are bound by human rights treaties which protect against *refoulement*.

The People's Republic of China is a party to the Convention and Protocol, but it has not implemented its treaty obligations in domestic law. Other parties to the Convention and Protocol in the region are Japan, the Philippines, Cambodia, Papua New Guinea, Nauru, Fiji, South Korea, Timor Leste, the Solomon Islands, Tuvalu, Australia and New Zealand. Domestic protection in countries such as Cambodia, Papua New Guinea and Nauru is weak,¹²⁶ with Australia, New Zealand and the Philippines providing better models of protection. Australia, however, has moved to 'offshore processing' on Nauru and in Papua New Guinea, precisely in

¹²⁵ *Final Text of the AALCO's 1966 Bangkok Principles*, above n 65.

¹²⁶ For criticism of the domestic refugee protection framework in Cambodia, see Human Rights Watch, 'Australia: Reconsider Nauru Refugee Transfers to Cambodia', *Human Rights Watch* (online), 20 November 2014 <<http://www.hrw.org/news/2014/11/20/australia-reconsider-nauru-refugee-transfers-cambodia>>. Nauru only acceded to the Refugee Convention on 28 June 2011 in order to be able to participate in the arrangement with Australia. It passed a national law regarding refugee status determination on 10 October 2012 (*Refugees Convention Act 2012* (Nauru) <http://www.naurugov.nr/media/33059/refugees_convention_act_2012.pdf>). It has also adopted legislation governing the detention centres in which transferees from Australia have been held. However, when UNHCR visited the centres on Nauru, which should be regarded as jointly controlled by Nauru and Australia, it noted various problems with the refugee status determination programme, and found that asylum seekers were arbitrarily detained and that conditions in the centres did not accord with international legal standards (UNHCR, *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013* (UNHCR, 26 November 2013) <<http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>>). Nauru has since announced that the centres will be open centres. UNHCR expressed similar concerns about the situation in Papua New Guinea, where there was no domestic legal framework in place, detention was arbitrary, and conditions in detention were substandard (UNHCR, *UNHCR Mission to Manus Island, Papua New Guinea 15–17 January 2013* (UNHCR, 4 February 2013) <<http://unhcr.org.au/unhcr/images/2013-02-04%20Manus%20Island%20Report%20Final.pdf>>).

order to deter boat departures for Australia.¹²⁷ Japan recognizes few refugees, but it is developing a strong interest in refugee protection, as demonstrated by its decision to become the first Asian country to join UNHCR's resettlement programme.¹²⁸

When states in the region have sheltered refugees, they have often done so through informal arrangements instead of legally binding instruments, and UNHCR has a fragile relationship with many countries in the region. Most refugees in the Asia-Pacific region are living in countries where they have no legal right to work. Consequently, many refugees are forced to work illegally without any labour protection, survive on money that is sent to them by family members, rely on limited social services provided by NGOs, and/or live in destitute conditions in the host country.¹²⁹ For many refugees, these conditions may leave them no choice but to leave the country of first asylum and move onwards in search of adequate protection for themselves and their families.

The lack of status for refugees in the region is the cause of many human rights violations¹³⁰ and significant problems for states, such as corruption, trafficking and smuggling.¹³¹ While this problem may be ascribed, in part, to 'government weakness',¹³² it is also the case that a positive policy of recognition would diminish refugees' vulnerability to exploitation, benefiting the state. Failure to recognize refugees does not avoid legal obligations owed to them as a matter of customary international law or under human rights treaties, while a policy of recognition can open up mechanisms of protection that do not require much additional activity by the state. Access to the formal labour market, for example, would mean that the market could provide a form of protection to refugees, as refugees would no longer be subjected to the exploitation

¹²⁷ See discussion in the Introduction to this book.

¹²⁸ UNHCR, 'Welcome to Japan: first Asian Country joins UNHCR's resettlement programme', *News Stories* (online), 28 September 2010 <<http://www.unhcr.org/4ca1dbe66.html>>.

¹²⁹ For discussion of the situation in Thailand, Malaysia and Indonesia, see Penelope Mathew and Tristan Harley, *Refugee Protection and Regional Cooperation in Southeast Asia: A Fieldwork Report* (Australian National University, March 2014) and Jesuit Refugee Service Asia Pacific, *The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines* (JRS Asia Pacific, 2012).

¹³⁰ Jesuit Refugee Service Asia Pacific, above n 129.

¹³¹ Palmgren, above n 122, 323, 332.

¹³² Alan Dupont, 'Refugees and Illegal Migrants in the Asia-Pacific Region' in William Maley et al (eds), *Refugees and the Myth of the Borderless World* (Australian National University, 2002) 9, 12.

that flows from lack of legal status. Of course, this assumes there are mechanisms to protect workers' rights more generally, which is often not the case and may result in a pull factor for unauthorized migrant workers. Access to the labour market would also greatly minimize the need for refugees to move onwards in an irregular way in search of protection. Reduction in onward secondary movement would, in turn, diminish the market for people smugglers.

If recognition of refugees can provide solutions to problems as states perceive them,¹³³ what explains the refusal to recognize them? The policies of many of the states in the region are partly explained by the process of state-building in the region. As Dupont writes,

Western governments have traditionally considered unregulated population movements ... to be a matter of 'low politics' (pertaining to the wealth and welfare of the citizens of the state) rather than 'high politics' (associated with security and the continued existence of the state). Asians, on the other hand, have been more sensitive to the national security implications of refugee movements and illegal migration for historical and cultural reasons – multi-ethnic Southeast Asia particularly so, because of endemic racial and religious tensions and the preoccupation of political elites with nation building and regime maintenance.¹³⁴

While states infrequently provide reasons as to why they do not accede to the Convention and/or Protocol, UNHCR suggests that states 'may be apprehensive about multilateral engagement, loss of flexibility, costs or the potential for abuse'.¹³⁵ Interrelated with the fear of abuse is the fear of pull factors common to most governments around the globe. These fears persist despite the countervailing realities. It is clear that the push factors of persecution, conflict and human rights violations result in movement, regardless of governments' refusal to recognize this, while people seeking work come because work is available in the informal

¹³³ See the comments of Mr Rick Towle, Regional Representative UNHCR, in *Report from the Colloquium on Refugees, Regionalism and Responsibility*, 22–23 August 2013 (Australian National University, 2013) 4.

¹³⁴ Dupont, above n 132, 9. See also Vitit Muntarbhorn, *The Status of Refugees in Asia* (Clarendon Press, 1992) ch 1.

¹³⁵ UNHCR, *The State of the World's Refugees: In Search of Solidarity* (Oxford University Press, 2012) 37.

economy.¹³⁶ Refugee status determination procedures enable governments to know who is in the community and whether their reasons for being there are recognized as a matter of international law.¹³⁷

Alternatively, governments in the region ‘may see the Convention as representing “Western” standards of treatment that some cannot provide, or as concerned only with “political” refugees when most of today’s refugees flee from conflict situations’.¹³⁸ Sara Davies has argued that the reason why the majority of Southeast Asian states have refused to accede to the Convention and the Protocol is because ‘they have never felt obliged to do so’.¹³⁹ According to Davies, this lack of a sense of obligation derives from two sources. First, it derives from the belief among Southeast Asian states that both the Convention and the Protocol are Eurocentric legal instruments that are largely irrelevant when dealing with the irregular migration movements occurring in Southeast Asia. Second, it derives from the CPA, which focused on resettlement in exchange for temporary refuge rather than on local integration.¹⁴⁰

Regional efforts concerning refugees in the Asia-Pacific have proved limited, and the one ‘qualified success’ – the CPA¹⁴¹ – may have entrenched an attitude that responsibility for refugees lies with Western countries. A current initiative, the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime¹⁴² has until recently focused on people smuggling, rather than protection, and the potential of the understandings around the regional cooperation framework¹⁴³ is uncertain.

In September 2012, Bali Process Co-Chairs Australia and Indonesia officially opened a Regional Support Office (RSO) in Bangkok, Thailand

¹³⁶ See, for example, Gordon Howard Hanson, *The Economic Logic of Illegal Immigration* (Council on Foreign Relations, 2007); Georges Tapinos, ‘Irregular Migration: Economic and Political Issues’ in *Combating the Illegal Employment of Foreign Workers* (OECD, 2000) 13.

¹³⁷ See the comments of Mr Rick Towle, above n 133, 4.

¹³⁸ UNHCR, *The State of the World’s Refugees*, above n 135.

¹³⁹ Sara E Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Martinus Nijhoff, 2008), 18.

¹⁴⁰ *Ibid.*

¹⁴¹ The CPA is discussed in Chapter 4 of this book.

¹⁴² *The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime* <<http://www.baliprocess.net>>.

¹⁴³ See the discussion of the regional cooperation framework in the Introduction to this book.

to operationalize the regional cooperation framework.¹⁴⁴ The RSO has commenced a number of projects for tackling irregular migration in the region and these include refugee protection elements. Non-state action may also prove significant. There is, for example, a vibrant network of refugee NGOs – the Asia Pacific Refugee Rights Network.¹⁴⁵

The Middle East

Regionalism in the Middle East – a Eurocentric term often used in this book because the term Arab World (also used in this book) captures a narrower slice of the population of this region – has generally been less effective in this region than others. Institutions such as the Arab League (formally speaking the League of Arab States) have not been able to respond effectively to problems besetting the region such as armed conflict.¹⁴⁶ This is despite the high degree of cultural similarity in many respects across this region.

Arguably, states in this region are linked not so much by an imagined community as through the ‘interaction of conflict’.¹⁴⁷ Some authors have described the Arab world as cooperating best when faced with a common enemy, but that otherwise competition is the default. For example, Gariup writes that ‘unity and conflict are the two facts of stereotyped Arab culture. An old Bedouin Arabic Proverb recites: “I and my brothers against my cousin; I and my cousins against the stranger (against the world)”’.¹⁴⁸

¹⁴⁴ Bali Process Steering Group, ‘Note on the Operationalisation of the Regional Cooperation Framework in the Asia Pacific Region’ (Paper presented at Fifth Meeting of the Bali Process Ad Hoc Group Senior Officials, Sydney Australia, 12 October 2011) 1.

¹⁴⁵ Asia Pacific Refugee Rights Network <<http://www.aprrn.info/1/>>. For discussion of APRRN, see Savitri Taylor, ‘Civil Rights and the Fight for Refugee Rights’ in Angus Francis and Rowena Maguire (eds), *Protection of Refugees and Displaced Persons in the Asia Pacific Region* (Ashgate, 2013) 13. APRRN is developing its own vision for protection and plan of action.

¹⁴⁶ Fawcett, above n 4, 429, 441.

¹⁴⁷ Helena Lindholm-Schulz and Michael Schulz, ‘Israel, Palestine and Jordan: Triangle of Peace or Conflict?’ in Björn Hettne, András Inotai and Osvaldo Sunkel (eds), *The New Regionalism and the Future of Security and Development* (Palgrave Macmillan/UNU-WIDER, 2000) 144, 147.

¹⁴⁸ Monica Gariup, ‘Regionalism and Regionalization: the State of the Art from a Neo-Realist Perspective’ in Cilja Harders and Matteo Legrenzi (eds), *Beyond Regionalism?: Regional Cooperation, Regionalism and Regionalization in the Middle East* (Ashgate, 2008) 69.

In addition to the Arab-Israeli conflict and the Palestinian refugee problem, which have been a major focus of the Arab world and the Arab League, other sources of conflict and competition have served to diminish the prospects of regional cooperation on many issues and to generate refugee flows. Writing in 1997, well before the Arab Spring, Abi-Aad and Grenon argued that

the different factors of instability and sources of conflict faced by the states of the Middle East are broadly comparable, and include the autocratic nature of the regimes and the struggle for power, interstate ideological cleavages, military antagonisms and race, ambition and structure of armed forces, sectarian minorities and religious rivalry, ethnic heterogeneity and minorities, border disputes, disparity in economic development, social impacts of economic constraints, divergence in petroleum policies, struggles over water, demographic explosion, disparity in population growth, and troubles caused by foreign labour migration, internal flight and flows of refugees. These factors are most of the time interrelated and interdependent.¹⁴⁹

While pan-Arabism could provide a basis for regionalism, as it is the basis for the Arab League, it is problematic. As Romano and Brown point out, the ethnic nationalist focus of the Arab League carries ‘a dangerous potential for exacerbating conflicts with “out-groups”.’¹⁵⁰ They also note that the authoritarian nature of the regimes involved means that any international organization established by them is likely to be used ‘to deflect international criticism of their policies.’¹⁵¹ Abi-Aad and Grenon argue that, in turn, the failure to seek democratic legitimation has exposed regimes in the region to extremism.¹⁵²

The ‘common enemy’ served as a justification for ‘strong’ autocratic regimes¹⁵³ and, instead of seeking democratic legitimation, governments sought to buy their citizens’ acquiescence through welfare and services.¹⁵⁴ As in other regions, the Cold War bolstered autocratic regimes as the USA was prepared to support many of them as a bulwark against pro-Soviet regimes and because of its interests in securing oil supplies,

¹⁴⁹ Naji Abi-Aad and Michel Grenon, *Instability and Conflict in the Middle East* (St Martins Press, 1997) 10.

¹⁵⁰ David Romano and Lucy Brown, ‘Regional Organizations, Regional Identities and Minorities’ in Cilja Harders and Matteo Legrenzi (eds), *Beyond Regionalism?: Regional Cooperation, Regionalism and Regionalization in the Middle East* (Ashgate, 2008) 157, 167.

¹⁵¹ Ibid 166.

¹⁵² Abi-Aad and Grenon, above n 149, 5.

¹⁵³ Ibid 5.

¹⁵⁴ Ibid 21.

among others.¹⁵⁵ In 2010, beginning with the self-immolation of a Tunisian street vendor, the protests known as the Arab Spring led to the end of many regimes in the region, but the aftermath continues to unfold in repression and conflict,¹⁵⁶ including the Syrian conflict that has resulted in over 4 million refugees.

Regional efforts at human rights protection are relatively weak. The Arab Charter on Human Rights entered into force in 2008.¹⁵⁷ It does not have a complaints mechanism and not all of its provisions are consistent with the international instruments.¹⁵⁸ However, 13 of the 22 League Member States are party and the Arab Human Rights Committee reviews reports submitted periodically by states parties.¹⁵⁹

Refugee flows in the Middle East have been primarily intra-regional, stemming from persecution of religious minorities as well as political persecution of dissidents,¹⁶⁰ but outflows of refugees and other displaced persons have often involved large-scale foreign intervention. The protracted Afghan refugee situation was initially sparked by the Soviet military intervention of 1979. The two Iraq wars – the first legally justified as a collective defence operation and by a UN Security Council resolution,¹⁶¹ the second being illegal as a matter of international law – also caused massive displacement.

These examples of intervention are relatively recent, but intervention in the Middle East and consequences in terms of refugee flows has a much longer history. The end of the Ottoman, Russian and Austro-Hungarian

¹⁵⁵ Ibid 8.

¹⁵⁶ For analysis, see, for example, John Davis (ed), *Arab Spring and Arab Thaw: Unfinished Revolutions and the Quest for Democracy* (Ashgate, 2013).

¹⁵⁷ League of Arab States, *Arab Charter on Human Rights*, adopted on 15 September 1994 (entered into force 15 March 2008).

¹⁵⁸ See the criticisms in Mervat Rishmawi, ‘The Revised Arab Charter on Human Rights: A Step Forward?’ (2005) 5 *Human Rights Law Review* 361, 363–5.

¹⁵⁹ Unfortunately, there is not much English language material available at the Arab Human Rights Committee’s website, meaning that it is difficult for English-speakers to assess the effectiveness of the reporting process.

¹⁶⁰ For example, the creation of numerous waves of refugees from Iraq prior to the US invasion in 2003 have been described as sharing a similar intent, ‘the consolidation and homogenization of various Iraqi regions through the expulsion of unwanted populations’ (Nabil Al-Tikriti, ‘There Go the Neighbourhoods: Policy Effects vis-à-vis Iraqi Forced Migration’ in Dawn Chatty and Bill Finlayson (eds), *Dispossession and Displacement: Forced Migration in the Middle East and North Africa* (Oxford University Press, 2010) 249, 258).

¹⁶¹ SC Res 678, UNSCOR, 2963rd mtg, UN Doc S/RES/0678 (29 November 1990).

empires forced many refugees into the Middle East.¹⁶² Dawn Chatty documents the demise of the Ottoman empire and its largely successful policies promoting peaceful co-existence of religious and ethnic groups, as a result of the rise of nationalism in the nineteenth century and foreign support or manipulation of various minorities.¹⁶³ The most protracted refugee situation in the world, the Palestinian refugee situation, resulted from the establishment of Israel and is, as Chatty states, a creature of the two world organizations – the United Nations and its predecessor, the League of Nations.¹⁶⁴

The Palestinian refugee problem is both an historical source of dissatisfaction with the United Nations and a long-standing example of the forbearance shown to Arab refugees, but it is dealt with outside the confines of the Refugee Convention as a special case. Article 1D of the Refugee Convention formally excludes from the protection of the Convention those Palestinians receiving assistance from the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) as does paragraph 7(c) of the UNHCR Statute. This has been described as ‘a symbol of the international commitment to the Palestinian people, a reflection of the fact that their refugee status was different than that of other refugees, that they should benefit from the international community’s assistance until the problem was resolved, that their case was not a simple one of resettlement in a third country or integration in the country of first asylum.’¹⁶⁵ The Palestinian refugee problem may also account for Arab States’ unwillingness to accede to the Convention and Protocol as it is feared this might open up durable solutions other than repatriation.¹⁶⁶

Unfortunately, the special regime for Palestinians has not had better outcomes than the Convention system in terms of protection and access to durable solutions. States in the region responded to the Palestinian

¹⁶² Dawn Chatty, ‘Epilogue: Dispossession and Forced Migration in 21st century Middle East and North Africa: The Way Forward’ in Dawn Chatty and Bill Finlayson (eds), *Dispossession and Displacement: Forced Migration in the Middle East* (Oxford University Press, 2010) 273, 274.

¹⁶³ Dawn Chatty, *Displacement and Dispossession in the Modern Middle East* (Cambridge University Press, 2010) ch 2.

¹⁶⁴ Ibid 208.

¹⁶⁵ Ilter Turkmen, quoted in Don Peretz, *Palestinian Refugees and the Middle East Peace Process* (USIP Press, 1993) 109–10. For the drafting history, see Brenda Goddard, ‘UNHCR and the International Protection of Palestinian Refugees’ (2009) 28 *Refugee Survey Quarterly* 475.

¹⁶⁶ Goddard, *ibid* 505.

refugees with the Casablanca Protocol,¹⁶⁷ granting Palestinians many rights on paper, but it is often not applied.¹⁶⁸ Hieronymi and Jasson observe that the exclusion of Palestinians from the international refugee regime has 'helped maintain the fiction that the Palestinian refugee situation was temporary, and would be resolved with the final elimination of Israel. Importantly, it also averted an obligation to facilitate local integration and third-country resettlement.'¹⁶⁹ They argue that this has resulted in generations of refugees, and their radicalization.¹⁷⁰

As Peretz documents, various schemes were developed in the 1940s and 1950s for regional solutions for Palestinian refugees through a mix of permanent settlement in neighbouring states combined with development assistance and repatriation by Israel, but these failed, while solutions involving resettlement outside the region met with the objection, from both refugees and neighbouring states, that resettlement means forfeiting the right of return for Palestinians.¹⁷¹ It is apparent that resolution of the root causes of displacement is the stumbling block to a regional arrangement for the Palestinian refugees.

There is little by way of legal protection for most refugees in this region. Most Middle Eastern states are not party to the Refugee Convention or Protocol. Bahrain, Iraq, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syria and the United Arab Emirates, for example, are not parties to either instrument. Iran and Yemen are parties. Egypt and Afghanistan (part of the 'greater Middle East')¹⁷² and Israel (geographically within the region) are also parties.

One regional effort, the 1994 Arab Convention on Regulating the Status of Refugees in the Arab Countries,¹⁷³ adopted by the League of Arab States, is not in force. On paper, it is an interesting document. It adopts a broad definition of refugee, encompassing in addition to the 1951 Convention definition, 'any person who unwillingly takes refuge in a country other than his country of origin or his habitual place of

¹⁶⁷ League of Arab States, *Protocol for the Treatment of Palestinians in Arab States* (Casablanca Protocol), (11 September 1965) <<http://www.refworld.org/docid/460a2b252.html>>.

¹⁶⁸ Goddard, above n 165, 507.

¹⁶⁹ Otto Hieronymi and Chiara Jasson, 'Palestinian Refugees: The Need for a New Approach' (2002) 4(4) *Global Dialogue* 110, 113.

¹⁷⁰ *Ibid* 113–14.

¹⁷¹ Peretz, above n 165, 92–114.

¹⁷² It has been noted that there are no natural borders, leading to different opinions on the size of the region. Lindholm-Schulz and Schulz, above n 147, 148.

¹⁷³ Arab Convention on Regulating Status of Refugees, above n 67.

residence because of sustained aggression against, occupation and foreign domination of such country or because of the occurrence of natural disasters or grave events resulting in major disruption of public order in the whole country or any part thereof'.¹⁷⁴ However, with respect to *non-refoulement* and asylum, there is an insipid commitment to 'undertake every possible effort, within the limits of their respective national legislation, to accept refugees defined in Article 1 hereof'¹⁷⁵ and a provision concerning *refoulement* that obliges states to 'temporarily accept a refugee should his expulsion or return (refoulement) threaten his life or freedom'.¹⁷⁶ Most other refugee rights contained in the Refugee Convention are not expressly referred to, with a weak catch-all provision requiring states to 'exert every possible effort, to ensure that refugees are accorded a level of treatment no less than that accorded to foreign residents on their territories'.¹⁷⁷ Concerning responsibility-sharing, the Convention provides that 'should a Contracting State face difficulty in granting or continuing to grant right of asylum under this Convention because of sudden or mass influx or for any other compelling reasons, the rest of the Contracting States shall, at the request of such State, take appropriate measures, severally or jointly as to alleviate the burden of the asylum-providing State.'¹⁷⁸

In practice, many refugees have been sheltered and sometimes treated very well by Middle Eastern states. The Syrian refugee crisis illustrates this point. Similarly, the presence of other refugees – Iraqis, and Afghans (who are not Arabs), for example – has often been tolerated and on a grand scale, but rights such as the right to work have not been recognized, leading to onward secondary movement to other regions.¹⁷⁹

The lack of legal protection may correspond to the idea of pan-Arab hospitality. As Victoria Mason explains, in accordance with pan-Arab hospitality, fellow Arabs are treated as 'visitors' and 'guests', while the

¹⁷⁴ Ibid Art 1.

¹⁷⁵ Ibid Art 3.

¹⁷⁶ Ibid Art 8(2).

¹⁷⁷ Ibid Art 5.

¹⁷⁸ Ibid Art 14.

¹⁷⁹ For a discussion of the failure of many Middle Eastern countries to permit Iraqi refugees to work, see Amnesty International, *Rhetoric and Reality: the Iraqi Refugee Crisis* (June 2008) AI Index MDE 14/011/2008; International Crisis Group, 'Failed Responsibility: Iraqi Refugees in Syria, Jordan and Lebanon' (10 July 2008) *Middle East Report* 77.

word ‘refugee’ is reserved for the Palestinian situation.¹⁸⁰ While a notion of hospitality would be a welcome respite from the xenophobia at work in so many refugee situations around the world, it has limitations. Mason distinguishes between the rhetoric of pan-Arab hospitality and its reality, pointing to the inherent power imbalance in the ‘host/guest’ binary.¹⁸¹ Noting the moral panics about refugees in Jordan and the similarity to moral panics about refugees elsewhere, she argues that the hospitality paradigm is a convenient way of justifying rejection of refugees, as the host nation can construct a discourse in which the deviant refugee has abused the host state’s hospitality.¹⁸²

THE MERITS OF REGIONAL ARRANGEMENTS FOR REFUGEES

The preceding exploration of the historical background concerning refugees and regionalism and the situation in the five major regions of the world provides important context for an exploration of the theoretical advantages of regional arrangements for the protection of refugees. The merits of regional arrangements have frequently been expounded by the Executive Committee that approves the programme of the United Nations High Commissioner for Refugees (ExCom). For example, in Executive Committee Conclusion No 22, ExCom recommended that ‘action should be taken bilaterally or multilaterally at the regional or at the universal levels’ and ‘[p]rimary consideration should be given to the possibility of finding suitable solutions within the regional context’.¹⁸³ Similarly, in Executive Committee Conclusion No 81, ExCom encouraged ‘States and UNHCR to continue to promote, where relevant, regional initiatives for refugee protection’.¹⁸⁴ In the 2000 Note on Protection, UNHCR stated

¹⁸⁰ Victoria Mason, ‘The Im/mobilities of Iraqi Refugees in Jordan: Pan-Arabism, “Hospitality” and the Figure of the “Refugee”’ (2011) 6(3) *Mobilities* 353, 354. Mason draws on Geraldine Chatelard, ‘What Visibility Conceals: Re-embedding Refugee Migration from Iraq’ in Dawn Chatty and Bill Finlayson (ed), *Dispossession and Displacement: Forced Migration in the Middle East and North Africa* (Oxford University Press, 2010) 17.

¹⁸¹ Mason, *ibid* 359.

¹⁸² *Ibid* 367. This is also a familiar trope in countries that do not have an equivalent notion of hospitality.

¹⁸³ UNHCR Executive Committee, Conclusion No 22 (XXXII), ‘Protection of Asylum-Seekers in Large-Scale Influx’ (1981), IV (2).

¹⁸⁴ UNHCR Executive Committee, Conclusion No 81 (XLVIII), ‘General Conclusion on International Protection’ (1997), [k].

that '[h]armonized regional protection approaches are an important means of strengthening the international protection regime. UNHCR's active participation in the design of these regional approaches has sought to guarantee consistency with universal standards and to ensure burden sharing and international solidarity, while responding to specific regional concerns.'¹⁸⁵

Acceptance of regionalism as a tool for refugee protection may reflect an optimism about regional protection that is based on generally positive experience. Regional initiatives within international refugee law have often strengthened the international refugee protection regime. As we have seen, regional instruments that have been developed since the 1951 Refugee Convention have often expanded the categories of persons who benefit from protection. Furthermore, these regional instruments specifically call for states that have not already done so to become party to the Refugee Convention as modified by the 1967 Protocol, recognizing that the regional instruments are complements to the universal instruments.¹⁸⁶ Normatively speaking, however, the benefits of a universal approach, on the one hand, or a regional approach, on the other, are open to debate.

Universalism

Universalism has its pros and cons. On the one hand, an inclusive multilateral approach tries to ensure that all states are bound by a common framework. On the other hand, this common framework may, because of the number of parties involved in initial negotiations, reflect only the lowest common denominator or result in gridlock.¹⁸⁷ In turn, Eckersley argues that this may have perverse results as justice either will not be done or serious injustices will not be prevented.¹⁸⁸

Arguably the Refugee Convention and Protocol illustrate the first problem – acceptance of the lowest common denominator. As was commented at the time of negotiation 'the draft Convention had at times been in danger of appearing to the refugee like the menu at an expensive

¹⁸⁵ *Note on International Protection*, UN GAOR 51st sess, UN Doc A/AC.96/930 (7 July 2000) 13.

¹⁸⁶ OAU Convention, above n 60, paragraphs 9 and 10. Cartagena Declaration on Refugees, above n 61 operative paragraph 2; see also preambular paragraphs 3 and 4 of the Recast Qualification Directive, above n 63.

¹⁸⁷ See Thomas Hale, David Held and Kevin Young, *Gridlock: Why Global Cooperation is Failing When We Need It Most* (Polity, 2013).

¹⁸⁸ Robyn Eckersley, 'Moving Forward in the Climate Negotiations: Multilateralism or Minilateralism?' (2012) 12(2) *Global Environmental Politics* 24, 33.

restaurant, with every course crossed out except, perhaps, the soup, and a footnote to the effect that even the soup might not be served in certain circumstances.¹⁸⁹ In relation to responsibility-sharing in particular, it is notable that the efforts to include a provision, albeit non-binding, concerning admission and ‘burden’ sharing failed; there is simply a reference to the ‘heavy burdens’ imposed by hosting refugees in the preamble to the Convention, a reference that was also controversial.¹⁹⁰

Regionalism

There are good reasons to promote regional cooperation in refugee protection. To begin with, refugee movements are frequently regional in location and impact. Regional actors may therefore have a more direct concern in addressing these movements, particularly if there are impacts in terms of regional stability. The OAU Convention acknowledges that refugee problems are a source of friction among many states and it is desirable at the regional level to eliminate the source of such discord.¹⁹¹

Arguably, regional actors may also be better equipped in some respects to respond because they have region-specific knowledge and could be more capable of coordinating and tailoring protection programmes to the particular needs of refugees. For refugees, this regional cooperation could result in greater certainty in finding sanctuary and greater opportunity for the enjoyment of basic social and economic rights, such as the right to work or the right to an adequate standard of living.

A final motivation for regional cooperation in refugee protection is the greater possibility of uniform agreement between nation states in the region. In an international political environment where refugee rights are not yet universally accepted, let alone universally implemented, regional agreement might be a more realistic and achievable goal. As Inis L. Claude wrote in his work on international organization, regional approaches to international problems are often more suitable than global ones because they confine state commitments to manageable sizes within segments of the globe which share common loyalties and/or cultural

¹⁸⁹ Mr Rees, representing Standing Conference of Voluntary Agencies, in *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting: Travaux Préparatoires, 26 November 1951* <<http://www.unhcr.org/3ae68cda4.html>>.

¹⁹⁰ See the discussion of the *travaux*, above n 69.

¹⁹¹ OAU Convention, above n 60, preamble 3.

practices.¹⁹² Additionally, regional arrangements may plug gaps at the global level, such as those that result from gridlock. Stein suggests that:

regional efforts, by regional international organizations and *ad hoc* groupings of regional actors, occur when the region either has rejected the solution advanced by the international community or when the international community has taken little or no action to achieve a solution.¹⁹³

Regions can theoretically collaborate in initiatives such as research and training development, institution and programme sharing, harmonized jurisprudence and combined efforts to tackle root causes of flight. Additionally, participating states could allocate distinct protection roles according to differing levels of expertise and capacity. States could assign tasks such as processing refugee claims, hosting refugees temporarily, resettling refugees permanently, and providing financial support. For states, regional cooperation in this sense could allow for more appropriate and efficient solutions to refugee influxes, reduced financial expenditure (through the elimination of duplicative processes where appropriate) and better diplomatic relationships between participants. For refugees, this cooperation could result in enhanced protection and the greater likelihood of receiving assistance closer to home.

Different forms of regionalism can obviously shape the form of refugee protection prevailing in a particular region. Some of the regional arrangements concerning refugees discussed in this book have been adopted under the auspices of existing regional organizations. For example, the CEAS has been created through legislation adopted by the EU. The CEAS is thus part of a regionalist project: a project that has conflicting visions of Europe at its heart. On the one hand, refugees have found it difficult to enter the EU lawfully, given the focus on controlling the external border to Europe, and the EU has been described as 'Fortress Europe' as a result. On the other hand, the imagined community of Europe as a space of freedom, justice and security, a place committed to protection of human rights because of the European experience during the Second World War, pulls in a different direction and serves to protect those who do arrive in the EU.

¹⁹² Inis L Claude, *Swords into Plowshares: The Problems and Progress of International Organization* (Random House, 1964) 102.

¹⁹³ Barry Stein, 'Regional Efforts to Address Refugee Problems' (Paper presented at the Annual Meeting of the International Studies Association, Toronto, 21 March 1997).

Many of the other initiatives discussed in this book appear to be *ad hoc* forms of regional cooperation, designed to implement (more or less) the global norm of *non-refoulement*, whether or not the participating states have ratified relevant instruments. They are often premised on the hope that a definitive solution will be found to a particular, regional refugee crisis. As Stein writes,

[c]losely related to regional efforts, but distinct from them, is the idea of a comprehensive response to refugee problems. A comprehensive approach is one in which a variety of different but concerted measures are brought to bear on a refugee situation. The ‘package’ needed for a solution can include: temporary asylum, *non-refoulement*, voluntary repatriation with UNHCR monitoring in the country of origin, as well as assistance for reintegration and perhaps local integration or resettlement of refugees who refuse to return.

[...]

Regional approaches are likely to be comprehensive responses because of the interdependence of the concerted measures. For example, refugee camps in the country of asylum cannot be closed unless the country of origin is willing to remove the causes of flight and accept the returnees. However, the removal of the causes of flight may be partially dependent on neighboring countries restricting the flow of political and military aid to insurgent groups.¹⁹⁴

While regional initiatives have the potential to strengthen the international refugee protection regime, regionalism is not necessarily a positive development for refugees. Stein identifies six reasons behind the move to regionalism that are not all motivated by the best interests for refugees, namely:

the shift from colonial struggles to internal conflicts;

the end of the Cold War and the ‘use’ of refugees as an element in the conflict;

growing concern by industrialized countries to contain refugee flows from the developing world;

the refusal of regional actors to play previously assigned roles;

the resistance of donor countries and asylum countries in the developing world to support continued burden-sharing;

¹⁹⁴ Stein, *ibid.* On ‘comprehensive’ approaches, see further, Martin Gottwald, ‘Back to the Future: The Concept of “Comprehensive Solutions”’ (2012) 31(3) *Refugee Survey Quarterly* 101.

and the need for regional actors to respond when global action proves inadequate.¹⁹⁵

Regionalism can also create disparities in treatment between different regions in the world, and it can undermine the pursuit of universality in refugee rights protection. For example, African states have perceived a distinct lack of interest in refugee flows within the African region as compared with other regions. Resettlement outside the region of refugee flows can be hindered when resettlement states adhere too closely to the definition of a refugee set out in the Refugee Convention while other regions are using broader definitions that encompass all victims of generalized violence. Further, the containment measures adopted by the Global North may well be succeeding as UNHCR's statistics show that over the last ten years, the numbers of refugees sheltered in the developing world has increased by over 10 per cent.¹⁹⁶ These policies have ensured that the costs of providing asylum to refugees still fall primarily, perhaps increasingly so, on the world's poorest states.

Minilateralism

Another variant on multilateralism that intersects with regional approaches is the concept of minilateralism, which has been deployed as a tool to overcome gridlock in climate change negotiations. Minilateralism seeks to 'bring to the table the smallest possible number of countries needed to have the largest possible impact on solving a particular problem'.¹⁹⁷ A further variation on minilateralism is 'inclusive minilateralism', which brings together 'the most capable, the most responsible and the most vulnerable'.¹⁹⁸ Robyn Eckersley describes these parties in the context of climate change as follows:

the most capable are the leading developed economies (using GDP as a proxy for capacity), which have the greatest capacity to assist to reduce emissions through technological innovation, and the greatest capacity to assist developing countries with mitigation and adaptation. The most responsible countries are the parties with the biggest historical, aggregate and forecasted emissions, and therefore the biggest scope to reduce emissions, with appropriate acknowledgement of differences in per capita emissions and development

¹⁹⁵ Stein, *ibid* 1.

¹⁹⁶ See UNHCR, *Global Trends 2013*, above n 121, 2.

¹⁹⁷ Moisés Naím, 'Minilateralism' (2009) (173) *Foreign Policy* 136, 135.

¹⁹⁸ Eckersley, above n 188, 26.

need. The most vulnerable are the parties that are expected to suffer the harshest impacts of climate change, and have the least capacity to adapt.¹⁹⁹

In the refugee context, inclusive minilateralism would certainly involve developing countries as some of the most vulnerable, given that they host 86 per cent of the world's refugees, and developed countries as some of the most capable given their economic strength, institutional and technical knowledge, strong democratic structures, and so on, but there are interesting questions as to who is the most responsible, how to include refugees' voices, and other questions as to how to measure capacity.

In both areas – climate change and refugee flows – there is a marked divide between the developed (Northern) and developing (Southern) regions of the globe. Unfortunately, however, this is where the similarities may end. For while the 'grand bargain' to be struck in the context of climate change is 'Southern participation in return for Northern assistance',²⁰⁰ Southern states are both the greatest generators of *and* hosts for refugees and there appears to be little incentive for Northern participation. Alexander Betts has argued for a grand bargain between North and South concerning refugee flows, involving targeted development assistance that helps both refugees and Southern host populations and, simultaneously, diminishes onward movement of refugees to the North.²⁰¹ However, unlike carbon dioxide emissions, which clearly cannot be contained, Northern states are willing to invest in containment of refugees in the South through deterrence mechanisms rather than by providing assistance to Southern states. As Matthew Gibney has written, these deterrence mechanisms can manifest as a kind of regionalism in which the North keeps the South out.²⁰²

¹⁹⁹ Ibid 35. Interestingly, the G20 has arguably made some progress on climate change, despite the fact that it probably only represents the most capable and the most responsible rather than the most vulnerable, perhaps showing the value of exclusive minilateralism.

²⁰⁰ Ibid 30.

²⁰¹ Alexander Betts, 'Development Assistance and Refugees: Towards a North-South Grand Bargain?' (Forced Migration Policy Briefing 2, Refugee Studies Centre, 2009). Betts (11–12) acknowledges his proposal is 'analogous' to that of Hathaway and Neve and the idea that North and South would have 'common but differentiated responsibility' (see James C Hathaway and R Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *Harvard Human Rights Journal* 115).

²⁰² Matthew J Gibney, 'Forced Migration, Engineered Regionalism and Justice between States' in Susan Kneebone and Felicity Rawlings-Sanaei (eds),

In turn, some Southern states are concerned that investment in refugee protection will simply act as a ‘pull factor’ and exacerbate, rather than eliminate, the problem. Thus, they too engage in deterrence measures of their own. Frequently, while the North invests in preventing asylum seekers and migrants from arriving at the border, the South declines to provide assistance in the hope that asylum seekers and migrants will return home.²⁰³

CONCLUSION

As we have seen, ‘regionalism’ and ‘regions’ are contestable ideas. However, it is clear that different approaches to refugee protection have been taken in the five major regions of the globe, so it is possible to talk meaningfully about regionalism and refugee protection. One of the aims of this book is to explore what kind of regionalism has been reflected in regional arrangements for refugee protection. Is it regionalism based on a conception of an imagined community, whether that be solidarity among like states or a commitment to universal values of human rights? If so, how does this affect responses to refugees? Are there different responses to refugees from within as opposed to those coming from outside the region, for example? Given the tendency of regionalism to focus on ‘insiders’, is there an accompanying tendency towards keeping extra-regional refugees out? How are responsibilities for refugees shared within the region? Do some regions refuse to accept responsibility for refugees in the sense of offering them a durable solution within the region? Is it necessary to move beyond regions and encourage inter-regional cooperation?

We think it is likely that cooperation between the most capable, the most responsible and the most vulnerable in refugee protection could achieve good outcomes in refugee protection. However, there are a number of uncertainties to explore. One of the issues we explore in Chapter 3 is how ‘capacity’ is to be measured, given that it impacts on the question of what is a fair share of responsibility. For example, is GDP based on purchasing power parity²⁰⁴ per capita, which is certainly used

New Regionalism and Asylum Seekers: Challenges Ahead (Berghahn Books, 2007) 57.

²⁰³ For example, see the discussion of African states and local settlement in Chapter 5.

²⁰⁴ Purchasing power parity refers to the amount of goods and services that a local currency can buy as compared with a stronger currency in its home country.

by UNHCR when measuring states' contributions to refugee protection,²⁰⁵ the best indicator of capacity? Other interesting questions arise as to a) whether an 'internalist'²⁰⁶ explanation of the causes of refugee flows, which defines the states from which refugees come as the most responsible, is always the most accurate and appropriate; b) whether viewing such states as responsible when non-state actors are involved is helpful; and c) whether involving such states necessarily leads to resolution of the root causes of refugee crises.

Before attempting to answer all these questions concerning regionalism and inter-regional cooperation, it is necessary to unpack another key concept – that of responsibility, for responsibility-sharing presumes agreement that refugees are people for whom responsibility should be taken by the international community. Responsibility can only be shared if all are agreed on the need for protection of refugees, wherever they may be. In Chapter 2 we look beyond the consensus reflected in treaties and customary international law and explore the deeper ethical concerns underpinning refugee protection.

²⁰⁵ See the tables attached to UNHCR's annual *Global Trends* publication – for example, UNHCR, *Global Trends 2013*, above n 121.

²⁰⁶ Chimni, above n 108.

2. The responsibility of states to protect refugees

The cardinal obligation imposed by modern international refugee law is that of *non-refoulement* – the obligation not to return a refugee to a place where their life or freedom would be threatened.¹ When the Refugee Convention was drafted,² the framers made little reference to the reasons why states should protect refugees from *refoulement*. In many ways, the reasons must have seemed self-evident and required little explanation. At that time, in the aftermath of the Second World War, states were acutely aware of the importance of protecting persons who had been displaced due to threats of persecution.³ It is clear from the following statement by the framers of the Convention that they did not want to be complicit in the harm from which refugees fled: ‘The turning back of a refugee to the frontiers of a country where his life or freedom would be threatened ... would be tantamount to delivering him into the hands of his persecutors’.⁴

Over the past 25 years, however, the international refugee regime has been under threat as states have sought to implement restrictive policies. Many states party to the Refugee Convention do not comply with its obligations in practice.⁵ In two regions of the world – the Asia-Pacific region and the Middle East – the majority of states have not undertaken express, binding and written commitments to refugees. Further, although

¹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) (‘Refugee Convention’) Art 33.

² Most of the drafting took place between 1950 and 1951.

³ Peter Showler, *Refugee Sandwich: Stories of Exile and Asylum* (McGill-Queen’s University Press, 2006) 212.

⁴ *Report of the Ad Hoc Committee on Statelessness and Related Problems (Lake Success, New York, 16 January–16 February 1950)* (UN Economic and Social Council, 17 February 1950) UN Doc E/1618; UN Doc E/AC.32/5 <<http://www.refworld.org/docid/40aa15374.html>>.

⁵ For examples of state practice that is not in compliance with Article 33 of the Refugee Convention, see James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 279–300.

the states parties to the Convention endorsed the continuing relevance of the Convention in 2001,⁶ it is sometimes suggested that the Convention should be ‘denounced’ – that is, that particular countries should withdraw from the Convention.

Frequently, arguments in favour of denouncing the Convention rest on an assertion that the Convention is somehow irrelevant or out of date or impractical.⁷ It is also argued that when other countries in a region are not party to the Convention, it is against the national interest of one particular state to either join or remain a party to the Convention. On the other side, those in favour of protecting refugees often take for granted the moral, ethical and theological reasons for granting shelter to refugees. Consequently, this chapter examines the moral, philosophical and practical reasons for granting refugees protection, with a view to firmly establishing that refugee protection is an enduring imperative. The chapter goes beyond merely reciting the legal obligations to which states have voluntarily agreed, seeking instead to show *why* states should shelter refugees.

Of course, none of this suggests that the Convention provides all the answers to refugee protection problems. It does not. One of the key arguments in this book is that the Convention has a significant lacuna concerning responsibility-sharing with respect to refugees. However, before one can establish that responsibility should be shared and the ways and means for doing so, it is important to establish that responsibility should be accepted in the first place. ‘Passing the buck’ will be particularly pronounced if the very rationale for protecting refugees is unclear or not accepted.

We acknowledge that underlying many overt arguments against protecting refugees there are other objections to granting shelter to refugees which are not always articulated in diplomatic discourse. These include racism and economic worries reflected in the potentially contradictory

⁶ *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees* (adopted at the Ministerial Meeting of States Parties in Geneva Switzerland on 13 December 2001) UN Doc HCR/MMSP/2001/09 (16 January 2002).

⁷ On the supposed impracticality of the Convention, see Anthony Bergin, ‘Law Changes Could Stop the Boats’ *The Australian Financial Review* (Sydney), 13 June 2013; Greg Sheridan, ‘UN Decree “Fueling” Asylum Disaster’ *The Australian* (Sydney), 13 June 2013. For an account of similar arguments in other countries, see Gary Troeller, ‘Asylum Trends in Industrialized Countries and their Impact on Protracted Refugee Situations’ in Gil Loescher et al (eds), *Protracted Refugee Situations: Political, Human Rights and Security Implications* (United Nations University Press, 2008) 43, 46.

arguments that refugees are on the one hand a burden on society and on the other a source of competition for jobs. It is, therefore, very important to consider the values that underpin the obligation of *non-refoulement* – values such as human dignity and equality, which compete with racist ideas – and to ascertain the facts concerning whether refugees are a burden or a benefit and whether they are competition for citizen workers or complementary to the existing workforce.

The chapter considers four important rationales for refugee protection. One rationale concerns the sanctity of life and human dignity and the need for states to provide a home or surrogate citizenship⁸ for those whose life and human dignity are threatened. This rationale finds its source in many traditions, some closely related, including human rights, philosophical concepts and religious beliefs. It is probably the primary impetus for international refugee law, although commentators have also noted other possible motivations behind the law, such as the need to respond to the reality of forced migration (albeit in a humane way) and the possibility of using refugee protection as a negative commentary on opposing political systems (for example, Communism vs capitalism) in the context of the Cold War.⁹

In addition to grounding refugee protection in human dignity, which we regard as the primary and best reason for refugee protection, there are other rationales for refugee protection that may work to build popular support for refugee protection. Moral culpability for causing or contributing to refugee flows is sometimes given as a second reason for sheltering refugees. A third rationale is consequentialist and concerns the impacts on state order when refugees are not protected. A fourth is utilitarian and focuses on the contributions that refugees make to their host societies, which contrasts with the more usual portrayal of refugees as a burden on host societies. We turn first to consider the moral and philosophical underpinnings of the protection of refugees, before looking at culpability and consequentialist and utilitarian reasons for protecting refugees.

⁸ James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 288.

⁹ See discussion in Terje Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 37.

MORAL AND PHILOSOPHICAL UNDERPINNINGS OF REFUGEE PROTECTION

The concept of asylum is a venerable one. The word asylum is drawn from the Greek word, *asylos*. In ancient Greece the temple was a place of refuge and to violate it was an act of sacrilege.¹⁰ In later centuries Christians protected fugitives from justice in churches.¹¹ In each of the three major Abrahamic religions – Judaism, Christianity and Islam – asylum holds a special place, because ‘all three founders, Moses, Jesus Christ, and Muhammad, experienced exile and sought asylum in foreign countries. In the three monotheist religions, asylum represents an act of love of one’s neighbour and of help to needy people.’¹² Indeed, in some countries, religion could play a more fundamental role than international human rights law in providing a rationale for refugee protection. UNHCR has worked with many faith leaders and humanitarian organizations on the ‘Welcoming the Stranger’ initiative, which explored the common values in all the world’s major religions that underpin refugee protection.

Although many Islamic states are not party to the Refugee Convention and regional instruments in the Middle East are somewhat minimalist in their protective value for refugees,¹³ the principle of asylum has a firm

¹⁰ See Norman Maclaren Trenholme, ‘The Right of Sanctuary in England: A Study in Institutional History’ (1903) 1(5) *University of Missouri Studies* 4; Atle Grahl-Madsen, *The Status of Refugees in International Law* (AW Sijthoff, 1972) 3-22; Ignatius Bau, *This Ground is Holy: Church Sanctuary and Central American Refugees* (Paulist Press, 1985) ch 5 and 6; S Prakash Sinha, *Asylum and International Law* (Martinus Nijhoff, 1971).

¹¹ Sheltering of people who could be viewed as unworthy of protection could be explained, as Hugo writes, by the imperfect nature of criminal justice (Victor Marie Hugo, *The Hunchback of Notre Dame* (Barnes and Noble Classics, 2004) 351). For a detailed historical analysis that draws the same conclusion, see Trenholme, above n 10 at 1, 95, 96.

¹² Khadija Elmadmad, ‘Asylum in Islam and in Modern Refugee Law’ (2008) 27 *Refugee Survey Quarterly* 51, 53. At Christmas in 2014, Pope Francis spoke of the plight of refugees in his Urbi et Orbi address and, when speaking to a group of refugees in Northern Iraq, he told them that they were ‘like Jesus on the night of his birth, when he was driven out’ (John Hooper, ‘Pope Francis prays for victims of Islamic State in Christmas address’, *The Guardian* (online), 26 December 2014 <<http://www.theguardian.com/world/2014/dec/25/pope-prays-victims-islamic-state-christmas-address>>).

¹³ The Arab Convention on Regulating Status of Refugees in the Arab Countries is not in force (*Arab Convention on Regulating Status of Refugees in the Arab Countries*, adopted by the League of Arab States, 1994.) The Arab Charter on Human Rights protects ‘the right to seek political asylum’ in Article

foothold in the Quran. The Quran states that '[i]f one amongst the pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah, and then escort him to where he can be secure. That is because they are men without knowledge.'¹⁴

The religious underpinnings of asylum have been emphasized by the Organization of the Islamic Conference (OIC). The OIC adopted a non-binding resolution on the problem of refugees in the Muslim World in 2003, in which, among other things, it called on member states to consider acceding to the Refugee Convention, urged member states and the Islamic Development Bank to increase their assistance to Islamic countries hosting refugees, urged non-member states to create better conditions for their Muslim communities and minorities so that they are not forced to become refugees, and condemned acts of repression against refugees.¹⁵ In the preambular paragraphs of this resolution, the OIC reaffirmed the solidarity of member states with countries hosting refugees, stating that this solidarity is 'dictated by the principles of brotherhood and the defense of human rights and human dignity, which are deep-rooted in the Islamic heritage and tradition.'¹⁶ Interestingly, for our purposes, the OIC also referred to the 'responsibility of all states to extend their timely and adequate assistance to Member States hosting

28 and most of the rights, including the right to an adequate standard of living, apply to all persons; some rights, including work, education and political participation rights, are limited to citizens (League of Arab States, *Arab Charter on Human Rights*, adopted on 15 September 1994 (entered into force 15 March 2008)).

¹⁴ The Quran 9:6 (Surah Al-Tawbah), as translated in Muhammad Nur Manuty, 'The Protection of Refugees in Islam: Pluralism and Inclusivity' (2008) 27(2) *Refugee Survey Quarterly* 24, 26. The verse could be misunderstood to condition grant of asylum on the need to proselytize. However, Elmadmad writes that while the verse encourages grant of asylum as a way of introducing non-Muslims to Islam, '[n]on-Muslim refugees ... are not obliged to adopt Islam and, as is clear in verse 6 of Sura Al-Tawbah of the Quran, are granted the status of "protected persons" in dar al-Islam.' Elmadmad, above n 12, 54. (The term dar al-Islam refers to Muslim countries.)

¹⁵ *Resolution No. 15/10-P (IS) on the Problem of Refugees in the Muslim World, Adopted by the Tenth Session of the Islamic Summit Conference*, Putrajaya, Malaysia, 16–17 October 2003, reprinted in (2008) 27 *Refugee Survey Quarterly* 91, [5], [7], [10] and [11].

¹⁶ *Ibid* preamble [5]–[6].

refugees to reduce the heavy burden they are shouldering in a spirit of international solidarity and burden sharing.¹⁷

Protection of the stranger is also deeply rooted in Christianity.¹⁸ Two examples in the Bible are the parable of the Good Samaritan¹⁹ and the description of Judgement Day in the Gospel of Matthew. On Judgment Day, according to Matthew, God will usher into Heaven those who treated the poor, the needy and strangers well, saying ‘I was a stranger and you welcomed me.’²⁰

In turn, Christianity’s emphasis on protection of the stranger has its source in Judaism. Mark Hetfield notes that the commandment to love the stranger (Leviticus 19: 33–34) ‘is repeated no less than 36 times in the Torah, the first five books of the Bible which were given to Moses, to the Jewish people, and to all humanity, by God.’²¹ Hetfield also states that the principle of *non-refoulement* is a tenet of Jewish law, as ‘a Jew may not surrender any person when the surrender is likely to result in the person’s death, unless the person is wanted for a serious crime.’²²

Other religious beliefs may also offer moral bases for the grant of asylum.²³ The Buddhist principle of *silā* (virtue) reflects the principles of equality and reciprocity; as stated by the Venerable Phrahama Nopadol

¹⁷ Ibid preamble [8]. Refugees should of course not be characterized as a burden as they are human beings and are also capable of making great contributions to their host societies.

¹⁸ Snyder notes, however, that, while one theme of the Bible is that strangers should be treated with compassion, there is another theme of hostility and fear (Susanna Snyder, ‘Encountering Asylum Seekers: An Ethic of Fear or Faith?’ (2011) 24 *Studies in Christian Ethics* 350).

¹⁹ Gospel of St Luke, 10: 25–37. See further, Ralston Deffenbaugh and Michael Gallagher, ‘Christian Perspectives on Caring for Refugees and the Displaced’ (Paper presented at the High Commissioner’s Dialogue on Protection Challenges, Theme: Faith and Protection, Geneva, 20 November 2012) <<http://www.unhcr.org/50ab5e4d40.html>>.

²⁰ Gospel of St Matthew, 25: 31–40, The Bible, English Standard Version 2001 <<http://biblehub.com/esv/matthew/25.htm>>.

²¹ Mark Hetfield, ‘The Protection of Refugees under Jewish Law: A Short Introduction’ (Paper presented at the High Commissioner’s Dialogue on Protection Challenges, Theme: Faith and Protection, Geneva, 20 November 2012) <<http://www.unhcr.org/50ab5e229.html>>.

²² Ibid.

²³ Ferris notes the emphasis on charity in the world’s major religions (Elizabeth Ferris, ‘Faith and Humanitarianism: It’s Complicated’ (2011) 24 *Journal of Refugee Studies* 606, 608).

Saisuta, reciprocity or the Golden rule in Christianity ('do unto others as you would have them do unto you') is known to all major religions.²⁴

In states organized around liberal political structures and philosophical principles, asylum also has a firm footing. The early international lawyers were natural lawyers and influenced by Christian morality, so it may not be surprising that writers like Grotius, said to be the founder of modern international law and himself an exile, 'were clearly of the view that states had a duty to admit homeless persons into their territories for the purpose of passage or settlement.'²⁵

Principles of humanity and hospitality have been important rationales for asylum – even after international law's turn away from religion and towards sovereignty as the basis for asylum²⁶ – as have political sympathies. The French Revolution led to support for the right of the politically oppressed to receive asylum; France would give asylum to foreigners who had fought for liberty.²⁷ Kant described universal hospitality as one of the prerequisites for perpetual peace and said that a foreigner could only be turned away if this could be accomplished 'without destroying him'.²⁸ It has been argued that a state of necessity (for the refugee) underpins the obligation of *non-refoulement*²⁹ or that, in limited circumstances, there is a 'duty to rescue'.³⁰ Protection of refugees

²⁴ Ven. Phramaha Nopadol Saisuta, 'The Buddhist Core Values and Perspectives for Protection Challenges: Faith and Protection' (Paper presented at the High Commissioner's Dialogue on Protection Challenges, Theme: Faith and Protection, Geneva, 20 November 2012) <<http://www.unhcr.org/50be10cb9.html>>.

²⁵ Stephen C Neff, 'Rescue Across State Boundaries: International Legal Aspects of Rescue' in Michael A Menlowe and Alexander McCall Smith (eds), *The Duty to Rescue: The Jurisprudence of Aid* (Dartmouth, 1993) 159, 175.

²⁶ See Prakash Sinha, n 10 above, 15 and 16.

²⁷ Ibid 19.

²⁸ Immanuel Kant, *Perpetual Peace and Other Essays* (Ted Humphrey trans, Hackett, 1983) 118. For a defence of the rights of refugees based on universal hospitality, see Gregor Noll, 'Why Refugees Still Matter: A Response to James Hathaway' (2007) 8 *Melbourne Journal of International Law* 536.

²⁹ Niraj Nathwani, 'The Purpose of Asylum' (2000) 12 *International Journal of Refugee Law* 354, 363. Grotius' support for the principle of asylum forms part of a discussion of necessity (*Grotius on the Rights of War and Peace* (abridged trans William Whewell, John W Parker, 1853) Bk II Ch II sXVI, 75).

³⁰ See generally Neff, above n 25. However, Neff accepts the strictly positivist view of *non-refoulement* as not implying a corresponding duty of admission – a position that is not generally accepted by international lawyers given the clearly extra-territorial application of the obligation of *non-refoulement* and the fact that a good faith reading of the Convention requires that, in the end,

has also been spoken of in economic terms as a global public good with one relatively pure public aim – protection of people from serious human rights abuses.³¹ Further, *non-refoulement* has been couched as a protection against complicity in persecution.³²

There are, however, countervailing tendencies in liberal thought that might be described as broadly ‘communitarian’ (concerned with the culture and self-determination of the nation state), as compared with these cosmopolitan (more outward-looking) viewpoints. These countervailing strains of thought are now well entrenched in international law and have almost sidelined asylum.

International law’s moorings have drifted from natural law to a positivist conception of law, under which states are only bound by international law if and when they consent. As international law took this positivist turn, asylum gradually evolved (or regressed) from a right of individuals to a right of the state.³³ For example, Vattel wrote that asylum was an incomplete right: ‘every Nation has the right to refuse to admit an alien into its territory when to do so would expose it to evident danger or cause it serious trouble’.³⁴

By the end of the nineteenth century, positivism had mingled with racism to erect a presumption that states had power to control immigration.³⁵ In turn, this necessitated an exception for refugees, and the first

a refugee be admitted somewhere. Because of his overly strict reading of *non-refoulement* (which accords with some state practice, of course), he writes that refugee law is a rather curious form of the duty to rescue:

States have a duty to treat refugees humanely, for example, by not expelling them, if the refugees happen to be in their territory. But they have no duty to rescue them by allowing them to enter in the first place. An analogy might be made to the case of a person drowning at sea who encounters potential rescuers in a boat. The people in the boat would (on this analogy) have no duty to exert themselves to rescue the drowning person. But if he were somehow to clamber on board, then the people in the boat would be under a legal duty not to throw him overboard (Neff, above n 25, 180).

³¹ Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Cornell University Press, 2009) 25–7.

³² See, for example, Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press, 2011) 397, 401.

³³ Neff, above n 25, 176; also Prakash Sinha, above n 10, 15.

³⁴ Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Bk 1 ch XIX [230]) (1758 trans Charles G Fenwick Oceana, reprinted 1964).

³⁵ James A Nafziger, ‘The General Admission of Aliens under International Law’ (1983) 77 *American Journal of International Law* 804; Adam McKeown,

international legal definitions of a refugee eventuated in the early twentieth century.³⁶ The Refugee Convention serves to soften the rule that states retain complete discretion over migration, enacting a partial exception for the refugee. The Convention does not confer a right to entry, but it does excuse refugees from entering or remaining in state territory in contravention of states' immigration laws,³⁷ and, crucially, it imposes the obligation of *non-refoulement* – the obligation not to return a refugee to a place of persecution.³⁸

The strands of liberal thought that favour control over immigration generally do not challenge the idea that there is an exception for refugees, but arguments in favour of immigration control frequently take on a more virulent form in public debates about asylum, and do result in arguments against any exception to immigration control.³⁹ Immigration control is a hot topic because citizenship has become the key to the entitlement to rights.⁴⁰ This is attributable to the rise in importance of the nation state and nationalism.⁴¹ The idea of the social contract – the idea that governments are founded on consent of the citizenry and their legitimacy depends on protection of citizens' rights, one of the better-known liberal theoretical justifications for the concept of civil rights,

Melancholy Order: Asian Migration and the Globalization of Borders (Columbia University Press, 2008); Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line* (Melbourne University Press, 2008). States now offer rationales for immigration control such as preserving national culture, defending liberal culture and the rule of law, protecting the economic and social rights of citizens, and giving meaning to democracy (Savitri Taylor, 'From Border Control to Migration Management: The Case for a Paradigm Change in the Western Response to Transborder Population Movement' (2005) 39 *Social Policy & Administration* 563, 566–71).

³⁶ Claudena Skran, 'Historical Development of International Refugee Law' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 3, 6.

³⁷ Refugee Convention, above n 1, Art 31.

³⁸ *Ibid* Art 33.

³⁹ For an example, see the argument by former Australian Immigration Minister, Gerry Hand, that Australia cannot protect refugees while also protecting vulnerable citizens, cited in Greg Sheridan, 'UN Decree "Fueling" Asylum Disaster' *The Australian* (Sydney), 13 June 2013.

⁴⁰ Peter Mares, 'Distance Makes the Heart Grow Fonder: Media Images of Refugees and Asylum Seekers' in Edward Newman and Joanne van Selm (eds), *Refugees and Forced Displacement: International Security, Human Vulnerability and the State* (United Nations University Press, 2003) 330, 338.

⁴¹ Christina Boswell, *The Ethics of Refugee Policy* (Ashgate, 2005) 21.

tends to focus on a contract between citizens and governments *within* states, rather than a global contract.⁴²

Joseph Carens has challenged the emphasis on the nation state, arguing it is inconsistent with liberal principles, by pointing out that nationality is an accident of birth⁴³ that should not impact on one's rights or entitlements any more than race, sex or any other ground of discrimination that is outlawed on liberal premises. Refugee status as a surrogate citizenship is a partial recognition of this insight, providing protection in the face of persecution. Similarly, the doctrine of Responsibility to Protect, which accepts that the international community has an obligation to protect where a state has failed in its obligations to protect citizens and crimes of atrocity are occurring, also recognizes that citizenship is inadequate in these situations, and some authors have argued that asylum should be viewed as an aspect of Responsibility to Protect.⁴⁴

One of the problems with Carens' 'liberal universalism', as Boswell points out, is that it appears to impose enormous, impossible duties.⁴⁵ There is also the prospect that some vulnerable citizens may be at risk from the greater competition for jobs, housing and other social goods presumed to follow from lifting immigration controls, which provides one of the most powerful theoretical justifications for retaining strict border controls.⁴⁶

There are several ways of tackling this issue. It may be questionable whether refugees and asylum seekers are substitutes for or complements to the local labour force, taking on jobs that citizens do not wish to perform.⁴⁷ The role that border control plays in securing vulnerable citizens' rights is also questionable, and it is arguable that there is in fact a lack of political will to find meaningful ways of supporting these

⁴² See the discussion of various approaches to Rawls' idea of the social contract, *ibid* 83–5.

⁴³ Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' in Will Kymlicka (ed), *The Rights of Minority Cultures* (Oxford University Press, 1995) 332.

⁴⁴ See, for example, Brian Barbour and Brian Gorlick, 'Embracing the "Responsibility to Protect": A Repertoire of Measures Including Asylum for Potential Victims' (2008) 20 *International Journal of Refugee Law* 533.

⁴⁵ Boswell, above n 41, ch 2.

⁴⁶ John Isbister, 'A Liberal Argument for Border Controls: Reply to Carens' (2000) 34 *International Migration Review* 629, 634.

⁴⁷ Mathias Czaika, 'A Refugee Burden Index: Methodology and its Application' (2005) 2 *Migration Letters* 101, 105.

citizens.⁴⁸ For example, Kevin Johnson has argued that if employment of unauthorized workers is tolerated in practice, border control does not work to protect citizen workers.⁴⁹ He argues that the solution is setting and enforcing reasonable labour protection standards.⁵⁰ Some economists have gone further and challenged the case for border control on the basis that economically, migration is beneficial (or at least neutral), while the costs of attaining perfect border control are overwhelming.⁵¹

It is also arguable that while liberal universalism requires citizens in liberal societies to imagine a world in which they owe duties to all other human beings on the basis of their equal and moral worth, empirically, the reality is that these citizens will not be called upon to implement these duties to each and every one of the potential claimants. Not everyone would move even if there were open borders, and the sad reality is that many people cannot move away from the forces of persecution, violence, natural disaster or extreme economic hardship that threaten their very survival. Furthermore, given that no one country is entirely responsible for generating refugees, neither is any one country going to receive all the world's refugees.⁵² The critique of 'unfeasibility', to use Boswell's words,⁵³ is hyperbole in many cases. The contrast between Australia's reaction to unauthorized boat arrivals and the Middle Eastern region's response to the Syrian refugee crisis illustrates this point.⁵⁴

It is therefore possible to call for a principled exception to immigration controls on behalf of the refugee, so long as the costs do not genuinely become so great that they undermine the state's ability to protect its own citizens. Thus political scientist Matthew Gibney argues for a principle of

⁴⁸ Timothy J Hatton and Jeffrey G Williamson, *Global Migration and the World Economy: Two Centuries of Policy and Performance* (MIT Press, 2005) 391.

⁴⁹ Kevin Johnson, 'Open Borders?' (2003) 51 *UCLA Law Review* 193, 249.

⁵⁰ *Ibid* 254.

⁵¹ Gordon Howard Hanson, 'The Economic Logic of Illegal Immigration' (Council Special Report 26, Council on Foreign Relations, 2007) 5.

⁵² See, for example, the table showing the number of countries that host more than 100 000 refugees from a single country of origin and the correlation with shared borders in Niels Harild and Asger Christensen, *The Development Challenge of Finding Durable Solutions for Refugees and Internally Displaced People* (World Development Report 2011 Background Note, World Bank, July 2010), 4 (table 2).

⁵³ Boswell, above n 41, 2.

⁵⁴ See the Introduction to this book.

humanitarianism to mediate between the moral claim of the refugee,⁵⁵ which, as he puts it, is ‘grant me asylum for, if you do not, I will be persecuted or face life-threatening danger’,⁵⁶ and the political and economic interests of states. He argues that ‘states have an obligation to assist refugees when the costs of doing so are low.’⁵⁷

The answer to a situation in which the costs are genuinely too great to bear is not to eschew entirely the principles of refugee protection but to require responsibility for protection to be shared with other states. The citizens of countries in the developing world, which is both the generator of most refugee and forced migration flows and the place in which the vast majority of the world’s refugees are sheltered,⁵⁸ generally have a stronger basis than developed countries for arguing that they are impacted upon by mass influxes⁵⁹ and are less able to cope with these influxes. In any case, where there is a particularly large influx and there are real (as opposed to hyperbolic ‘what if’) questions about the capacity of a particular state to protect refugees, there is a case for sharing responsibility.

The primary justification for taking responsibility for refugees rests on the necessitous circumstances of the refugee and the desire to avoid

⁵⁵ Gibney uses the following definition of a refugee: ‘people in need of a new state of residence, either temporarily or permanently, because if forced to return home or remain where they are they would – as a result of either the brutality or inadequacy of their state – be persecuted *or* seriously jeopardize their physical security or vital subsistence needs.’ (Matthew J Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge University Press, 2004) 7.)

⁵⁶ Ibid 3.

⁵⁷ Ibid 231.

⁵⁸ At the end of 2012, the top ten source countries of refugees were Afghanistan, Somalia, Iraq, Syria, Sudan, the Democratic Republic of Congo, Myanmar, Colombia, Vietnam and Eritrea. The top ten refugee-hosting countries were Pakistan, Iran, Germany, Kenya, Syria, Ethiopia, Chad, Jordan, China and Turkey (UNHCR, *Global Trends 2012: Displacement: The New 21st Century Challenge* (UNHCR, 2013) 13, 15).

⁵⁹ UNHCR describes the features of a ‘mass influx’ as follows: ‘mass influx situations may, inter alia, have some or all of the following characteristics: (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers.’ UNHCR Executive Committee, *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations* 100 (LV) (2004) <<http://www.unhcr.org/41751fd82.html>>.

becoming complicit with the persecutors. However, there are other arguments that support taking responsibility for refugees. One is moral culpability for refugee flows, and we turn to this justification below.

MORAL CULPABILITY FOR CAUSING OR CONTRIBUTING TO REFUGEE FLOWS

An often-overlooked reason to accept responsibility for refugees is the contribution to root causes of refugee flows of factors external to the state. This rationale is most obvious in the case of military interventions, such as the wars in Vietnam, Afghanistan and Iraq.⁶⁰ Less obvious, perhaps, are the ways in which global inequalities – in levels of development, for example – lead to migration and refugee flows.

B S Chimni has pointed out that the focus on ‘internalist’ explanations of the causes of refugee flows, which denies the involvement of states other than countries of origin, has led to the undermining of asylum and the maintenance of these inequalities between states.⁶¹ These inequalities feed both refugee and migration flows, a phenomenon known as the ‘asylum–migration nexus’. As Castles and Miller write, ‘[u]nderdevelopment, impoverishment, poor governance, endemic conflict and human rights abuse are closely linked.’⁶²

Gibney writes that it is possible, in light of the many ways that external factors contribute to refugee flows, to view refugee status as a form of reparation for being made a refugee.⁶³ He further argues that the harm to be repaired is the deprivation of the refugee’s ‘social world’, which militates in favour of refugee choice as to the country in which to rebuild that world.⁶⁴

Attempts at containment may exacerbate, rather than reduce, these inequalities between states, leading in the end, perhaps, to consequences

⁶⁰ See, for example, the discussion of the responsibility of the states that invaded Iraq in 2003 in Amnesty International, *Rhetoric and Reality: The Iraqi Refugee Crisis* (June 2008) AI Index MDE 14/011/2008 and International Crisis Group, ‘Failed Responsibility: Iraqi Refugees in Syria, Jordan and Lebanon’ (Middle East Report 77, 10 July 2008).

⁶¹ B S Chimni, ‘The Geopolitics of Refugee Studies: A View from the South’ (1998) 11 *Journal of Refugee Studies* 350, 351.

⁶² Stephen Castles and Mark J Miller, *The Age of Migration* (Palgrave Macmillan and Guilford, 3rd ed, 2003) 32.

⁶³ Matthew J Gibney, ‘Refugees and Justice Between States’ (2015) 14 *European Journal of Political Theory* 448, 460.

⁶⁴ *Ibid.*

for the North, including unauthorized migration. This leads to a consequentialist argument for the protection of refugees, which we turn to consider next.

CONTAINMENT'S IMPOSSIBILITY AND CONSEQUENCES

Although we argue that the primary reason for affording refugees protection is humanitarian, Hathaway has written that modern refugee law was envisaged as a pragmatic response to the reality of forced migration: '[r]efugee law was designed to effect a compromise between the reality of [the] largely unstoppable flow of involuntary migrants across European borders and the broader policy commitment to restrictionism in immigration.'⁶⁵

European states are in a much better position to police their borders than they were at the end of the Second World War and have now erected a formidable array of *non-entrée* measures, including carrier sanctions and the like. However, in late 2015, enormous migration flows posed significant challenges to border control. It is also highly doubtful that any system could completely prevent unauthorised arrivals. As Edward Alden explains,

The most secure border in modern history was probably the Cold War border between East and West Germany. To keep their people from leaving – logistically much easier than keeping others from entering – the East Germans built more than 700 watchtowers, sprinkled more than a million antipersonnel mines, created a deep no-man's zone of barbed wire and electric fencing, and deployed nearly 50 guards per square mile with shoot-to-kill orders. Even so about 1,000 people each year somehow managed to find a way across.⁶⁶

A contrary example, Australia's Operation Sovereign Borders, which might be viewed as a success in terms of preventing unauthorized boat arrivals,⁶⁷ carries an unknown but undoubtedly significant economic

⁶⁵ James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 2.

⁶⁶ Edward Alden, 'The Meaningless Mantra of "Border Security"' *Wall Street Journal* (New York), 2 June 2010.

⁶⁷ Scott Morrison, Australia's Minister for Immigration from 2013 to December 2014, cited the fact that only one boat arrived in Australia during Operation Sovereign Borders as proof that the policy of maritime interception was the 'critical blow' to people smuggling operations between Indonesia and Australia (see Jared Owens, 'Scott Morrison ends secrecy surrounding Operation

cost.⁶⁸ The number of arrivals was also not significant in comparison with other countries to begin with,⁶⁹ which may help to explain the relative 'success'.

Of course, it is possible that it is not actual containment, but the *image* of containment and control to which governmental efforts at deterrence aspire. Perhaps Australia's focus (obsession?) with unauthorized boat arrivals illustrates this point. Unauthorized plane arrivals and visa overstayers already living in the Australian community are simply not as visible as those coming on rickety fishing boats. However, the statistical evidence may suggest that deterrence efforts are having a real impact on

Sovereign Borders', *The Australian* (online), 18 September 2014 <<http://www.theaustralian.com.au/national-affairs/immigration/scott-morrison-ends-secrecy-surrounding-operation-sovereign-borders/story-fn9hmlgu-1227062425371>>.

⁶⁸ A paper concerning budget measures regarding border protection and people-smuggling counter-measures indicates that over 2015 and 2016, AU\$186.5 million will be put to counter people-smuggling and to maritime surveillance (Cat Barker, 'Border Protection and Counter-People Smuggling Measures' *Budget Review 2015–16* <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201516/Border>). Meanwhile, the cost of offshore detention is estimated to be AU\$811 million (Kaldor Centre, *2015–2016 Budget* (13 May 2015) <<http://www.kaldorcentre.unsw.edu.au/news/2015-2016-budget>>).

⁶⁹ While Australia has a relatively generous resettlement programme, the total number of refugees, including refugees resettled from overseas and those applying for visas onshore, has been set in recent years at 13 750 places, although in 2012–13 this number increased to around 20 000. Unauthorized boat arrivals have been the main concern for Australian governments during this time. Numbers for this group of asylum seekers peaked in 2013 at 20 587 (Janet Phillips, *Boat Arrivals in Australia: A Quick Guide to the Statistics* (Parliament of Australia, 23 January 2014) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/QG/BoatArrivals>). This number is still very small when compared with the total refugee population for 2013, which was 16.7 million people (UNHCR, *Global Trends 2013: War's Human Cost* (UNHCR, 2014) 2). As the Refugee Council has noted, '[w]hile our resettlement program remains the second-highest in the world and the highest per capita, Australia received just 0.34 per cent of the world's asylum claims. When the protection of refugees through asylum processes and the further protection of refugees through resettlement are considered together, Australia ranked 17th overall, 22nd on a per capita basis and 36th relative to national gross domestic product (GDP)' (Refugee Council of Australia, *2015–2016 Refugee and Humanitarian Program: Discussion Paper and Consultation Questions* <http://www.refugeecouncil.org.au/r/isub/2015-16_RHP_discussion_paper.pdf>).

refugees' ability to move. Over the last decade, the number of refugees sheltered in the developing world has risen from 70 per cent to 86 per cent.⁷⁰

The containment of refugees in the Global South in situations where they are not adequately protected leads to or exacerbates a multitude of problems that may adversely affect states' interests. Containment may contribute to humanitarian tragedies as people are prevented from leaving.⁷¹ The many deaths at sea or at the border of Northern states are another effect.⁷²

The tendency to treat migration as a threat to security and resulting efforts at containment may also backfire.⁷³ The outcome of the North's refusal to share responsibility for refugees in a way that includes meaningful protection and durable solutions for them is that refugees are maintained in a compromised emergency situation in camps in the developing world. Securitization discourse tends to encourage a race to the bottom,⁷⁴ and developing states generally have fewer resources to devote to policing their borders than developed states. Faced with true mass influxes, they are quite likely to resort to encampment as a strategy. Refugees can and do play a role in insurgencies in their countries of origin,⁷⁵ and their containment in refugee camps may assist the insurgents.

The literature regarding the causes of militarization of refugees in camps is still in its infancy and subject to ongoing debates. Guglielmo

⁷⁰ UNHCR, *Global Trends 2013*, above n 69, 2. Jeff Crisp has argued that the increase is due to the *non-entrée* measures adopted by the Global North (Jeff Crisp, 'Get Back to Where You Once Belonged! A Global Perspective on Migration, Asylum and the Challenges of Refugee Protection' (Keynote address at the National Asylum Summit 2013, University of South Australia, 26 June 2013) <<https://www.youtube.com/watch?v=yI5d7eFobIM>>).

⁷¹ See Katy Long, 'In Search of Sanctuary: Border Closures, "Safe" Zones and Refugee Protection' (2012) 26 *Journal of Refugee Studies* 458, 463.

⁷² For analysis of deaths at the border, see Leanne Weber and Sharon Pickering, *Globalization and Borders: Deaths and the Global Frontier* (Palgrave Macmillan, 2011).

⁷³ For a history of the turn to security, including by UNHCR, see Anne Hammerstad, 'UNHCR and the Securitization of Forced Migration' in Alexander Betts and Gil Loescher (eds), *Refugees in International Relations* (Oxford University Press, 2011) 237.

⁷⁴ Ibid 253. See also Troeller, above n 7, 43.

⁷⁵ See, for example, Aristide R Zolberg, Astrid Suhrke and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (Oxford University Press, 1989) 275–9.

Verdirame and Jason Pobjoy write that camps ‘create an ideal space for political and ethnic radicalization’.⁷⁶ On the other hand, Lischer warns that socio-economic factors are less important than the political context and that political context explains why some refugee populations are involved in conflict.⁷⁷ Whatever the causes, militarization of refugees may well have consequences beyond the region, if only because it may prolong and deepen conflicts, creating more refugees and putting ever-greater pressure on the containment walls erected by the Global North.

It is vital that the militarization that has occurred does not become a reason to reject refugees and that the role of encampment in militarization is better understood. The answers to problematic refugee camps may include better security within camps, local integration instead of encampment,⁷⁸ and durable solutions, including political solutions for root causes that feed refugee warrior movements. Containment, by contrast, is premised on an overwhelmingly negative perception of refugees, as a burden and a possible security threat. The next section presents a more nuanced picture of refugees and acknowledges that they contribute to their host societies.

ARE REFUGEES A BURDEN OR A BENEFIT?

A fourth reason for refugee protection, and in our view an important, though supplementary, one, is that refugees are not a just a short-term ‘burden’ but are likely to make valuable contributions to their host countries in the long term. In developed countries, which are generally party to the Refugee Convention⁷⁹ and in which the state takes responsibility for determination of refugee status and reception of asylum

⁷⁶ Guglielmo Verdirame and Jason Pobjoy, ‘The End of Refugee Camps?’ in Satvinder S Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate, 2013) 471, 473.

⁷⁷ Sarah Kenyon Lischer, *Dangerous Sanctuaries: Refugee Camps, Civil War, and the Dilemmas of Humanitarian Aid* (Cornell University Press, 2005) 34–43. For more on this topic, see Mike Lebson, ‘Why Refugees Rebel: Towards a Comprehensive Theory of Refugee Militarization’ (2013) 51(5) *International Migration* 133.

⁷⁸ See further the discussion of the security impacts of refugees in the section on ‘Political and Security Impacts’ below.

⁷⁹ Some countries classified by the World Bank as ‘high income’, and therefore developed economies, are not party to the Convention or Protocol. For example, Singapore and the oil-rich Gulf states of Bahrain, Oman, Qatar and Saudi Arabia are not party.

seekers, the costs of refugee protection can be quantified relatively easily.⁸⁰ The benefits of hosting humanitarian migrants have, however, received less attention.

In 2010, the Refugee Council of Australia prepared a literature review on the economic, civic and social contributions of refugees and humanitarian entrants, which documented the long-term benefits of resettling refugees.⁸¹ One example of the review's findings was that, over 18 months, the Afghan community contributed AU\$2.4–2.7 million to the economy of the New South Wales country town of Young and its surrounding region.⁸² Similarly, Graeme Hugo's report on the economic, social and civic contributions of first- and second-generation humanitarian entrants to Australia confirms that this group of migrants help to meet labour shortages, establish their own businesses and help forge economic links between Australia and their countries of origin.⁸³ These are aspects of refugee protection that are too often forgotten. In addition, as Boswell and Crisp point out, asylum policies themselves, such as the heavy use of detention centres, can increase reception costs, while denial of the right to work can increase fiscal costs.⁸⁴

In the developing world it is frequently assumed that costs of receiving refugees must outweigh any benefits, given developing countries' lesser capacity to host them. Here we sketch the economic, social, political, security and environmental impacts of hosting refugees and question whether the balance sheet will always be negative.

Economic Impacts

Developing countries, which have more difficulty than developed countries meeting the needs of their own citizens and are frequently faced with mass influxes of refugees, are more justified in their claim that refugees may place an undue burden on them and in calling for greater

⁸⁰ Christina Boswell and Jeff Crisp, 'Poverty, International Migration and Asylum' (Policy Brief No 8, United Nations University World Institute for Development Economics Research, 2004) 19.

⁸¹ Refugee Council of Australia, *Economic, Civic and Social Contributions of Refugees and Humanitarian Entrants: A Literature Review* (RCOA, 2010).

⁸² *Ibid* 9.

⁸³ Graeme Hugo, *Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants: Final Report to the Department of Immigration and Citizenship* (Department of Immigration and Citizenship, June 2011) <https://www.immi.gov.au/media/publications/research/_pdf/economic-social-civic-contributions-about-the-research2011.pdf> chs 3 and 4.

⁸⁴ Boswell and Crisp, above n 80, 19.

effort on the part of developed countries to share responsibility. The Syrian refugee crisis, documented in the introduction to this book, is perhaps the best illustration of this point. Research into the economic and social impacts of large numbers of refugees in developing host countries has, however, shown that refugees have both positive and negative impacts on their host countries.⁸⁵ Among the negative impacts are uncompensated public expenditure and burden on the economic infrastructure,⁸⁶ price increases for essential products, and loss of purchasing power.⁸⁷ Positive effects include increased agricultural production, an increase in local incomes, access to services such as education and the provision of basic infrastructure by the international community,⁸⁸ and a reduction in commodity prices.⁸⁹ The extent to which the effects are either positive or negative depends on several factors, such as the policy settings in the country of asylum (for example, whether refugees are allowed to work and contribute to the economy) and relationships between the host population and the refugee population (for example, whether the refugees are well-accepted because they share a similar ethnicity).⁹⁰

As with migration more generally, it is important to note that the burdens and benefits will not necessarily be spread evenly.⁹¹ There can be winners and losers among citizens of the host country and among the refugees themselves.⁹² For example, local entrepreneurs in Tanzania have benefited from the cheap labour that refugees have been willing to

⁸⁵ Margarita Puerto Gomez and Asger Christensen, 'The Impacts of Refugees on Neighboring Countries: A Development Challenge' (World Development Report 2011 Background Note, World Bank, 29 July 2010) 3.

⁸⁶ Ibid 19.

⁸⁷ Executive Committee of the High Commissioner's Programme, *Economic and Social Impact of Massive Refugee Populations on Host Developing Countries, as Well as Other Countries*, UN Doc EC/54/SC/CRP.5 (18 February 2004) <<http://www.unhcr.org/403dc64.html>> 3.

⁸⁸ Ibid 3-4; for discussion of improved education provision in Uganda, see Sarah Dryden-Peterson and Lucy Hovil, 'Local Integration as a Durable Solution: Refugees, Host Populations and Education in Uganda' (Working Paper No 93, UNHCR, September 2003) <<http://www.unhcr.org/3f8189ec4.html>> 12-18.

⁸⁹ Gomez and Christensen, above n 85, 19.

⁹⁰ Ibid 7.

⁹¹ Hatton and Williamson, above n 48, demonstrate that, historically, migration has impacted on the wages of poorer citizens (see particularly their Chapter 6) and argue that there is a need to compensate the 'losers' (at 391).

⁹² Gomez and Christensen, above n 85, 7.

supply, yet this has adversely affected the wages of Tanzania's unskilled workers by driving income levels lower.⁹³

Social Impacts

Refugees who are perceived by host societies as 'insiders' in some way are often welcomed, even in impoverished developing countries. Loescher notes that during the 1980s,

the remarkable receptivity provided to millions of Afghans in Pakistan and Iran, to ethnic kin from Bulgaria in Turkey, to Ethiopians in the Sudan, to Ogadeni Ethiopians in Somalia, to southern Sudanese in Uganda, to Issaq Somali in Djibouti and to Mozambicans in Malawi has been facilitated by the ethnic and linguistic characteristics they share with their hosts.⁹⁴

On the other hand, racial, ethnic, religious and cultural differences between citizens of host societies and refugees can cause friction, particularly if there is extant animosity.⁹⁵

Frequently, tensions have arisen in developing countries because of differing treatment of refugees and host communities. There are well-documented examples of the impact of structural adjustment policies in Africa that have lessened or neutered the capacity of the state to provide services to its citizens, while refugees continue to be provided those services by international organizations.⁹⁶ Various strategies may be used to combat this phenomenon, including the use of what is called targeted development assistance, or refugee aid and development, which aims to assist local communities hosting refugees as well as the refugees themselves. This strategy, which arose out of regional arrangements in Africa and Latin America, is discussed in Chapter 3.

⁹³ Ibid 10. See also Jean-François Maystadt and Philip Verwimp, 'Winners and Losers Among a Refugee-Hosting Population: Consumption, Economic Activities, and Agglomeration' (2014) 62 *Economic Development and Cultural Change* 769, 776.

⁹⁴ Gil Loescher, Alexander Betts and James HS Milner, *UNHCR: The Politics and Practice of Protection into the Twenty-First Century* (Routledge, 2008), quoted in James HS Milner, *Refugees, the State and the Politics of Asylum in Africa* (Palgrave Macmillan, 2009) 42.

⁹⁵ Gomez and Christensen, above n 85, 11.

⁹⁶ See Cassandra R Veney, *Forced Migration in Eastern Africa: Democratization, Structural Adjustment, and Refugees* (Palgrave Macmillan, 2007) 80–103; Milner, above n 94, 81, 114–16, 132, 175.

Racism and xenophobia on the part of citizens can be tackled through the implementation of government policies that embrace diversity and multiculturalism. Unfortunately, however, there is an observable trend around the globe of governments playing on fear of the other and fanning the flames of racism and xenophobia. In Western developed countries, refugees may become a tool for demonstrating control in the context of a globalized economy over which governments have a decreasing level of control.⁹⁷ Populist campaigns against the arrival of ‘boat people’ in Australia have been very successful, for example.⁹⁸

In developing countries, governments and regimes are often weak and insecure. Milner argues persuasively, with respect to three African states (Tanzania, Kenya and Guinea), that a strategy of scapegoating has been used:

Job (1992, 29) notes that a common security strategy of regimes in weak states is to ‘focus upon external enemies ... to try to create a common national concern and mobilize support around the state (i.e., regime) and its efforts against this threat’. Such a strategy is often deployed when the regime is under pressure and seeks to either divert attention from its inability to respond to popular demands or to rally the support of the population by emphasizing a common objective against an outside group.⁹⁹

A common example of scapegoating is the allegation made by some governments that refugees are responsible for most crime in the host country.¹⁰⁰

Political and Security Impacts

In addition to impacts, whether real, perceived or manufactured, on low or indirect security issues such as crime, the hosting of refugees (or, more correctly, excludable¹⁰¹ elements among refugee populations) may have

⁹⁷ Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008).

⁹⁸ See the discussion in the Introduction to this book.

⁹⁹ Milner, above n 94, 82–3.

¹⁰⁰ Milner, above n 94, 64–5; see also the reference to the discourse concerning unauthorized migrants and crime in Malaysia in Penelope Mathew and Tristan Harley, *Refugee Protection and Regional Cooperation in Southeast Asia: A Fieldwork Report* (Australian National University, March 2014) 12.

¹⁰¹ Milner, above n 94, 75. Article 1F of the Refugee Convention provides for the exclusion of refugees deemed unworthy of protection – for example, those who have committed war crimes or crimes against humanity.

an impact on high or direct security issues. Since 2001, many governments have wrongly represented unauthorized migrants, including refugees, as a security threat. Following the attacks of September 11 of that year on New York and the Pentagon, the UN Security Council adopted Resolution 1373, which appeared to identify refugees and asylum seekers as a possible terrorism threat, despite the fact that none of the hijackers entered the USA as refugees and the fact that those guilty of terrorist acts are excluded from refugee status under the Refugee Convention.¹⁰²

This is not to say that refugees never commit crime, including acts of terrorism. Notoriously, the gunman involved in the siege at Martin Place in Sydney in December 2014 had been admitted as a refugee to Australia, many years before the siege.¹⁰³ One of the bombers involved in the Paris terror attacks in November 2015 may have presented in Greece as part of the flow of migrants and refugees from Syria; however, all the identified attackers appear to have been European nationals who had travelled to Syria.¹⁰⁴ A more real connection between refugees and national security may be presented by ‘refugee warriors’ prosecuting wars at home from the safety of a refugee camp.¹⁰⁵ During the Cold War refugee warriors, such as the Nicaraguan Contras, were often supported by Western countries,¹⁰⁶ thus prolonging the conflict. There is also a risk that such conflicts will become regionalized as refugee hosting countries are drawn

¹⁰² For discussion, see Penelope Mathew, ‘Resolution 1373 – A Call to Preempt Asylum Seekers? (or “Osama the Asylum Seeker”)’ in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Hart, 2008) 19.

¹⁰³ Rick Feneley, ‘Martin Place Siege Gunman Man Haron Monis: Why Amnesty Supported his Application for a Protection Visa’, *The Sydney Morning Herald* (online), 6 January 2015 <<http://www.smh.com.au/national/martin-place-siege-gunman-man-haron-monis-why-amnesty-supported-his-application-for-a-protection-visa-20150106-12itu3.html>>.

¹⁰⁴ Alicia Parlapiano et al, ‘The Expanding Web of Connections Among the Paris Attackers’ *The New York Times*, 26 November 2015 <http://www.nytimes.com/interactive/2015/11/15/world/europe/manhunt-for-paris-attackers.html?_r=0>. In another case, one of the bombers appears to have been in possession of a stolen Syrian passport: Abigail Abrams, ‘Paris Attack 2015: Named Terrorists All European Nationals, Not Syrian Refugees’ *International Business Times*, 19 November 2015 <<http://www.ibtimes.com/paris-attack-2015-named-terrorists-all-european-nationals-not-syrian-refugees-2191677>>.

¹⁰⁵ Zolberg, Suhrke and Aguayo, above n 75.

¹⁰⁶ Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford University Press, 2001) 1, 214–24.

into the conflict.¹⁰⁷ UNHCR argues that ‘the failure to address the problems of the Rwandan refugees in the 1960s contributed substantially to the cataclysmic violence of the 1990s’.¹⁰⁸

Strategies to combat these risks include separation of armed elements from refugees, which is admittedly challenging in the context of a mass influx,¹⁰⁹ pursuing a policy of local integration instead of containment in camps at the periphery of the state, increasing state presence in border areas, and moving the camps away from the borders.¹¹⁰ However, political factors unrelated to the presence of refugees but related to the survival of regimes have led to a different approach. Milner gives the example of Kenya, which adopted a policy of ‘abdication and containment’ after 1991, when Somali refugees arrived in huge numbers;¹¹¹ responsibility for sheltering refugees was handed to UNHCR and they were contained in camps at the edges of Kenya.

Noting that a range of valid direct and indirect security concerns, such as the large number of refugees and the failure of donors to share responsibility with Kenya, were used to justify the policy, Milner argues that other factors, ‘[i]n particular, the history of the *shifita* wars [a Somali guerrilla campaign between 1963 and 1967] and the vulnerability of the Moi regime, compounded by the suspension of international aid to Kenya in November 1991, led Kenya to grant asylum to the Somali refugees on the condition that they be contained on the periphery of the state.’¹¹² Milner documents factors underlying the perception that the North Eastern Province of Kenya where the Dadaab camps are located is integral yet peripheral, threatening and therefore important to the Kenyan state. The North Eastern Province has always been ethnically Somali and the five points of the Somali flag represent five Somali territories separated in the European ‘scramble for Africa’, including most of northern Kenya.¹¹³ The *shifita* wars were a consequence of the fact that secession of what became the North Eastern Province of Kenya was not permitted. The threat the conflict posed to the newly independent Kenya

¹⁰⁷ Milner, above n 94, 77; Idean Salehyan and Kristian Skrede Gleditsch, ‘Refugees and the Spread of Civil War’ (2006) 60(02) *International Organization* 335.

¹⁰⁸ UNHCR, *The State of the World’s Refugees: Fifty Years of Humanitarian Action* (Oxford University Press, 2000), 49.

¹⁰⁹ *Ibid* 248–9.

¹¹⁰ The last two strategies are mentioned by Milner, above n 94, 88.

¹¹¹ *Ibid*.

¹¹² *Ibid* 107.

¹¹³ *Ibid* 102–103.

resulted in a declaration of a state of emergency that was not lifted until 1991, when it became necessary to do so to facilitate a response to the arrival of Somali refugees.¹¹⁴

Environmental Impacts

Studies concerning environmental impacts of refugees have tended to focus on situations of mass influx that have developed into protracted refugee situations. In relation to displacement in Sudan, for example, the United Nations Environment Programme lists impacts of deforestation and firewood depletion, land degradation, unsustainable groundwater extraction and water pollution.¹¹⁵ Strategies to alleviate these problems include abandoning policies of encampment in favour of dispersed refugee settlement or local integration, and development initiatives that target areas affected by refugee influxes and that aim to assist both refugees and local populations.¹¹⁶

Could There be More Benefits than Burdens?

In answering the question about whether the presence of refugees in developing countries brings more benefits to those countries than negative effects, we turn to a study conducted in April 2010 of the impacts of the Dadaab refugee camps in Kenya's North Eastern Province. Commissioned by the Kenyan Department of Refugee Affairs and the Danish and Norwegian embassies in Nairobi, it concluded that, on balance, the camps probably had a positive impact on the North Eastern Province.¹¹⁷ Perhaps the strongest evidence for this finding is the significant inflow of Kenyans to the Dadaab area, which would probably not otherwise occur given the arid nature of the land.¹¹⁸ The study noted the significant overlap in host and refugee identities given their often shared sub-clan identities and the intermingling of populations.¹¹⁹ It also drew attention

¹¹⁴ Ibid 103.

¹¹⁵ United Nations Environment Programme, *Sudan Post-Conflict Environmental Assessment* (2007) <http://www.unep.org/sudan/post-conflict/PDF/UNEP_Sudan.pdf> 92.

¹¹⁶ Gomez and Christensen, above n 85, 19.

¹¹⁷ Martin Enghoff et al, *In Search of Protection and Livelihoods: Socio-economic and Environmental Impacts of Dadaab Refugee Camps on Host Communities* (Royal Danish Embassy, Republic of Kenya, Norwegian Embassy, 2010).

¹¹⁸ Ibid 7, 20.

¹¹⁹ Ibid 24.

to the large number (estimated at 27 per cent) of the local population, originally from the host communities and from elsewhere in Kenya, who held refugee ration cards, even though they are not refugees,¹²⁰ and recommended that measures be taken to eliminate this practice.¹²¹ However, there were many other ways in which the host communities benefited legitimately from the refugee camps.

Locals benefited from increased social services as a result of the camps, with camp hospitals accessible to locals and improvements in transportation being prominent examples.¹²² Some significant economic benefits went beyond the ability of locals to access refugee rations, such as the resale of refugee rations, markets for pastoral products and income accruing to local contractors from work for UN agencies and NGOs.¹²³ The study estimated that the total economic benefits flowing from the camps in 2010 were around US\$14 million, or about 25 per cent of average annual per capita income in the North Eastern Province.¹²⁴ The study also noted growing investment in host community initiatives from those working with the refugees, including initiatives relating to food security, conflict reduction, environmental management, education, health, sanitation and business development.¹²⁵

The study identified the impacts on natural resources as the most problematic, noting increased demand for firewood and building materials, together with the enclosure of grazing land, which undermines the traditional mobile pastoral way of life in the area and, in turn, encourages dependence on the refugee camps and food relief rather than self-reliance.¹²⁶ The aquifer was being depleted very gradually (although lack of water was unlikely to become a problem for many centuries), in part because of the presence of the camps.¹²⁷ As the study suggests, the policy of encampment generates economic benefits to the host area, but they come at an environmental cost.¹²⁸

Overall, the study concluded that:

¹²⁰ Ibid 25.

¹²¹ Ibid 83.

¹²² Ibid 9, 36–7.

¹²³ Ibid 9, 39–46.

¹²⁴ Ibid 9, 45–8.

¹²⁵ Ibid 9, 46–7.

¹²⁶ Ibid 10, 50–59.

¹²⁷ Ibid 10, 59–61.

¹²⁸ Ibid 65.

Impacts on the host community are complex and both positive and negative. Positive impacts are related to access to distributed food, economic opportunities and services, while negative impacts are largely related to depletion of firewood and building material as well as grazing competition in the immediate vicinity of the camps. Depending on the situation of the individual household, the positive and negative impacts will play out differently, but in total the study has established significantly more important positive impacts on the host area than negative. This finding is supported by the significant attraction of many people who have settled in the host area, which cannot be attributed to push factors alone.¹²⁹

Nevertheless, the authors of the study warned against their conclusions being used to justify any reduction of support for host communities.¹³⁰ Rather, they drew attention to ways in which host and refugee populations could be better supported, by investing in services further away from the camps and by re-evaluating the encampment policy to enable refugees to contribute more to the local economy.¹³¹

The study acknowledged the difficulty of deciding on developmental priorities when dealing with a refugee influx of inherently uncertain duration, but criticized the 'short-term compensatory approach to immediate and visible problems', suggesting that longer-term development efforts be directed to 'support moderate pastoral production improvements and production investments that can be moved to other areas if and when the refugee operation is phased out and the host area becomes less attractive.'¹³² In particular, the authors recommended that support for host communities be focused on strategies related to mobile pastoral production, such as investment in veterinary outreach services, mobile schools, mobile clinics, development of stock routes and livestock holding grounds, and conservation of water points.¹³³ Review of the encampment policy was recommended because their observations of the vibrant trade and business inside the refugee camps suggested that refugees would be even more productive if the restrictions imposed by encampment were removed.¹³⁴

There are often political reasons for representing refugees as a burden on the state. In developing countries, policies of encampment are perceived to ensure that refugees remain visible to the outside world and

¹²⁹ Ibid 79.

¹³⁰ Ibid 19.

¹³¹ Ibid 11.

¹³² Ibid 71.

¹³³ Ibid 80.

¹³⁴ Ibid 82.

donor states, even though they may separate refugees from citizens and, thus, enable myths about refugees to strengthen. In writing this book, we accept that, as 86 per cent of refugees are sheltered in the developing world, there is a need for the developed world to stop containment policies and work proactively with the developing world to share responsibility for refugees and we explore ways in which regional arrangements might assist in this endeavour. By including the case study of Kenya's North Eastern Province, our intention is to show that there are benefits to hosting refugees, which flow to the citizens of even the poorest countries. Among these benefits are those that flow from the responsibility-sharing efforts realized in the activities of donor states and international humanitarian agencies. These benefits stand as an argument for responsibility-sharing, as all states sharing the responsibility for refugees can expect a return on their investment.

CONCLUSION

We might all wish that refugee flows might never occur again and that the root causes could quickly be resolved. However, the reality recognized in 1967 through the adoption of the Protocol Relating to the Status of Refugees¹³⁵ and in the indefinite extension of UNHCR's mandate in 2004,¹³⁶ is that the concept of refugee status and its recognition will probably always be needed to safeguard humanity. Despite the sometimes virulent public discourse that suggests that refugees should not be given refuge or that particular countries should not participate in refugee protection, we think that the arguments for refugee protection are compelling. The fact that refugees are human beings who bring with them the gift of their humanity and make significant contributions to host societies should render the serious responsibility of refugee protection a cause for celebration as well as concern. To make it a cause for celebration there is a need for a concerted information campaign that builds public understanding of and, consequently, support for refugees.

¹³⁵ *1967 Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

¹³⁶ *General Assembly Resolution Implementing Actions Proposed by the United Nations High Commissioner for Refugees to Strengthen the Capacity of his Office to Carry out its Mandate*, GA Res 58/153, UN GAOR, 3rd Comm, 58th sess, Agenda Item 112, UN Doc A/RES/58/153 (24 February 2004).

3. Sharing responsibility among states

International instruments concerning refugee law have consistently referred to the need for international cooperation regarding the protection of refugees. In the Preamble to the 1951 Refugee Convention, the parties acknowledged that the ‘grant of asylum may place unduly heavy burdens on certain countries, and ... a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation’.¹ Similarly, the Conference of Plenipotentiaries at which the final text of the Convention was agreed, adopted a resolution recommending that ‘Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement’.²

In many General Assembly resolutions and UNHCR Executive Committee Conclusions, the United Nations has reiterated the importance of international cooperation as a central principle of the international refugee regime.³ For example, in Executive Committee (ExCom) Conclusion No 100 ‘the importance of international burden and responsibility sharing in reducing the burdens of host countries, especially developing countries’ is reaffirmed.⁴ Also, in an expert meeting on international cooperation convened by UNHCR in Amman, Jordan in 2011, the participants expressly recognized the need for international cooperation

¹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) (‘Refugee Convention’).

² *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, A/CONF.2/108/Rev.1 (25 July 1951).

³ See Anja Klug and Claire Inder, ‘Introductory Note to the Amman Summary Conclusions on International Cooperation to Share Burdens and Responsibilities’ (2012) 24(2) *International Journal of Refugee Law* 468.

⁴ UNHCR Executive Committee, *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations* 100 (LV) (2004) <<http://www.unhcr.org/41751fd82.html>>.

by origin, host and destination countries in order to deal with refugee challenges.⁵

Following the Global Consultations on International Protection that were held during the commemoration of the 50th anniversary of the Refugee Convention, UNHCR and states adopted the 'Agenda for Protection' in which burden-sharing was a prominent theme and, among other things, it set goals concerning increased resettlement and development assistance focused on the needs of both refugees and citizens of refugee-hosting countries.⁶ It is a non-binding document and Betts, Loescher and Milner write that it has, unfortunately, had limited impact in the decade following its adoption.⁷

At the regional level, states have similarly underscored the importance of international cooperation in legal instruments, but have stopped short of developing a blueprint for how responsibility should be shared. The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa provides that where a member state has difficulty continuing to grant asylum to refugees, other member states 'shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden'.⁸ Although the terminology used indicates that this provision is mandatory, it has not been implemented. The European Commission has articulated the need for the translation of solidarity and responsibility-sharing into concrete measures in the protection of asylum seekers.⁹ As will be seen later in this book, the European arrangements have historically focused on the allocation of responsibility by reference to the state that has permitted entry into the European Union, which does not necessarily translate to equitable responsibility-sharing, although there have also been conscious efforts to share responsibility equitably,

⁵ UNHCR, 'Expert Meeting on International Cooperation to Share Burdens and Responsibilities: Summary Conclusions' (Amman, 27–28 June 2011) 2. ('Amman Summary Conclusions on International Cooperation').

⁶ UNHCR, *Agenda for Protection* (October 2003) <<http://www.unhcr.org/3e637b194.pdf>>.

⁷ Alexander Betts, Gil Loescher and James Milner, *The Politics of Protection* (Routledge, 2nd ed, 2012) 65–6.

⁸ *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) <<http://www.unhcr.org/45dc1a682.html>> Art II(4).

⁹ See, for example, European Commission, 'Communication on enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust' (Brussels, 2 December 2011) COM 835.

particularly in recent years. In Latin America, there have been efforts to lift standards of refugee protection in the region under the rubric of solidarity, and, as will be seen later in this book, these arrangements include some responsibility-sharing, but they are contained in a non-binding instrument and implementation of these norms is imperfect.¹⁰

Thus, despite the apparent importance of international cooperation in relation to the protection of refugees, the international refugee regime has been plagued by a lack of international cooperation and responsibility-sharing. Eighty-six per cent of the world's refugees are currently hosted by the countries least able to do so;¹¹ UNHCR regularly only achieves 60 per cent of its funding targets;¹² and resettlement in a third country provides a durable solution for less than one per cent of the world's refugee population.¹³ Citizens and policy-makers in refugee hosting countries often voice the opinion that their country is over-burdened and disadvantaged in hosting refugees in comparison with other countries, even though no attempt has been made to assess states' contributions.¹⁴ As Mathias Czaika argues, questions regarding the allocation of responsibility for refugees are generally 'answered by subjective feelings instead of looking [at] the actual data'.¹⁵

This chapter examines why and how states should share responsibility for refugees. First, the chapter considers possible explanations for the lack of international cooperation in the protection of refugees. The chapter then presents the case for sharing responsibility for refugees among states and the criteria that should be used for determining the distribution of responsibility. The chapter also addresses the means by which states may share the responsibility for refugees and, finally, notes different models for responsibility-sharing and draws some preliminary conclusions about their workability.

¹⁰ *Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America* (16 November 2004) <http://www.oas.org/dil/mexico_declaration_plan_of_action_16nov2004.pdf>.

¹¹ UNHCR, *Global Trends 2013: War's Human Cost* (UNHCR, 2014) 2.

¹² UNHCR, *The State of the World's Refugees: In Search of Solidarity* (Oxford University Press, 2012) 199.

¹³ UNHCR, *Global Trends 2011: A Year of Crises* (UNHCR, 2012) 17.

¹⁴ Mathias Czaika, 'A Refugee Burden Index: Methodology and its Application' (2005) 2(2) *Migration Letters* 101, 122.

¹⁵ *Ibid* 102.

WHY IS THERE SO LITTLE INTERNATIONAL COOPERATION IN REFUGEE PROTECTION?

Lack of cooperation in the protection of refugees is endemic. Several interrelated factors may explain the lack of cooperation. There is a suspicion of international legal regulation in this area and an unwillingness to cede sovereign control over immigration. Responsibility-sharing is not completely inconsistent with sovereign control, as it could offer a collective means of protecting sovereignty by diminishing the risks of uncontrolled entry into state territory. Some states have not, however, historically viewed themselves as countries of immigration and perceive risks from immigration to both their security and their national culture. In Asia, there appears to be some reluctance to fully accept the refugee as a legal category of person deserving of protection, as evidenced in the failure to accede to relevant legal instruments.¹⁶ In the West, the view that economic migrants are abusing the asylum system has meant that, while many states maintain a formal commitment to the legal norm of *non-refoulement*, in practice, deterrence mechanisms make it difficult for refugees to gain protection. As we have argued in Chapter 2, cooperation will not be forthcoming if there is disagreement as to the need for refugee protection in the first place, and there seems to be a pervasive malaise in this regard.

Even where refugee protection is valued in principle, there has been an historical unwillingness to cede sovereign control and a readiness to free-ride on the contribution of other states if possible. This is reflected in the failure of the Convention and the Protocol to provide refugees with a right to enter a state and the failure of Article 14 of the Universal Declaration of Human Rights to move beyond a 'right to seek asylum' to a right to *receive* asylum. Further, while the reality of forced, unauthorized migration was recognized in Article 31 of the Convention, which provides immunity from prosecution for entry or presence that is unlawful as a matter of domestic immigration law, many refugee rights depend on *lawful* presence or stay. For example, the right to engage in wage-earning employment is guaranteed for 'lawfully staying' refugees (Article 17).¹⁷ Sovereignty and willingness to free-ride are similarly

¹⁶ See discussion in Chapter 1.

¹⁷ This raises the possibility that a state party might not grant lawful presence or stay (through a visa or residence permit, for example). Australian practice under the so-called 'no advantage' concept might be viewed in this light, as there were significant delays in determining the claims to refugee status of

apparent in the failure of the treaties relevant to refugee protection to contain clear and binding norms concerning responsibility-sharing and in their failure to provide practical guidance as to how responsibility might be fairly shared.

Between 2002 and 2005, UNHCR tried to address some of these shortfalls in responsibility-sharing by developing a legal framework that would expand upon the 1951 Refugee Convention and the 1967 Protocol. This UNHCR initiative, called 'Convention Plus', focused on developing 'special agreements'¹⁸ or multilateral arrangements aimed at burden-sharing including comprehensive plans of action for mass outflows, agreements on 'secondary movements' (irregular movement of refugees and asylum seekers from countries of first asylum to another country), and agreements concerning development assistance that assists both refugees and the citizens of their host countries.¹⁹ However, despite significant diplomatic engagement with states at this time, UNHCR was unable to develop a blueprint for international cooperation that all states were willing to support. Marjoleine Zieck argues that this is in part because the interstate consultations lost focus on the overarching objective, focusing instead on particular issues, especially with regards to resolving specific protracted refugee situations.²⁰ Alexander Betts suggests, alternatively, that the approach failed to convince states that the process met their interests in development and regular migration flows.²¹

According to scholars such as Betts and Astri Suhrke, states have tended to free-ride on the contributions of other states in the area of refugee protection because international cooperation is discretionary and because the costs of providing protection are borne by the individual state

asylum seekers who arrived after 13 August 2012 (but prior to the announcement of the 'regional resettlement arrangement' with Papua New Guinea) and they were not being permitted to work while waiting for their claims to be assessed.

¹⁸ UNHCR is empowered to enter into 'special agreements' under its statute:

Statute of the Office of the United Nations High Commissioner for Refugees, GA Res 428(V), UN Doc A/RES/428(V) (14 December 1950) Art 2(b).

¹⁹ Foreword by the United Nations High Commissioner for Refugees, *Agenda for Protection*, above n 6, 6–7.

²⁰ Marjoleine Zieck, 'Doomed to Fail from the Outset?: UNHCR's Convention Plus Initiative Revisited' (2009) 21 *International Journal of Refugee Law* 387, 419.

²¹ See Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Cornell University Press, 2009) ch 5.

yet the benefits flow to all.²² According to these authors, refugee protection is a *global public good* because it offers benefits to the international community that are both ‘non-excludable and non-rival’.²³ (These benefits include protection of human rights, the knowledge that the world is not complicit with human rights violators, maintenance of order, and so on.) In other words, the benefits of providing protection to refugees flow on to all other members of the international community, regardless of whether they also offer refugees protection or not (that is, it is non-excludable or non-exclusive), and the provision of refuge by one state does not prevent another state from doing likewise (that is, it is non-rival or not prone to rivalry).²⁴ Owners of private goods, by contrast, can prevent those who have not paid for the goods from receiving their benefits (they are excludable). In economic theory, private goods are normally scarce (‘rivalrous’ or prone to rivalry) and, therefore, there is a competitive market for them. This helps to explain why three-quarters of the international community is party to the Convention and/or Protocol and other treaties that guarantee *non-refoulement*, but these same states have not reached binding agreements concerning responsibility-sharing.

Many states appear to be confident that they do not need to insure themselves against refugee influxes through responsibility-sharing mechanisms and are content to rely on unilateral deterrence mechanisms. ‘The seductive logic of unilateral action’, according to Suhrke, explains why

²² Ibid 26; Astri Suhrke, ‘Burden-sharing During Refugee Emergencies: The Logic of Collective Versus National Action’ (1998) 11(4) *Journal of Refugee Studies* 396, 400.

²³ Suhrke, above n 22, 400; Betts, *Protection by Persuasion*, above n 21, 25.

²⁴ Scott Barrett, *Why Cooperate?: The Incentive to Supply Global Public Goods* (Oxford University Press, 2007) 1; See also Betts, *Protection by Persuasion*, above n 21, 25. Betts acknowledges that refugee protection may not be a completely pure global public good, in the sense that states may receive both private and public benefits when providing protection to refugees. For example, Betts writes elsewhere that states may obtain excludable benefits such as ‘state-specific security, the specific altruistic benefit from being the provider and the linkage-benefit from increased bargaining power in other areas’ when providing protection to refugees. The fact that states earmark many of their donations to UNHCR for projects that align with their political and cultural interests supports this recognition of refugee protection as an impure global public good. Nevertheless, Betts maintains that the public goods concept is still valuable insofar as it highlights ‘that the partly nonexcludable nature of many of the benefits of protection may lead to free-riding’ (Alexander Betts, ‘Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory’ (2003) 16 *Journal of Refugee Studies* 274, 276).

sharing mechanisms in the area of refugee protection have been so modest.²⁵ In turn, this may fuel reluctance on the part of some states to participate actively in the international legal framework for refugee protection. Why would a state that is likely to be a first country of asylum participate in the international refugee regime if it knows that the rest of the world will not assist it in meeting its international obligations? We are stuck in a vicious cycle of non-cooperation.

WHY STATES SHOULD SHARE RESPONSIBILITY FOR REFUGEES

There are compelling reasons to share responsibility for refugees. Presently, responsibility for refugees lies wherever it falls, and it falls frequently on states in the developing world which may be the least equipped to shoulder this responsibility. The Syrian refugee crisis highlights the inequities for states and refugees in a system that does not adequately share responsibility for refugee protection. Below, we explore this and other rationales for sharing responsibility, including the idea that responsibility-sharing could operate as a form of insurance against refugee influxes and that it is economically efficient to share responsibility.

Sharing Should Occur Because the Current System is Unjust

A primary reason to share responsibility for refugees is the present arbitrary and inequitable distribution of responsibility. States that are geographically closer to refugee-producing countries generally incur a greater share of the responsibility for protecting refugees. Most refugees seek asylum in neighbouring states because they are not able to seek asylum further afield. Frequently, too, refugee-generating states are in the developing world, reflecting the deep structural inequalities between developing and developed states, including artificial boundaries that are the legacy of colonialism, which assist in fuelling disputes over land and resources, and reliance on strong regimes, often led by those who fought for independence from colonial powers, that are not inclusive of all sectors of the population.²⁶

²⁵ Suhrke, above n 22, 403.

²⁶ See Fatmata Lovetta Sesay, 'The Root Causes of Refugee Flows in a Global Context' (2002) 21 *Mots Pluriels*; Leon Gordenker, 'Refugees in Developing Countries and Transnational Organization' (1983) 467 *Annals of the*

Chimni argues that the focus on 'internalist' explanations for refugee flows has 'exonerated' imperialism and acted as a justification for containment measures by the developed world.²⁷ Developed countries have spent considerable time and effort to ensure that refugees remain within their region of origin and outside of the Global North. As Matthew Gibney argues, since the 1990s Western states have 'engineered' regionalism so that the Global South is kept separate from the Global North, preventing the 'globalisation of asylum'.²⁸ Some of the tools that developed states have used to prevent the arrival of asylum seekers at their borders include interdiction at sea, visa restrictions, carrier sanctions, 'safe third country' relocations, international safe-havens, and the policing of people-smuggling operations.²⁹

As a result of geographical happenstance, perhaps compounded by the policies of Western states,³⁰ poorer states have increasingly incurred the overwhelming responsibility for hosting refugees. According to UNHCR, developing countries at the end of 2012 hosted 86 per cent of the world's refugees,³¹ a proportion that has increased from 70 per cent in the last ten years.³² At the end of 2012 the 49 least developed countries (LDCs) were providing asylum to 2.8 million refugees.³³

Refugees often face difficulties when they seek asylum in developing and LDCs. By definition, LDCs are characterized by their 'low gross domestic product per capita, weak human assets [such as literacy and

American Academy of Political and Social Science 62–77; B S Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11(4) *Journal of Refugee Studies* 359–61.

²⁷ Chimni, above n 26, 360–1.

²⁸ Matthew J Gibney, 'Forced Migration, Engineered Regionalism and Justice between States' in Susan Kneebone and Felicity Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers: Challenges Ahead* (Berghahn Books, 2007) 58, 63.

²⁹ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 50.

³⁰ Jeff Crisp, 'Get back to Where You Once Belonged! A Global Perspective on Migration, Asylum and the Challenges of Refugee Protection' (Keynote address at the National Asylum Summit, University of South Australia, 26 June 2013) <<https://www.youtube.com/watch?v=yI5d7eFobIM>>.

³¹ UNHCR, *Global Trends 2012: Displacement: The New 21st Century Challenge* (UNHCR, 2013) 13.

³² *Ibid.*

³³ *Ibid.* 2.

education enrolments] and high degree of economic vulnerability'.³⁴ This may make local integration difficult for refugees, as they are likely to encounter greater problems than usual in accessing education and health services and in obtaining housing and employment. LDCs find it challenging to protect the rights of their own citizens, let alone refugees and other migrants. Thus the current refugee regime is characterized by a distribution of responsibility that puts the economic and other costs of protecting refugees primarily on the states that are least capable of meeting them.

Functional Necessity

A related reason for states to share responsibility for refugees is to ensure meaningful protection for refugees – that is to say, responsibility-sharing is a matter of functional necessity. For example, in situations such as the Syrian refugee crisis, where there is a mass influx of refugees, international cooperation is practically necessary because host states often do not have the capacity or the infrastructure to deal with large numbers of refugees alone. As J P L Fonteyne states, 'burden sharing, certainly in cases of large-scale refugee movements, is a virtual sine qua non for the effective operation of a comprehensive *non-refoulement* policy'.³⁵ Similarly, in order to avoid protracted refugee situations, states may need to share responsibility.³⁶ Protracted refugee situations occur in part because no durable solution is offered to refugees.

In situations where refugees are in distress at sea, states also need to cooperate with one another because rescue situations often implicate the protection responsibilities of a number of different states, with no one state clearly bearing ultimate responsibility for refugees rescued at sea. Implicated states may include the state with jurisdiction over the waters where the vessel in distress is rescued, the flag state of the rescuing vessel (the state where the vessel is registered or which permits the ship

³⁴ See the description for the UN Conference on Trade and Development, 'Least Developed Countries Report' (2012) <<http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=249>>.

³⁵ J P L Fonteyne, 'Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees' (1978–1980) 8 *Australian Year Book of International Law* 162, 175.

³⁶ There are a number of different conceptions of what constitutes a protracted refugee situation, but according to UNHCR, a refugee situation is considered protracted when 25 000 refugees or more of the same nationality have been in exile for five years or more in a developing country (UNHCR, *The State of the World's Refugees*, above n 12, 219 note 1).

to fly its flag),³⁷ and other coastal states in close proximity. The ambiguity regarding state responsibility in rescue-at-sea emergencies means that these situations are particularly susceptible to buck-passing. As UNHCR has stated, it is ‘easy for responsibility to be referred from one state to another without any one taking action’.³⁸

Although states have recognized the need for international cooperation when dealing with refugees in distress at sea, there are still ominous gaps in the legal framework governing this area. There are well-established obligations on ships’ masters to rescue persons in distress at sea.³⁹ In addition, states have developed a framework for coordinating search and rescue.⁴⁰ Under the International Convention on Maritime Search and Rescue (SAR Convention), states responsible for a particular search and rescue area are to provide assistance to a person in distress at sea, regardless of the nationality or status of that person.⁴¹ However, the place of disembarkation has remained a contentious issue.

Member states of the International Maritime Organization (IMO) attempted to address this shortfall in 2004 by amending the International Convention for the Safety of Life at Sea (SOLAS Convention)⁴² and the SAR Convention, as well as accompanying (non-binding) IMO Guidelines.⁴³ Under Chapter 3 of the SAR Convention, states agree that they will cooperate to ‘identify the most appropriate place(s) for disembarking persons found in distress at sea.’⁴⁴ Further, the

Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ship’s intended voyage, provided that releasing the master of the ship from these obligations

³⁷ *United Nations Convention on the Law of the Sea*, signed 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (‘UNCLOS’) Arts 91, 92.

³⁸ UNHCR, *The State of the World’s Refugees*, above n 12, 208.

³⁹ UNCLOS, above n 37, Art 98(1); *International Convention for the Safety of Life at Sea 1974*, entered into force 25 May 1980 (as amended) (‘SOLAS Convention’) Art 33(1).

⁴⁰ *1979 International Convention on Maritime Search and Rescue*, entered into force 25 March 1980 (as amended) (‘SAR Convention’).

⁴¹ *Ibid* 2.1.9 & 2.1.10.

⁴² SOLAS Convention, above n 39.

⁴³ The amendments and guidelines are all contained in UNHCR Division of International Protection, *Rescue at Sea, Stowaways and Maritime Interception – Selected Reference Materials* (2nd ed, 2011) <<http://www.refworld.org/docid/4ee087492.html>>.

⁴⁴ SAR Convention, above n 40, 3.1.6.4.

does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization [IMO]. In these cases, the relevant parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.⁴⁵

An almost identically worded provision has been added to the SOLAS Convention.⁴⁶

In summary, states are obliged simply to coordinate and cooperate in finding a place of safety at which to disembark rescues within a reasonable time. While primary responsibility falls on the state responsible for a search and rescue area, the IMO notes that each situation may have its own distinguishing features and the amendments are supposed ‘to give the responsible Government the flexibility to address each situation on a case-by-case basis, while assuring that the masters of ships providing assistance are relieved of their responsibility within a reasonable time and with as little impact on the ship as possible.’⁴⁷

Unfortunately, there continue to be many situations in which there is no cooperation. For example, in late 2013 Indonesia refused to allow disembarkation of people who had been intercepted or rescued by an Australian naval vessel.⁴⁸ The disagreement took place in the broader context of the Abbott government’s policy of ‘turning back the boats’ (from Australia to Indonesia), which meant that the characterization of the situation as a rescue needing coordination by Indonesia could be challenged. Indonesia alleged that the boat had been pushed back towards Indonesia while within Indonesia’s search and rescue zone.⁴⁹ In 2015, Indonesia, Malaysia and Thailand were pushing back boats of Rohingya

⁴⁵ Ibid 3.1.9.

⁴⁶ SOLAS Convention, above n 39, Regulation 33, 1-1.

⁴⁷ *Guidelines on the Treatment of Persons Rescued at Sea*, IMO Resolution MSC.167(78), Annex 34. A further set of guidelines adopted by the IMO Facilitation Committee in 2009 states that where disembarkation cannot be arranged swiftly elsewhere, the state responsible for the search and rescue area should allow disembarkation on its own territory (IMO, *Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea*, 22 January 2009, FAL.3/Circ.194).

⁴⁸ ‘Does Indonesia have to take asylum seekers rescued by the Australian Navy?’, *ABC* (online), 22 November 2013 <<http://www.abc.net.au/news/2013-11-14/asylum-seekers-rescued-at-sea/5088168>>.

⁴⁹ Ibid.

asylum seekers and Bangladeshi migrants, despite obligations with respect to search and rescue, refugee protection and the smuggling and trafficking of migrants.⁵⁰

In relation to the ongoing problems with rescue-at-sea, the IMO decided to develop a 'regional agreement on concerted procedures relating to the disembarkation of persons rescued at sea' for the Mediterranean region.⁵¹ This pilot programme would assign more predictably the responsibilities of states with regard to rescuees, particularly at the disembarkation stage. Similarly, UNHCR developed a Model Framework in Djibouti in November 2011 that highlights how responses to rescue-at-sea situations could be improved through responsibility-sharing.⁵² UNHCR has now embarked on a Global Initiative on Protection at Sea in an effort to ensure that lives are saved and protection assured.

International Cooperation as Inter-state Insurance

A third reason sometimes advanced in favour of responsibility-sharing is that it may be a form of insurance against future refugee emergencies where states may be overwhelmed if other states are not bound to assist. James C Hathaway and Alexander Neve argue that states should insure themselves against overwhelming refugee emergencies by developing cooperation frameworks among interested states to make protection feasible.⁵³ Similarly, Peter H Schuck argues that 'states may rationally prefer to incur a small and predictable protection burden now in order to avoid bearing large, sudden, unpredictable, unwanted, and unstoppable

⁵⁰ The obligations on each of these countries are not always the same, as some states have acceded to more of the relevant treaties in each of these areas than other states. Nevertheless, Article 98(2) of UNCLOS (above n 37), which requires the operation of an adequate search and rescue service, and the customary obligation of *non-refoulement* provide a common bottom line of obligations.

⁵¹ See IMO, 'Trafficking or Transport of Illegal Migrants by Sea/Persons Rescued at Sea' <<http://www.imo.org/OurWork/Facilitation/IllegalMigrants/Pages/Default.aspx>>; also Anja Klug, 'Strengthening the Protection of Migrants and Refugees in Distress at Sea through International Cooperation and Burden Sharing' (2014) 26 *International Journal of Refugee Law* 48.

⁵² UNHCR, 'Summary Conclusions on Refugee and Asylum-Seekers in Distress at Sea – How Best to Respond?' (Djibouti, 8–10 November 2011).

⁵³ James C Hathaway and R Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *Harvard Human Rights Journal* 115, 145.

refugee inflows in the future'.⁵⁴ Schuck explains that this 'refugee crisis insurance' will most likely be an increasingly good investment for states as 'the world grows smaller and more interconnected, and as an increasing number of refugees can more easily reach places and claim protection there'.⁵⁵ The present influx of migrants and refugees into the EU has the potential to convince the states of the Global North that they do need insurance against such shocks. Perhaps only those states which are truly geographically isolated from refugee flows, such as Australia, will continue to insist that they have immunity and are not in need of insurance, and even a state like Australia should be cognizant that climate change may result in human movement of a scale that it cannot simply avoid by border control.

However, not all advocates and academics are optimistic states will see the logic of insuring themselves against risk. Writing well before the Syrian refugee crisis, Deborah Anker, Joan Fitzpatrick and Andrew Shacknove stated, 'if states perceive that they are not very vulnerable over the long term, that they can self-insure against occasional crises, or that they will be assisted in any case without an advance commitment, then the capital necessary to construct the system of burden-sharing will not materialize'.⁵⁶ Indeed, Hathaway and Neve acknowledged that the insurance rationale is most likely to appeal to Southern states.⁵⁷ Schuck also recognized the possibility that states would not recognize their interests in insurance from disorderly flows of refugees.⁵⁸ The reliance on deterrence mechanisms in the West to date illustrates this point.

Economic Efficiency

A fourth argument put forward by some scholars is that responsibility-sharing may be economically efficient. There may be various situations where states can provide greater protection for refugees at lower cost by

⁵⁴ Peter H Schuck, 'Refugee Burden-sharing: A Modest Proposal' (1997) 22 *Yale Journal of International Law* 243, 249, and Peter H Schuck, 'Refugee Burden-Sharing: A Modest Proposal, Fifteen Years Later' in Anita Shapira et al (eds), *The Nation State and Immigration: The Age of Population Movements* (Contemporary Challenges to the Nation State, vol. 3) (Sussex Academic Press, 2015) ch 4.

⁵⁵ Schuck, 'Refugee Burden-Sharing' (1997), above n 54, 250.

⁵⁶ Deborah Anker, Joan Fitzpatrick and Andrew Shacknove, 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck' (1998) 11 *Harvard Human Rights Journal* 295, 301.

⁵⁷ Hathaway and Neve, above n 53, 190–92.

⁵⁸ Schuck, 'Refugee Burden-Sharing' (1997), above n 54, 290.

working collectively with one another. For example, Schuck argued that the global financial expense of protecting refugees may be reduced if it is agreed that states with lower (less expensive) standards of living bear most of the responsibility of physically hosting refugees.⁵⁹ Similarly, the costs of protecting refugees may decrease if states avoid duplicative processes and collectively develop administrative procedures and so forth, in order to identify and protect refugees. Finally, the costs of policing people-smuggling enterprises and deterrence mechanisms such as detention may decrease if states collectively provide adequate protection to asylum seekers.

According to Hathaway and Neve, states in the Global North would not perceive the need to spend as much money on containment mechanisms and reception conditions (initial accommodation, for example) if cooperation frameworks were in place to support developing states hosting refugees.⁶⁰ Schuck, who proposes a quota system in which refugee quotas could be traded in a market system, envisions that states with lower standards of living would take on more responsibility for hosting refugees as states bargain in the marketplace for the most financially efficient outcome.⁶¹

On the other hand, Anker, Fitzgerald and Shacknove argue that there are unlikely to be protection benefits from shifting the physical protection of refugees from developed states to developing states. Their view is that, 'once refugees are contained in the South, the interests of the North will not be sufficiently implicated to produce the large cash transfer payments which these proposals anticipate and which are crucial for their success in enhancing refugee protection'.⁶² Furthermore, they believe that it is unlikely that states will redirect any savings gained from diminished refugee status determination (RSD) procedures, if there are any, to support refugees in the regions of origin.⁶³

⁵⁹ Ibid 285.

⁶⁰ Hathaway and Neve, above n 53, 152-4; see also Ryan Bubb, Michael Kremer and David Levine, 'The Economics of International Refugee Law' (Paper presented at the American Law & Economics Association Annual Meetings, Harvard Law School, 2007).

⁶¹ Schuck, 'Refugee Burden-Sharing' (1997), above n 54, 285.

⁶² Anker, Fitzpatrick and Shacknove, above n 56, 300.

⁶³ Ibid.

Arguments for Sharing Responsibility: Conclusions

In our view, the most convincing arguments in favour of sharing responsibility for refugees are that the present system is unjust and leads to inadequate protection for refugees. Although, as lawyers, we may not be well-qualified to draw firm conclusions concerning the possible economic efficiencies or insurance effects of responsibility-sharing mechanisms and we are in sympathy with those who critique arguments in favour of shifting further responsibilities onto developing countries, it appears that insurance is most needed by developing states and that developed states are largely content to bear large economic costs pursuing unilateral deterrence mechanisms. Meanwhile, the moral arguments concerning the injustices imposed by the present *laissez-faire* system appear not to appeal to any sense of national interest on the part of developed states. This is despite the fact that, as we noted in Chapter 2, humanitarian migrants can make significant contributions to their host societies, while containment may be counterproductive if it permits conflicts to fester and spread, thus creating more and more pressure for migration. It remains to be seen whether the influx of Syrian and other refugees and migrants into the EU during 2015 will stimulate change and whether that change will extend beyond Europe to the other states of the Global North.

HOW SHOULD STATES SHARE RESPONSIBILITY FOR REFUGEES?

There are three principal ways through which states can share responsibility for refugees.⁶⁴ First, states can share the responsibility of hosting refugees physically (sharing of people). In 2013, 21 states participated in resettlement and together admitted 98 400 refugees for resettlement.⁶⁵ This number is less than 1 per cent of the world's total refugee population. They offered resettlement to only one in ten of the refugees that UNHCR assessed as being in need of resettlement. Second, states can share the financial costs involved in providing protection to refugees (sharing of finances). Presently, there is some sharing of financial

⁶⁴ Noll also talks about sharing norms. Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection, and the Common Market of Deflection* (Martinus Nijhoff, 2000) 270.

⁶⁵ UNHCR, *Global Trends 2013*, above n 11, 2.

resources, through, for example, funding UNHCR's programmes.⁶⁶ Third, states can share administrative, material and technical resources; for example, they can share expertise with respect to refugee status determination or pool their resources by establishing common institutions for such purposes (sharing of non-financial or 'in-kind' resources).

Sharing People

One way states can and, many would argue, should share responsibility for refugees is by sharing the responsibilities of hosting and protecting refugees. Traditionally, refugee hosting has occurred through local integration (that is settlement, including the possibility of naturalization, in a country of first asylum – the first place in which refugees seek safety);⁶⁷ temporary protection in the country of first asylum (temporary protection is different from local integration in that it is not a durable or permanent solution and in practice may entail limited rights for refugees);⁶⁸ and resettlement to a third country. Frequently local integration and even temporary refuge are viewed as voluntary on the part of the country of first asylum, as opposed to a logical corollary of *non-refoulement*, especially in the absence of any express obligation to admit refugees. The UN High Commissioner for Refugees has recently stated that local integration is available less frequently than resettlement.⁶⁹ Meanwhile,

⁶⁶ The UNHCR Donor Profiles Report for 2013 lists 48 donors. The United States makes the largest contribution of US\$1 041 707 225. Some donors are from the private sector; see UNHCR, 'Donor Profiles' (UNHCR, 2014) <<http://www.unhcr.org/539809e80.html>>.

⁶⁷ On local integration, see UNHCR, *Global Consultations on International Protection/Third Track: Local Integration*, 4th mtg, EC/GC/02/6 (25 April 2002).

⁶⁸ With regard to the temporary protection of refugees, participants at a UNHCR roundtable on temporary protection in San Remo in July 2012 proposed the development of a humanitarian framework on temporary protection that details the scope of temporary protection, minimum standards for treatment of refugees, conditions for termination of temporary protection and criteria for transitioning to more long-term solutions for refugees (UNHCR, 'Summary Conclusions on Temporary Protection' (San Remo, 19–20 July 2012) <<http://www.refworld.org/docid/506d908a2.html>> 3–6). Following another roundtable in 2013, UNHCR adopted a set of guidelines in February 2014 (UNHCR, *Guidelines on Temporary Protection or Stay Arrangements* (UNHCR 2014) <<http://www.refworld.org/docid/52fba2404.html>>).

⁶⁹ UN High Commissioner for Refugees, 'Statement on questions relating to refugees, returnees and displaced persons' (Statement delivered at the Third Committee of the General Assembly, 70th Session, New York, 3 November 2015) <<http://www.unhcr.org/563a17566.html>>.

resettlement is clearly a discretionary activity. An alternative way to deal with responsibility for refugee protection would be to establish quotas that dictate the number of refugees that each state should host. Another option is to open up migration pathways for refugees – for example, pathways based on countries' labour needs. In the following paragraphs we look at resettlement, quotas and labour migration. We also propose principled limits to the relocation of refugees given the disruption involved and the moves by Australia to 'resettle' refugees in developing countries.

i) Resettlement to a third country

The traditional way for states to share the responsibility of hosting refugees is through resettlement. While resettlement is commonly recognized as a form of responsibility-sharing, less than one per cent of the world's refugees have benefited from the durable solution of resettlement in recent years.⁷⁰ The situation today is markedly different from the response to refugees in the wake of the Second World War. During the Cold War, resettlement was the favoured durable solution for refugees. During the 1980s, however, there was a shift to voluntary repatriation by both UNHCR and states. As Western states were reluctant to offer resettlement, which Chimni has attributed to the myth that the 'new asylum seekers' from the Global South were fundamentally different from refugees during the Cold War,⁷¹ and countries of first asylum would not offer local integration, UNHCR had to promote voluntary repatriation.⁷² Even so, there is a significant shortfall between the numbers of refugees who urgently require resettlement and the numbers of resettlement places offered by states. UNHCR forecast that approximately 690 000 people would be in acute need of resettlement in 2014, yet there are only around 86 000 resettlement places available annually.⁷³ There is also a serious imbalance among the countries that offer resettlement to

⁷⁰ See for example, UNHCR, *Global Trends 2011*, above n 13, 17.

⁷¹ Chimni, above n 26, 355–7.

⁷² Gil Loescher, Alexander Betts and James HS Milner, *UNHCR: The Politics and Practice of Protection into the Twenty-First Century* (Routledge, 2008) 38.

⁷³ See UNHCR, *UNHCR Projected Global Resettlement Needs: 19th Annual Tripartite Consultations on Resettlement* (UNHCR, July 2013) <<http://www.unhcr.org/51e3eabf9.pdf>> 5. This statistic does not include the possible resettlement needs of Syrian refugees; see also UNHCR, *UNHCR Projected Global Resettlement Needs: 20th Annual Tripartite Consultations on Resettlement* (UNHCR, June 2014) <<http://www.unhcr.org/543408c4fda.pdf>>.

refugees; the USA resettles approximately two-thirds of all resettled refugees, while European countries resettle only 10 per cent collectively.⁷⁴

The development of resettlement as a form of international cooperation in the hosting of refugees can occur through increases in the number of resettlement places available for refugees, more flexibility in the criteria applied, and more strategic uses of resettlement as a protection tool. UNHCR believes that resettlement ‘can and should play a greater role as an instrument of responsibility-sharing’.⁷⁵ UNHCR continues to advocate for more countries to participate in resettlement and for more refugees to be resettled.⁷⁶ The EU is responding to the call to expand refugee resettlement programmes.⁷⁷ In the Agenda for Protection, states were encouraged to examine ‘how more flexible resettlement criteria could be applied with regard to refugees recognized on a *prima facie* basis⁷⁸ in mass displacement situations ...’.⁷⁹

UNHCR has also considered how resettlement can be used more effectively. It advocates the strategic use of resettlement – the planned use of resettlement that maximizes the benefits, directly or indirectly, to refugees (other than those being resettled), the hosting state and other states. Examples of the strategic use of resettlement include using it to reduce the burden on countries of first asylum, thereby improving protection conditions in those countries or allowing UNHCR to have access to refugees in detention, and using it to unlock protracted refugee situations.⁸⁰ Although these ideas are theoretically sound, some advocates and scholars are sceptical that the planned strategic uses of resettlement have actually been implemented.⁸¹

⁷⁴ UNHCR, *The State of the World's Refugees*, above n 12, 202.

⁷⁵ Ibid 201.

⁷⁶ Ibid.

⁷⁷ A Joint European Resettlement Programme has been adopted and further proposals about resettlement have been made in response to the high level of boat arrivals from across the Mediterranean; see Chapter 7 for further discussion.

⁷⁸ Prima facie recognition of refugees generally occurs in the developing world, where a group of refugees will be recognized on the basis of the objective situation prevailing in the country of origin. This may occur on the basis of a regional definition of refugee status that is broader than the definition of refugee contained in the 1951 Convention.

⁷⁹ UNHCR, *Agenda for Protection*, above n 6, 61.

⁸⁰ UNHCR, ‘UNHCR Position Paper on the Strategic Use of Resettlement’ (UNHCR, June 2010) <<http://www.refworld.org/docid/4c0d10ac2.html>> 2.

⁸¹ For example, see the consultant’s report: Joanne Van Selm, *Great Expectations: A Review of the Strategic Use of Resettlement*, PDES/2013/13

Another strategic use of resettlement would be to link it to local integration. Keane Shum proposes that countries could contractually agree to resettle one refugee for every refugee locally integrated, thereby employing resettlement ‘as a “stimulus to local integration”, instead of as a replacement to local integration’.⁸²

ii) Refugee quotas

Another way that states could share the responsibility of hosting refugees is through the establishment of mandatory pre-determined quotas of refugees that states should host. Those states presently participating in resettlement usually have a nationally determined quota of resettlement places. States have not acted in concert to adopt a quota-based distribution of responsibility for the physical welfare of refugees throughout the globe. Acceptance of refugees for resettlement remains a matter of discretion for individual states.

The idea of quotas has been suggested on a number of occasions. During the drafting of the Refugee Convention, the UN Secretariat proposed an article on admission, part of which would have stated that the ‘High Contracting Parties shall to the fullest possible extent relieve the burden assumed by initial reception countries which have afforded asylum They shall do so, *inter alia*, by agreeing to receive a certain number of refugees in their territory.’⁸³

Atle Grahl-Madsen, an early leading scholar of refugee law, also made proposals for burden-sharing.⁸⁴ He first proposed that each state should, in principle, take responsibility for asylum seekers on their territory, but that as some states were more exposed to mass influx, a responsibility-sharing scheme was necessary. Focusing on European states, Grahl-Madsen suggested that absorption capacity should be measured by reference to gross national product (GNP) per capita and population, with

(UNHCR Policy Development and Evaluation Services, 2013) <<http://www.unhcr.org/520a3e559.html>>.

⁸² Keane Shum, ‘A New Comprehensive Plan of Action: Addressing the Refugee Protection Gap in Southeast Asia through Local and Regional Integration’ (2011) 1(1) *Oxford Monitor of Forced Migration* 60, 66, citing W C Robinson, *Terms of Refuge: The Indochinese Exodus & the International Response* (Zed Books, 1998) 277.

⁸³ Memorandum by the Secretary-General, Statelessness Conference, 3 January 1950 (E/AC.32/2) <<http://www.unhcr.org/3ae68c280.html>> Art 3(2).

⁸⁴ His proposals date back to 1965. See Atle Grahl-Madsen, ‘Ways and Prospects of International Cooperation in Refugee Matters’ in Peter Macalister-Smith and Gudmundur Alfredsson (eds), *The Land Beyond: Collected Essays on Refugee Law and Policy by Atle Grahl-Madsen* (Martinus Nijhoff 2001) 273–8.

GNP carrying greater weight. The formula he proposed was $i^{1.5} \times p$, with i representing GNP per capita and p representing population.⁸⁵ Grahl-Madsen suggested that there would need to be a ceiling, as states would be unlikely to make a commitment to an undetermined number of refugee arrivals.⁸⁶ Once this upper limit was reached, states would have to negotiate on an *ad hoc* basis to meet increased needs.⁸⁷

More contentiously, in 1997 Schuck took the concept of a quota-based distribution one step further. Schuck proposed that states should be allocated a nominal quota of refugees based on their capacity, but that states should then be able to trade their quota on a refugee market and pay others to fulfil their obligations.⁸⁸ Under this model, states would collectively commit to fulfil the temporary protection and permanent resettlement needs of refugees. An international organization, such as UNHCR, would allocate each state a quota of refugees based on an assessment of the number of people who need such protection and the 'burden-bearing capacity' of states.⁸⁹ This international authority would then play an administrative role in the market in which states could purchase and sell their quotas, in whole or in part.⁹⁰

According to Schuck, a market-based model for refugee protection offers four main benefits. First, his model would use existing resources for refugee protection more efficiently and bring in new resources.⁹¹ Second, the model can ensure that refugees actually receive practically effective protection that is consistent with human rights standards.⁹² Third, Schuck posits that a market system can deal with the considerable political restraints that some states face in implementing refugee policy reform by exploiting factors such as state self-interest.⁹³ Fourth, the market is administratively simple and requires little regulation and few transaction costs.⁹⁴ Essentially, Schuck's model is a classic application of

⁸⁵ Ibid 278.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Schuck, 'Refugee Burden-Sharing' (1997), above n 54, 248, 290.

⁸⁹ Ibid 271.

⁹⁰ Ibid 288.

⁹¹ Ibid 270.

⁹² Ibid 271. Schuck (ibid 294) indicates that states that pay others to fulfil their obligations under the model nevertheless remain responsible for ensuring that the rights of their quota of refugees are fully protected. He suggests that this can be enforced through contractual provisions as well by ongoing rather than lump-sum payments.

⁹³ Ibid 271.

⁹⁴ Ibid.

Coase theorem:⁹⁵ where it is cheaper for one country to host refugees, a country in which it would cost more to host refugees will pay that country to host their quota of refugees.⁹⁶

Despite these asserted benefits, some academics have dismissed Schuck's market model as inappropriate.⁹⁷ They argue that Schuck's model corrupts the concept of asylum by 'putting a price on something that is priceless'.⁹⁸ Furthermore, critics believe that Schuck's model demeans refugees 'by treating refugees as if they possess negative value'.⁹⁹ Matthew Gibney argues that Schuck's model degrades refugees by valuing them in a manner akin to 'toxic waste':

there is something uniquely dubious about a market that registers in price terms how much states don't want particular groups of refugees. It is as if refugees are not only being rejected by states, but, to add insult to injury, they are also being provided with a monetary measure of how unwanted they are.¹⁰⁰

Finally, economists have questioned the validity of Schuck's economic assessment that the quantity and quality of refugee protection would also be enhanced under a market-based protection system. Cook queries whether in fact countries to which the responsibility for refugees would be shifted would ask for a much higher price than anticipated by the countries attempting to trade their refugee quotas.¹⁰¹ Anker, Fitzpatrick and Shacknove argue that Schuck's model fails to take into account the ways international relations and international politics would vitiate the effectiveness of the model. Unlike Hathaway and Neve, who envisage 'interest-convergence groups' coming together to agree on cooperation,¹⁰² Schuck does not really grapple with the political process necessary to establish quotas in the first place. He merely envisages that regions will

⁹⁵ Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1.

⁹⁶ Benjamin Cook, 'Method in its Madness: The Endowment Effect in an Analysis of Refugee Burden-Sharing and a Proposed Refugee Market' (2004) 19 *Georgetown Immigration Law Journal* 333, 353.

⁹⁷ See Anker, Fitzpatrick and Shacknove, above n 56; Gibney, above n 28.

⁹⁸ Gibney, above n 28, 69.

⁹⁹ *Ibid* 70.

¹⁰⁰ *Ibid* 72–3.

¹⁰¹ Cook, above n 96, 360.

¹⁰² Hathaway and Neve, above n 53, 189–94.

offer greater prospects of agreement,¹⁰³ an argument that Anker, Fitzpatrick and Shacknove attack on the basis that regions are often riven with enmity.¹⁰⁴ More fundamentally, regional agreements may fail to draw in the countries with most capacity¹⁰⁵ – although Schuck is certainly amenable to countries outside a region being drawn into the system.¹⁰⁶

Anker, Fitzpatrick and Shacknove also argue that the commodification of refugees under Schuck's model 'will have the practical effect of de-emphasizing the existing protection responsibilities of states toward refugees under international law'.¹⁰⁷ Schuck, however, contends that the system could hardly be worse than the present situation.¹⁰⁸

Most of the criticisms of Schuck's proposal focus on the market-based component of the model, rather than the allocation of state quotas of refugees based on capacity. The potential of a quota-based approach to the distribution of responsibility in the international refugee regime has not, thus far, been entirely dismissed or rejected as a politically unfeasible or ethically inappropriate approach. It is more likely that, in the absence of a crisis like the Syrian refugee crisis and its spillover effect on Europe, there has been a lack of interest in such a scheme.

In 1986, Denmark put forward a draft General Assembly Resolution requesting the UN Secretary-General and UNHCR to prepare a report which would, among other things, indicate the number of refugees that each member of the UN might be able to receive given its population, population density and GDP and to then invite member states' comments on how many refugees registered with UNHCR they would be willing to receive annually.¹⁰⁹ However, the draft resolution was never debated.

In mid-2015 the European Commission proposed a quota system for relocation of asylum seekers among EU states based on population size, GDP, unemployment levels and past contribution to hosting refugees.¹¹⁰ While unsuccessful in its first iteration, which related to 40 000 asylum seekers in Greece and Italy whose relocation was settled by consensus

¹⁰³ Schuck, 'Refugee Burden-Sharing' (1997), above n 54, 249.

¹⁰⁴ Anker, Fitzpatrick and Shacknove, above n 56, 300–01.

¹⁰⁵ See discussion of unilateralism in Chapter 1.

¹⁰⁶ Schuck, 'Refugee Burden-Sharing' (1997), above n 54, 275.

¹⁰⁷ Anker, Fitzpatrick and Shacknove, above n 56, 296.

¹⁰⁸ Schuck, 'Refugee Burden-Sharing' (1997), above n 54, 297.

¹⁰⁹ *International Procedures for the Protection of Refugees*, GA Draft Resolution (Denmark) UN Doc A/C.3/41/L.51 (12 November 1986).

¹¹⁰ *Council Decision (EU) 2015/1523 of 14 September 2015 on Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece* [2015] OJ L 239/146.

instead, a second proposal for a quota system for relocation of 120 000 asylum seekers from Italy, Greece and Hungary was adopted by majority vote.¹¹¹ There was also a proposal for compulsory quotas based on a similar distribution key with respect to resettlement of 20 000 refugees from outside the EU, but while it was agreed that resettlement of the 20 000 would occur (and eventually, over 22 000 resettlement places were offered) the mandatory nature of the quotas was not accepted.¹¹²

That states have been unable to implement such a model thus far may be due to the failure of states to agree upon the criteria to determine the size of the quotas and the underlying problems of collective action failure and free-riding¹¹³ rather than to broader concerns about the viability of the quota system as a sharing mechanism. It may also be that states are more willing to agree to a quota-based sharing mechanism for hosting refugees if, as Grahl-Madsen proposed, an upper limit is placed on the number of refugees each state will host so that states can properly plan for the reception of refugees in their territory.¹¹⁴

iii) Labour migration

A third way that states might share the responsibility of hosting refugees is through the creation of labour migration programmes for refugees. Labour migration options for refugees may offer several benefits for both refugees and states. Summary conclusions adopted following a UNHCR and International Labour Organization (ILO) workshop in Geneva in September 2012 note their potential benefits; labour mobility for refugees can: (a) enable refugees to realize their right to work; (b) allow refugees freedom of movement and access to a durable solution; (c) complement resettlement programmes; and (d) enable refugees to contribute to their host and home countries.¹¹⁵

The use of labour migration as a response to refugee flows has a long history. In the aftermath of the Second World War, states such as

¹¹¹ EU Parliament, 'MEPs give go-ahead to relocate an additional 120,000 asylum seekers in the EU' (Press Release, 17 September 2015) <http://www.uroparl.europa.eu/pdfs/news/expert/infopress/20150915IPR93259/20150915IPR93259_en.pdf>.

¹¹² European Commission, *Commission Recommendation of 8.6.2015 on a European Resettlement Scheme*, C(2015) 3560; European Commission, *Annex to the Commission Recommendation on a European Resettlement Scheme*, C(2015) 3560 (8 June 2015).

¹¹³ See the discussion of the potential for free-riding earlier in this chapter.

¹¹⁴ Grahl-Madsen, above n 84, 278.

¹¹⁵ UNHCR, 'Summary Conclusions on Labour Mobility for Refugees' (Geneva, 11–12 September 2012) 2.

Australia, Belgium, Canada, the United Kingdom and the United States resettled refugees from Europe because they recognized their potential to fill labour shortages in growing domestic industries. For example, the Australian government, in cooperation with the International Refugee Organisation, resettled approximately 180 000 displaced persons between 1948 and 1951 in order to ease labour shortages and increase the population of Australia.¹¹⁶ Similarly, the Canadian government resettled approximately 100 000 refugees after the Second World War as part of a labour placement scheme.¹¹⁷ Unfortunately, when the countries that had so willingly participated in resettlement after the Second World War faced economic decline, the benefits of resettlement were not so readily apparent.

More recently, a labour migration programme has offered solutions to protracted refugee situations in West Africa. In 2009 Nigeria provided Liberian and Sierra Leonean refugees with three-year renewable residence permits under the West African Protocol relating to the Free Movement of Persons, Residence, and Establishment (ECOWAS).¹¹⁸ These residence permits provide refugees with the right to work in Nigeria and other ECOWAS states. In Latin America, the Mercado Común del Sur (MERCOSUR) subregional consultation in the lead-up to the 2014 Brazil Declaration also proposed the establishment of a labour mobility programme to facilitate the free movement of refugees to third countries for the purposes of employment and self-sufficiency.¹¹⁹ This programme takes account of the labour needs of the country of destination and the profiles of the possible refugee workers who choose this option.¹²⁰

Academics, UNHCR and refugee advocates are now considering how labour migration may be developed to meet the current needs of refugees

¹¹⁶ See Klaus Neumann, 'Providing a "Home for the Oppressed"? Historical Perspectives on Australian Responses to Refugees' (2003) 9(2) *Australian Journal of Human Rights* 14; Ann Tündern-Smith, *The Fifth Fleet* <<http://www.fifthfleet.net/>>.

¹¹⁷ See UNHCR, 'Labour Mobility for Refugees: Past and Present Examples' (7 September 2012) <<http://www.unhcr.org/509a82ba9.html>> 3.

¹¹⁸ Katy Long and Jeff Crisp, 'Migration, Mobility and Solutions: An Evolving Perspective' (2010) 35 *Forced Migration Review* 56. For discussion of the ECOWAS Protocol, see Aderanti Adepoju, Alistair Brown and Mariah Levin, 'Promoting Integration Through Mobility: Free Movement and the ECOWAS Protocol' (Research Paper No 150, UNHCR, December 2007).

¹¹⁹ *Brazil Declaration and Plan of Action* (3 December 2014) <<http://www.refworld.org/docid/5487065b4.html>> 13.

¹²⁰ *Ibid* 14.

and the interests of states. Anja Klug suggests that a temporary labour migration scheme could be developed to create new possibilities for refugees to achieve self-reliance. She argues that such a scheme

would be driven primarily by the labour market needs of the destination country, and it would be time bound and cease after a few years. It would not, in itself, provide a durable solution for participating refugees, but it could facilitate the realization of a durable solution by allowing refugees to gain self-reliance and valuable vocational and other skills. The scheme would only be able to benefit selected groups of refugees, i.e., those who could fulfil the labour needs in the country hosting the scheme.¹²¹

In the Southeast Asian context, Keane Shum proposes that states could develop local integration options for refugees on a more long-term basis through a labour mobility model where refugees are 'placed in the Southeast Asian country where they are best equipped to support the local economy'.¹²² In this model, a coordinating organization such as UNHCR or IOM would

interview refugees upon their being granted asylum for the kinds of work they are either experienced in or able to undertake. If those results match any areas of labour shortage identified by the asylum country's ministry of labour, then local integration is offered in that country. ... Otherwise, a second option opens up for regional integration – a kind of hybrid of local integration and resettlement – in another Southeast Asia country where a match can be made.¹²³

Shum proposes that the traditional use of resettlement under this model would only become available as a potential durable solution for a refugee if there were no matches between the refugee's work experience and any labour demands in the region,¹²⁴ or if the person is unable to work or has a special need or vulnerability.¹²⁵ The great benefit of this model, according to Shum, is that Southeast Asian states can embrace refugees 'as development assets instead of liabilities'.¹²⁶

¹²¹ Anja Klug, 'Towards Durable Solutions – Enhancing Refugees' Self Reliance Through a Temporary Labour Migration Scheme' (Discussion Paper, UNHCR, March 2012) <<http://www.unhcr.org/509a84819.pdf>> 2.

¹²² Shum, above n 82, 67.

¹²³ Ibid 74.

¹²⁴ Ibid 75.

¹²⁵ Ibid 73.

¹²⁶ Ibid 65.

While these examples highlight the possibility of labour migration options to facilitate durable solutions for refugees, there are still some concerns among refugee advocates and academics about the development of labour migration as an alternative to local integration or resettlement. As Katy Long argues, labour migration is a ‘precarious form of temporary protection’.¹²⁷ It is contingent upon the continuing employment of refugees in the host states, as well as the continual demand for labour in the country concerned. There is a danger, according to Long, that, in a context of unwillingness to offer local integration, labour migration programmes could thwart permanent integration for refugees.¹²⁸

iv) **Limits on physical relocation: sharing versus shifting responsibility**

The physical relocation of refugees from one state to another involves risks as well as benefits. It may be experienced as disruptive by refugees, it involves bureaucracy and expense, and it does not always result in the enhancement of protection. Consequently, movement of refugees from one state to another should only occur when certain conditions are met.

First, refugees and asylum seekers should only be moved when legally enforceable and practically effective protection services are in place in the receiving country that guarantee that the rights of refugees will be protected.¹²⁹ These conditions are necessary to guarantee that the international protection of refugees is enhanced and not diminished and to ensure that states share rather than shift the responsibility to protect refugees. The European Court of Human Rights and the Court of Justice of the European Union have both found that the relocation of refugees to countries where adequate mechanisms are not in place to protect refugees violates the obligation of *non-refoulement*.¹³⁰ Similarly, the High Court of Australia, adjudicating on legislation that required safe third countries

¹²⁷ Katy Long, ‘Extending Protection? Labour Migration and Durable Solutions for Refugees’ (New Issues in Refugee Research, Research Paper No 176, UNHCR, 2009) <<http://www.unhcr.org/4ad334a46.html>> 20.

¹²⁸ Ibid 21.

¹²⁹ See ‘The Michigan Guidelines on Protection Elsewhere (Fourth Colloquium on Challenges in International Refugee Law)’ (2007) 28(2) *Michigan Journal of International Law* 208; UNHCR, ‘Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers’ (Lisbon Expert Roundtable, 9–10 December 2002) (2003) <<http://www.refworld.org/docid/3fe9981e4.html>>.

¹³⁰ *M.S.S. v Belgium and Greece* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011); *N. S. v Secretary of State for the Home Department and M. E. and others v Refugee Applications*

to act as a 'legal reflex' of Australia's own obligations, found that an instrument declaring Malaysia as a safe third country under Australian law was invalid in the absence of international or domestic legal obligations on the part of Malaysia to protect refugee rights.¹³¹

Second, as adequate protection means that the place to which refugees are moved should be one in which family unity can be protected and family reunification achieved and the rights to practise their religion and enjoy their culture are protected, this might entail an element of choice on the part of the refugee. Kuosmanen suggests that the preferences of refugees should be considered where they relate to family reunification, as well as 'meaningful opportunities to practice one's religion, to express one's culture, and to develop capacities to participate in the activities of the recipient society'.¹³² Similarly, refugees should be able to remain in a host country if they have established new lives in that country and have successfully integrated over a number of years. These restrictions are consistent with the rights of refugees to live in dignity. In the European context, there have been calls for free choice for asylum seekers as coercion tends to work against effective integration.¹³³

Third, refugees and asylum seekers should only be moved when this will result in a more equitable distribution of responsibility among states. There is a danger that states may seek to relocate refugees using the rhetoric of responsibility-sharing or resettlement, even when they are not hosting a disproportionate number of refugees by any evaluative criteria, as evidenced by Australia's 'regional resettlement agreements' with Papua New Guinea, Nauru and Cambodia.¹³⁴ UNHCR has expressed its

Commissioner, Minister for Justice, Equality and Law Reform (Court of Justice of the European Union, C-411/10 and C-493/10, 21 December 2011).

¹³¹ *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

¹³² Jaakko Kuosmanen, 'What (If Anything) Is Wrong with Trading Refugee Quotas?' (2013) 19 *Res Publica* 103, 110.

¹³³ See Special Rapporteur on the Human Rights of Migrants, Francois Crepeau, *Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants*, A/HRC/29/36 (8 May 2015) [66]; Elspeth Guild et al, Civil Liberties, Justice and Home Affairs Committee, 'Enhancing the Common European Asylum System Alternatives to Dublin' (2015) 59.

¹³⁴ *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, 3 August 2013 <<http://www.dfat.gov.au/geo/Documents/nauru/nauru-mou-20130803.pdf>>; *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and*

view that transfer arrangements between states must not operate as responsibility-shifting devices, but rather enhance the protection of refugees and asylum seekers.¹³⁵

Sharing Financial Costs

In addition to hosting refugees, states can also share responsibility for refugees by sharing the financial costs involved in hosting and protecting refugees. Although refugees may provide long-term economic benefits to the host state,¹³⁶ there are costs involved in hosting refugees in the short term. Refugees often need support with housing, health care, food, language training, psychosocial services, employment and education.

Presently, financial assistance for the protection of refugees is provided to international organizations, regional mechanisms, host governments and NGOs. In particular, states donate funds voluntarily to UNHCR, which then uses the money to protect refugees under its mandate. EU member states also contribute to an Asylum and Migration and Integration Fund (AMIF)¹³⁷ which is used for numerous activities, including improvement of reception of refugees (accommodation and so on) and RSD, and for intra-EU relocation operations. States also provide funds directly to civil society organizations that work directly with refugee communities.

The financial contributions to the UN are voluntary. While UNHCR receives two per cent of its budget from the regular UN budget, the majority of its funding is sourced from voluntary donations by states and the private sector. UNHCR regularly reports that it only receives 60 per cent of the funds it requires to meet the global needs of refugees.¹³⁸

the Government of Australia, relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues, 6 August 2013 <<http://www.dfat.gov.au/geo/png/joint-mou-20130806.html>>; *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, relating to the Settlement of Refugees in Cambodia* (signed and entered into force 26 September 2014) <<http://dfat.gov.au/international-relations/themes/people-smuggling-trafficking/Documents/cambodia-australia-mou-and-operational-guidelines.pdf>>.

¹³⁵ See UNHCR Division of International Protection, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-seekers* (UNHCR, 2013) <<http://www.refworld.org/docid/51af82794.html>> [3](iv).

¹³⁶ See the discussion in Chapter 2.

¹³⁷ This fund has replaced and supplemented the European Refugee Fund.

¹³⁸ UNHCR, *The State of the World's Refugees*, above n 12, 199.

Furthermore, developed countries often spend more money on implementing measures to deter refugees from arriving in their territory than they spend on protecting refugees and building capacity in developing countries.¹³⁹

There are several ways in which states could provide enhanced financial assistance as part of a responsibility-sharing framework for refugee protection. First, states could increase their overall financial contributions to states hosting refugees under the current system, with the aim of reaching the targets set by UNHCR. This could be done either on a compulsory or voluntary basis.

In 2003, in a report regarding the capacity of UNHCR to carry out its mandate, the High Commissioner for Refugees stated that he would 'encourage States to support additional incremental increases in the allocation of funding from the United Nations Regular Budget to reach a level consistent with the Office's Statute'.¹⁴⁰ He also recommended that states adopt a 'base-level' model for the purposes of their voluntary contributions, whereby 30 per cent of UNHCR's annual budget would be funded by as many states as possible and calculated by applying the UN scale of assessment and weighting contributions according to the average contributions of states over the preceding ten years or their contributions in the most recent financial year, and taking into account the contributions of developing countries in hosting significant numbers of refugees already.¹⁴¹ More recently, the agency has shifted from a funding model

¹³⁹ Hathaway and Neve, above n 53, 153. In Australia, for example, the National Commission of Audit found that Australia had spent AU\$3.3 billion in 2013–2014 on detention and processing of boat arrivals. National Commission of Audit, 'Towards Responsible Government: Appendix to the Report of the National Commission of Audit' volume 2 (February 2014) 10.14. Obviously, processing will always be needed, but the costs of detention are enormous and unnecessary. The total budget for UNHCR for 2014 as initially approved by its executive committee was US\$5.3 billion. Daniel Endres, *Update on UNHCR's Budget and Funding in 2014*, 60th standing comm (1–3 July 2014) <<http://www.unhcr.org/53b6a5a99.pdf>>. Australia's donation to UNHCR for 2013 was US\$57 522 352 (see UNHCR, 'Donor Profiles', above n 66.)

¹⁴⁰ *Report by the High Commissioner to the General Assembly on Strengthening the Capacity of the Office of the High Commissioner for Refugees to Carry Out its Mandate*, UN GAOR, 54th sess, UN Doc A/AC.96/980 (20 August 2003) [62].

¹⁴¹ *Ibid.* See also UNHCR, *Global Report 2004: Funding UNHCR's programmes* <<http://www.unhcr.org/42ad4d9c0.pdf>> 20. See also Zieck, above n 20, 417.

based on anticipated revenue to a needs-based assessment,¹⁴² but the agency is still facing significant funding shortfalls.

Second, states could improve the way in which they provide financial support. They could contribute to programmes that develop the self-sufficiency of refugees, instead of merely providing emergency aid. For example, states could fund microcredit programmes and programmes aimed to enhance employment opportunities for refugees. Keane Shum has suggested a focus on promoting local integration, not just self-sufficiency, by providing conditional foreign aid incentives – that is, giving aid in a way that is proportional to the number of refugees offered local integration.¹⁴³

Third, states could provide targeted development assistance (TDA) that simultaneously aims to provide durable solutions to refugees and development benefits to the local hosting community. As Betts explains, TDA

refers to the way in which donor states can provide overseas development aid to host countries of first asylum as a means to enhance refugees' access to protection and durable solutions. Its central characteristic is an integrated development approach, which focuses on the needs of both refugees and host communities, through, for example improving livelihood opportunities, service provision or infrastructure.¹⁴⁴

There are several examples of the successful use of TDA as a strategic tool to enhance the local integration of refugees in developing countries. In the 1980s UNHCR implemented a Refugee Aid and Development agenda in regional forums such as the International Conferences on Assistance to Refugees in Africa (ICARA I and II) and the International Conference on Central American Refugees (CIREFCA).¹⁴⁵ This agenda successfully utilized development assistance programmes in communities hosting large numbers of displaced persons as a means to develop local communities and promote the inclusion of refugees in these areas. Similarly, under the Borders of Solidarity pillar of the Mexico Declaration and Plan of Action, small infrastructure projects in remote border

¹⁴² *Report of the United Nations High Commissioner for Refugees: Part II Strategic Review pursuant to General Assembly Resolution 58/153*, UN Doc A/68/12 (Part II) (21 August 2013).

¹⁴³ Shum, above n 82, 65.

¹⁴⁴ Alexander Betts, 'Development Assistance and Refugees: Towards a North-South Grand Bargain?' (Forced Migration Policy Briefing 2, Refugee Studies Centre, 2009) 1.

¹⁴⁵ See Chapter 5 for discussion of ICARA and Chapter 6 for discussion of CIREFCA.

communities hosting refugees in Latin America have been funded as a way to enhance the self-sufficiency of refugees in these communities and minimize discrimination and xenophobia.¹⁴⁶ These examples are discussed in more detail in the following chapters of the book.

There has since been further work on the concept of refugee aid and development (as well as a proliferation of terms to describe the concept). This includes the Brookings Process in 1999, the 2003 Framework for Durable Solutions for Refugees and Persons of Concern, and the Transitional Solutions Initiative.¹⁴⁷ Furthermore, the success of the PRODERE programme in CIREFCA led UNHCR and UNDP to replicate the programme in numerous other refugee situations across the globe.¹⁴⁸

Sharing Non-Financial (In-Kind) Resources

A final way that states can cooperate with one another in the area of refugee protection is by sharing administrative, material and technical resources with a view to strengthening capacity to protect refugees.¹⁴⁹ For example, states can assist other states with research and training. This can also occur by pooling resources, through, for example, the establishment of joint institutions to conduct research and training or RSD. An example is the European Asylum Support Office established by the EU, which has, among other things, run workshops on issues such as country of origin information – vital in RSD – and assisted particular states such as Greece to improve its RSD processes.¹⁵⁰

Frequently, this kind of support is actually provided by UNHCR with funding from states, meaning that states are effectively sharing financial, rather than non-financial, resources, although the funding is provided for a particular strategy. In the case of the EU Regional Protection Programmes (RPP), for example, capacity-building activities are often carried out by the UNHCR with funding from the RPP, which makes it

¹⁴⁶ The Mexico Declaration and Plan of Action is discussed in Chapter 8.

¹⁴⁷ See UNHCR, *Concept Note on Transitional Solutions Initiative: UNDP and UNHCR in collaboration with the World Bank* (October 2010) <<http://www.unhcr.org/4e27e2f06.html>>.

¹⁴⁸ Ibid [4].

¹⁴⁹ See, for example, the Strengthening Protection Capacity Project, which began in 2005 and is now in 12 countries (UNHCR, *Strengthening Protection Capacity* <<http://www.unhcr.org/pages/4a1673d46.html>>).

¹⁵⁰ The European Asylum Support Office is discussed further in Chapter 7.

difficult to see how the RPP are different to regular UNHCR programmes.¹⁵¹ Arguably, states could share non-financial resources more often and in more innovative ways than they do at present. Recently, scholars have argued in favour of a common international refugee status determination system either at the universal or regional level and group *prima facie* assessment in order to reduce processing costs.¹⁵²

HOW SHOULD RESPONSIBILITY FOR REFUGEES BE DISTRIBUTED AMONG STATES?

The key desiderata guiding the allocation of responsibility for refugee protection are, in the view of UNHCR and many scholars and advocates, a more equitable distribution of the responsibility among states and enhanced refugee protection.¹⁵³ This is consistent with the sentiments expressed in the preamble to the Refugee Convention and Recommendation D of the Final Act of the conference at which the Convention was adopted.¹⁵⁴

These guiding principles could be implemented in different ways. Some proposals for reform of the international refugee regime have arguably prioritized efficiency over equity while attempting to secure more equitable, protection-sensitive mechanisms.

Focusing first on the *hosting* of refugees, we think that the physical distribution of refugees should be determined on the basis of a state's capacity to absorb and protect refugees, which raises further questions about how that capacity is measured. In its annual *Global Trends* publication, UNHCR regularly evaluates states' contributions to international refugee protection by comparing the size of refugee populations in host states with the GDP and GDP (PPP (purchasing power parity))

¹⁵¹ Aspasia Papadopoulou, 'Regional Protection Programmes: an effective policy tool?' (Dialogue on Migration and Asylum in Development: Discussion Paper, European Council on Refugees and Exiles, January 2015) 17.

¹⁵² Guy S Goodwin-Gill, 'Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action' (Speech delivered at the Jean Monnet Centre of Excellence on Migrants' Rights in the Mediterranean, University of Naples 'L'Orientale' Palazzo de Mesnil, 11 May 2015), 3; Guild et al, Civil Liberties, Justice and Home Affairs Committee, above n 133, 53; James Hathaway, *Moving Beyond Good Intentions: the Road to Refugee Rights*, Banco Court, Brisbane, 23 September 2015.

¹⁵³ See UNHCR, *The State of the World's Refugees*, above n 12, 198–9.

¹⁵⁴ *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, A/CONF.2/108/Rev.1 (25 July 1951).

per capita of those states, thus taking into account the cost of living – how much each dollar actually buys – in each state. If we focus on *financing* refugee protection, wherever in the world that might occur, responsibility should be based on the capacity of a state to pay.

We suggest that the Global North will need to do more than it presently does in both areas. However, there have been differences in the literature on the ways in which to achieve such a result.

The ‘Reformulation’ project which resulted in an edited collection¹⁵⁵ and a model of ‘common but differentiated’ responsibility co-authored by Hathaway and Neve,¹⁵⁶ proposed what, in their view, was a politically realistic way of achieving better protection outcomes for refugees. Hathaway and Neve argued for ‘solution-oriented temporary protection’ and therefore that refugees should be hosted in the country where they will be ‘safest, most self-sufficient, least likely to experience social conflict, and ultimately in the best position to repatriate if and when safety is restored in their country of origin’.¹⁵⁷ Hathaway and Neve envisaged a residual resettlement role for Northern states,¹⁵⁸ and their proposal theoretically could be consistent with an increase in both funding and resettlement by Northern states. However, they contemplated that even more refugees would be physically hosted in the South than in the North.¹⁵⁹

Other models see efficiency or ‘comparative advantage’¹⁶⁰ coming to the fore. Such models can have different consequences for different states; some states may host refugees and others might finance refugee protection. For example, the market-based system proposed by Schuck would see quotas assessed on states’ capacity to protect traded on a market, which would mean that the market decides the price of protection.¹⁶¹ Under Schuck’s model, the South would continue to do most of

¹⁵⁵ James C Hathaway (ed), *Reconceiving International Refugee Law* (Martinus Nijhoff, 1997).

¹⁵⁶ Hathaway and Neve, above n 53.

¹⁵⁷ Ibid 204.

¹⁵⁸ Ibid 207.

¹⁵⁹ Ibid 146.

¹⁶⁰ We use the term ‘comparative advantage’ here somewhat loosely. In economic theory, the term refers to the relatively efficient production of goods. We use the term as a shorthand to encapsulate proposals for reforming the international system for refugee protection in a way that attempts to enhance protection in an efficient way. Cf Eiko R Thielemann and Torun Dewan, ‘The Myth of Free-riding: Refugee Protection and Implicit Burden-sharing’ (2006) 29 *West European Politics* 351, 366.

¹⁶¹ Schuck, ‘Refugee Burden-Sharing’ (1997), above n 54, 282–8.

the physical hosting of refugees, but would be financially compensated for doing so.

A final option which does not necessarily correlate either with capacity to host or pay or with comparative advantage, is the distribution of responsibility, where appropriate, on the basis of the culpability of states for causing the displacement of people. This could include the country of origin, although any contribution from the country of origin would necessarily have to be through financial support. At other times, culpability might rest in large part with countries that, coincidentally, do have a high capacity to host or pay for refugee protection, as, for example, in the case of military interventions by wealthy countries of the Global North which contribute to refugee flows.

Physical Distribution and Capacity to Absorb Refugees

The principle that the responsibility to physically host refugees should be based on a state's capacity to absorb refugees has been expressed in different ways over the years. As previously noted, Atle Grahl-Madsen proposed that resettlement quotas for refugees should be determined based on the objective basis of GNP, with a greater emphasis on the size of the economy than of the population.¹⁶² In 1993 B S Chimni proposed that all states of sufficient size should take approximately the same number of refugees, with only a few adjustments made for total landmass and population density.¹⁶³ Chimni defined countries of a sufficient size as those having a landmass greater than 20 000 square kilometres.¹⁶⁴

Since these early proposals, academics, demographers and international organizations have considered other factors to measure the capacity of states to absorb refugees, including GDP per capita, GDP (PPP) per capita, average life expectancy, employment rates, land reserves and the quality of environmental infrastructure. Tally Kritzman-Amir has also tried to define the term 'absorption capacity', arguing that it refers to a state's 'ability to endure additional responsibility in a way that, from a functionalist point of view, will not dramatically affect the State or will not radically influence its economy'.¹⁶⁵ Similarly, Seglow,

¹⁶² Grahl-Madsen, above n 84, 278.

¹⁶³ See Hathaway and Neve, above n 53, 204. They refer to an unpublished paper by Chimni.

¹⁶⁴ Ibid.

¹⁶⁵ Tally Kritzman-Amir, 'Not in my Backyard: On the Morality of Responsibility Sharing in Refugee Law' (2009) 34 *Brooklyn Journal of International Law* 372.

writing about the need for an ethical allocation of immigration quotas as a matter of global distributive justice, proposes that the arrival of all migrants – he does not discuss refugees as a particular category of migrants – should be determined by three objective criteria: GDP, population density and the quality of a state’s environmental infrastructure.¹⁶⁶ According to Seglow, these criteria should be used because (a) ‘the better off a state, the more likely migrant admission will augment rather than diminish the resources and opportunities available to the indigenous population’; (b) the less densely populated a state, the more likely there will be a reasonable amount of living space for its residents; and (c) ‘the better the condition of a state’s environmental infrastructure, the greater its ability to maintain the same quality of life (as measured by appropriate goods and resources) for its residents as numbers increase’.¹⁶⁷

In response to the marked increase in boat arrivals across the Mediterranean, a 2015 recommendation from the European Commission for resettlement of an additional 20 000 refugees from priority areas in North Africa, the Middle East and the Horn of Africa, used the size of the population (40 per cent weighting), the total GDP (40 per cent weighting), the average number of resettled refugees and spontaneous asylum seekers per one million inhabitants over the period 2010–2014 (10 per cent weighting), and the unemployment rate (10 per cent weighting) to determine the distribution of those additional refugees.¹⁶⁸ The criteria were justified on the grounds that population size reflects absorptive capacity for a certain number of refugees, that GDP is indicative of the economy’s capacity to absorb refugees, that the average number of refugees hosted reflects member states’ efforts concerning refugee protection in the recent past, and that the unemployment rate reflects the capacity to integrate refugees.¹⁶⁹ The recommendation allocated the

¹⁶⁶ Jonathan Seglow, ‘Immigration and Global Justice’ (Politics and International Relations Working Paper No 1, Royal Holloway University of London, April 2006) <https://www.royalholloway.ac.uk/politicsandir/documents/pdf/pir_workingpapers/pir_workingpaper1-april2006-jonathanseglow,immigrationandglobaljustice.pdf>.

¹⁶⁷ Ibid 4–5.

¹⁶⁸ European Commission, *Commission Recommendation of 8.6.2015 on a European resettlement scheme*, C(2015) 3560; European Commission, *Annex to the Commission Recommendation on a European resettlement scheme*, C(2015) 3560 (8 June 2015).

¹⁶⁹ European Commission, *Annex to the Commission Recommendation on a European resettlement scheme*, C(2015) 3560 (8 June 2015), above n 168.

highest absolute number of refugees (3086 persons) to Germany.¹⁷⁰ The mandatory nature of these proposals was, however, rejected.

The proposals outlined above have generally used wealth and population size, among other factors, to measure states' absorption capacity for refugees, whereas a state's protective capacity may well rest on factors such as legal frameworks, societal norms and integration programmes. We touch on these factors below in the paragraphs considering proposals for responsibility-sharing that are based on common but differentiated responsibility and comparative advantage.

Financial Responsibility and Capacity to Pay

Just as the allocation of responsibility for hosting refugees should be based on a state's absorption capacity (and, we would argue, protective capacity), the financial distribution of responsibility in the area of refugee protection should be based on a state's capacity to pay. This criterion is already used and considered in other areas of international cooperation. For example, states make financial contributions to the United Nations according to their capacity to pay. The UN Committee of Contributions determines the amount each state is required to pay, taking into account gross national income, conversion rates, and adjustments for low per capita income and debt burdens.¹⁷¹ Basing the distribution of financial responsibilities for refugee protection on a state's ability to pay is morally supported by a principle by which 'benefits and burdens should be shared in such a way that as many people as possible (including future people) have sufficient resources to achieve a certain level of well-being'.¹⁷² This suggests that states should contribute to the well-being of refugees in other states if states are already able to finance the well-being of their citizens and refugees in their own territory.

¹⁷⁰ Ibid.

¹⁷¹ *Report of the Committee on Contributions*, UN GAOR, 69th sess, UN Doc A/69/11 (23 June 2014).

¹⁷² Dan Weijers, David Eng and Ramon Das, 'Sharing the Responsibility of Dealing with Climate Change: Interpreting the Principle of Common but Differentiated Responsibilities' in Jonathan Boston, Andrew Bradstock and David Eng (eds), *Public Policy: Why Ethics Matters* (ANU E Press, 2010) 463, 483.

Common but Differentiated Responsibility and the Reformulation Project

James C Hathaway coordinated a project for reformulating refugee protection that resulted in an edited collection¹⁷³ and an article co-authored with Alexander Neve. In their proposal for 'collectivized and solution-oriented protection', Hathaway and Neve suggest that '[d]ifferent states have differing capabilities to contribute to a collectivized process of refugee protection'.¹⁷⁴ Consequently, they argue that 'the net resources available for refugee protection would be maximized by calling on states to contribute in ways that correspond to their relative capacities and strengths'.¹⁷⁵ Borrowing from international environmental law, their model seeks to operate on the basis of 'common but differentiated' responsibility.¹⁷⁶

Hathaway and Neve do not believe that state responsibility for hosting refugees should be distributed based solely on absorption capacity. They argue that the distribution of responsibility should be based on four overarching criteria. First, responsibility-sharing should proceed on the basis of the ramifications for refugees' physical security. Second, there should be an evaluation of the compatibility between the refugee and the potential host state. Third, the evaluation should consider elements of cultural harmony, such as ethnic, religious and other social-cultural bonds. Finally, the distribution should prioritize states that are geographically closer to the refugees' country of origin 'to allow for ongoing contact between refugee and stayee communities, and ultimately to facilitate repatriation'.¹⁷⁷

They proceed on the basis that voluntary repatriation is the best solution for refugees and therefore emphasize 'temporary protection'¹⁷⁸ as envisaged by the Refugee Convention.¹⁷⁹ There is some merit in this view of repatriation as homecoming, but it is clear that Hathaway and Neve are also responding to the reality that voluntary repatriation is the

¹⁷³ James C Hathaway (ed), *Reconceiving International Refugee Law*, above n 155.

¹⁷⁴ Hathaway and Neve, above n 53, 210.

¹⁷⁵ *Ibid* 211.

¹⁷⁶ *Ibid* 118.

¹⁷⁷ *Ibid* 204.

¹⁷⁸ *Ibid* 139.

¹⁷⁹ Under the Refugee Convention, protection can cease when circumstances change in the country of origin: *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) Arts 1(C) (5) and (6).

solution preferred by states, as evidenced by states' relative lack of enthusiasm for local integration and resettlement as durable solutions for refugees. Resettlement is to be used as a 'residual' solution under the model proposed by Hathaway and Neve, with the emphasis being on temporary, but rights-regarding, protection in the first instance.

One of the big differences between distribution of responsibility based on a state's capacity to absorb refugees and distribution of responsibility based on other factors is that while absorption capacity is largely already objectively determined, other factors may be subjective and viewed as unfair.¹⁸⁰ On the one hand, someone who is excluded on the basis of elements of cultural harmony or functional compatibility is likely to view the decision as unjust.¹⁸¹ On the other hand, the focus on refugee security could be viewed as a responsible addition to factors concerned only with absorptive capacity. It is certainly well-accepted that if refugees are to be moved, particularly where the move is back to a country of first asylum, protection, especially respect for *non-refoulement*, should be at the heart of the matter.¹⁸² In models of responsibility-sharing that are based on absorption instead, factors such as wealth stand as proxies for protection. Resettlement generally, for example, operates as an immigration channel in which protection needs are assessed against the country of first asylum, but generally not against the country of resettlement. It is assumed that resettlement countries are both willing and able to protect refugees. Why else would they accept refugees for permanent residence? Protection for resettled refugees rests on legal and social mechanisms for protection that are not factored into the criteria for responsibility-sharing, although they could be factored in as barriers to physical relocation.

A number of aspects of the model presented by Hathaway and Neve are problematic, suggesting that their proposal for a collectivized system based on common but differentiated responsibility may fail. Consequently, we spend some time here dealing with the problems.

In addition to the fact that refugee status is envisaged in the Refugee Convention as temporary, risk-based protection, the argument in favour of temporary protection is bolstered by the idea that 'pull'¹⁸³ factors for

¹⁸⁰ Seglow, above n 166, 6.

¹⁸¹ Ibid. See also Satvinder Juss, 'Toward a Morally Legitimate Reform of Refugee Law: The Uses of Cultural Jurisprudence' (1998) 11 *Harvard Human Rights Journal* 311–54.

¹⁸² See 'The Michigan Guidelines', above n 129; Lisbon Expert Roundtable, above n 129; UNHCR Division of International Protection, above n 135.

¹⁸³ We accept that this terminology is dated and simplistic.

permanent migration would be eliminated.¹⁸⁴ Hathaway and Neve seem to oscillate between addressing the situation of those asylum seekers who have valid claims for protection and those who are economic migrants.¹⁸⁵ Temporary protection, combined with better protection in countries of first asylum, could indeed work to prevent the onward movement that prompts deterrence mechanisms by Western states as they seek to eliminate both push and pull factors. We agree that there is a need to improve protection in countries of first asylum. However, if the aim is to address the problem of asylum seekers who are not actually in need of protection but who are in fact seeking work, for example, then we should address that problem directly.

If such persons are applying for refugee status, then one answer is to ensure that RSD is both fair and efficient and that failed asylum seekers are returned, although the latter is sometimes easier said than done. At a deeper level, opportunities for work in the informal sector may be the relevant pull factor here, and strategies that acknowledge real labour needs, allow legal work and ensure an adequate system for protection of workers' rights are necessary to deal with problems arising from those opportunities.¹⁸⁶ Framing solutions for refugees in a way that seeks to deal with the possibility of applications from economic migrants attempts to resolve a problem that has its roots in the economy rather than in the system of refugee protection.

Moreover, and this is another important reason not to premise solutions for refugees on the need to deal with a labour migration problem, temporary protection assumes that the root causes of refugee flight can somehow be addressed – through something other than international refugee law, which is, as Hathaway and Neve sagely acknowledge, about addressing consequences of flight.¹⁸⁷ Unfortunately, however, around 6.3 million refugees, not counting the nearly 5 million Palestinians not covered by the Refugee Convention, live in protracted refugee situations.¹⁸⁸ In other words, if we exclude Palestinians, half the world's

¹⁸⁴ Hathaway and Neve, above n 53, 117.

¹⁸⁵ At one point, they justify temporary protection by making the point that refugee law must not be viewed as a 'backdoor' to permanent immigration, which would include even those refugees with valid claims, and at another, they argue that their proposal will deter unmeritorious claims (ibid 140, 146).

¹⁸⁶ See discussion in Chapter 2.

¹⁸⁷ Hathaway and Neve, above n 53, 140.

¹⁸⁸ Cameron Thibos and Sarah Bonfanti, *Worldwide Protracted Refugee and IDP Populations* (Migration Policy Centre, 2015) <<http://www.migrationpolicycentre.eu/worldwide-protracted-refugee-idp-populations/>>.

refugees live in a protracted refugee situation. Consequently, what is needed is not a race to the bottom, where every state offers temporary protection while foreign and immigration ministers cross their fingers in the hope of eventual repatriation, but more durable solutions that involve permanent settlement in countries other than the country of origin. It would be worth raising the levels of resettlement and trying to encourage local integration through targeted development assistance and strategic use of resettlement.

As an additional argument in support of temporary protection, Hathaway and Neve state that the asylum system needs replenishing and that repatriation permits this replenishment to occur.¹⁸⁹ The point that world's resources are finite and infinite migration impossible is well-taken. However, humanitarian migrants make up only a small proportion of the world's migration flows; they can contribute in the long term to economic growth; and in many circumstances this growth ensures continued capacity for the absorption of migrants. Permanent settlement is not a bar to voluntary repatriation, and empowering refugees to make choices to return or engage in circular migration can be beneficial to all – to host countries, countries of origin and the individual refugee. By contrast, temporary protection, even where it permits generous family reunion,¹⁹⁰ can leave refugees in a state of uncertainty and be harmful to their mental health, as Hathaway and Neve acknowledge.¹⁹¹

Finally, it is arguable that the attempt to translate the concept of 'common but differentiated responsibility' from the realm of international environmental law does not 'take the idea of global distributive justice seriously'.¹⁹² Rather it takes existing inequalities and uses and builds on them in some ways. Hathaway and Neve argue that the status quo is deeply flawed and that their proposals are an improvement.¹⁹³ In other words, the perfect (or even something that is just better than the status quo) should not be an enemy of the good. As Australians we are, however, particularly wary of governments that may 'cherry-pick'¹⁹⁴ aspects of the Hathaway/Neve model and distort it in ways those authors could never have anticipated. The Australian government has used several

¹⁸⁹ Hathaway and Neve, above n 53, 211.

¹⁹⁰ This should be compared with the situation in Australia, where temporary protection visas, by virtue of their temporary nature, do not permit family reunion.

¹⁹¹ Hathaway and Neve, above n 53, 132.

¹⁹² Chimni, above n 26, 362.

¹⁹³ Hathaway and Neve, above n 53, 151.

¹⁹⁴ Anker, Fitzpatrick and Shacknove, above n 56, 304.

developing countries to shelter asylum seekers who arrived in Australia by boat even though these countries are generally not in the region of the source of the refugee flow and has used temporary protection visas in such a way as to maintain refugees in a perpetual state of limbo.

Culpability and Distribution of Responsibility

Culpability is another potential basis on which to allocate responsibilities for the protection of refugees. As Tally Kritzman-Amir writes, this form of remedial responsibility can occur when one state ‘has an exploitative relationship with the refugee’s State of origin’.¹⁹⁵ For example, a state that negligently pollutes the air, water or land of another state, causing environmental damage that forces people to move, should accept responsibility for that damage and its effects.¹⁹⁶ It may also be relevant when a state conducts military operations inside another state, creating forced displacement of the people of that state.¹⁹⁷

Examples of states accepting protection responsibilities for refugees in the context of this type of remedial responsibility include the responses of the USA and Australia in the aftermath of the war in Vietnam. Both countries accepted that they had a duty to protect refugees fleeing Vietnam,¹⁹⁸ although, especially in the case of the USA, this may have arisen from a continuing commitment to the ‘victims of communism’, rather than from an admission of responsibility for the consequences of military intervention.

Several problems arise in routinely allocating responsibility based on culpability. First, persecutory governments will usually deny or justify their actions. Second, allocation of responsibility based on culpability will likely require states and international organizations to blame other states for causing the displacement of people and insist that they take a larger share of the responsibility for protecting refugees. This has the potential to erode commitment to asylum by allowing states to argue over

¹⁹⁵ Kritzman-Amir, above n 165, 374.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Mike Steketee, ‘Malcolm Fraser the unsung hero of humane refugee policy’, *The Australian* (online), 2 January 2010 <<http://www.theaustralian.com.au/opinion/columnists/fraser-the-unsung-hero-of-humane-refugee-policy/story-e6frg7ax-1225815259755>>.

culpability at the expense of the immediate needs of asylum seekers.¹⁹⁹ Third, a new mechanism for assessing culpability may be needed, as existing mechanisms are probably unsuited to this task.

The UNHCR has always claimed its work is apolitical. The UN human rights treaty bodies identify responsibility for human rights abuses, but states do not complain against other states, which generally means that reparations for states will not be recommended. They are also generally slow and reactive. The UN Security Council has sometimes determined that refugee flows are a threat to peace and security and has identified states that have caused the flows,²⁰⁰ but it has not ordered reparations to other states for the impact of refugee flows on those states and is perhaps unlikely to do so. The Security Council is also a highly politicized body, plagued by the veto of its five permanent members. It is notable that the Council has not been able to adopt many resolutions with respect to the Syrian refugee crisis. One resolution which notes the impact of refugees on 'regional stability' in its preamble urges states, 'on the basis of burden-sharing principles', to assist through increased and flexible funding and more resettlement places.²⁰¹

Even if a mechanism for allocating responsibility based on culpability were to be adopted, it would be unlikely that this could ensure compliance by the refugee-generating state – refugee law is in essence a response to a failure of state protection, after all. Such a mechanism might make it even more likely that refugee-generating states would resist responsibility for their actions.

A fourth problem with culpability as the basis for responsibility is that refugee-producing countries can only contribute to the financial sharing of responsibility, and even this is impractical in many instances. Any physical sharing of responsibility with the country of origin would breach states' *non-refoulement* obligations.

¹⁹⁹ This is evident in the approach of some Southeast Asian countries that pushed back boats carrying Rohingya asylum seekers in the first half of 2015 and underlined Myanmar's responsibilities.

²⁰⁰ Relevant Security Council Resolutions include: SC Res 688, UN SCOR, 2982nd mtg, UN Doc S/RES/0688 (5 April 1991); SC Res 841, UN SCOR, 3238th mtg, UN Doc S/RES/841 (16 June 1993); SC Res 819, UN SCOR, 3199th mtg, UN Doc S/RES/819 (16 April 1993); SC Res 1199, UN SCOR, 3930th mtg, UN Doc S/RES/1199 (23 September 1998); SC Res 1203, UN SCOR, 3937th mtg, UN Doc S/RES/1203 (24 October 1998).

²⁰¹ SC Res 2191, UN SCOR, 7344th mtg, UN Doc S/RES/2191 (17 December 2014). See also the Statement by the President of the Security Council, S/PRST/2015/10 (24 April 2015).

In conclusion, culpability should only be considered as a relevant factor in determining the distribution of responsibility if the state involved has accepted remedial responsibility for the displacement of refugees and is willing and able to absorb greater responsibility for protecting or financing the protection of refugees than would normally be assigned. The inclusion of the refugee-producing country in the financial distribution of responsibility may be feasible in certain situations, particularly when the refugee-producing country is much stronger economically than the host state and when the persecutors in the refugee-producing country are not part of the government of that state. For example, Colombia has provided the Ecuadoran government with some financial support to assist in the protection of Colombian refugees fleeing the generalized violence and persecution in Colombia.²⁰²

HOW RESPONSIBILITY SHOULD BE DISTRIBUTED: PRELIMINARY CONCLUSIONS

The aim of this book is not to generate a universal blueprint for responsibility-sharing. The United Nations has already generated its Agenda for Protection,²⁰³ and it may be that the kind of collectivized responsibility-sharing scheme that Hathaway and Neve have proposed is simply too ambitious.²⁰⁴ As suggested in Chapter 1, it may be worthwhile experimenting not with massive schemes that try to deal with risk by drawing in as many partners as possible, but with unilateral arrangements that trial a number of different mechanisms that are likely to assist with equitable sharing and enhancement of refugee protection and solutions.

The experts who participated in the Amman Meeting on International Cooperation to Share Burdens and Responsibilities in 2011 suggested that a practical next step in the development of international cooperation could be to establish a 'common framework on international cooperation

²⁰² 'Colombia hizo aportes a Ecuador para sus refugiados, pero se requiere de más, según Gobierno' *Ecuador Inmediato* (Quito), 1 March 2013 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=192401&umt=colombia_hizo_aportes_a_ecuador_para_refugiados_pero_se_requiere_mas_segun_gobierno>.

²⁰³ United Nations High Commissioner for Refugees, *Agenda for Protection*, above n 6, 6–7.

²⁰⁴ See Jenny Bedlington, 'Creating Shared Solutions to Refugee Protection' (2004) 12(1) *Journal of the International Institute*.

to share burdens and responsibilities'.²⁰⁵ They proposed that this framework could comprise a set of understandings to support international cooperation in refugee protection, as well as an operational toolbox providing practical, historical examples of international cooperation and sample agreements detailing how responsibility could be shared in particular scenarios, such as humanitarian evacuations, distress at sea situations and temporary protection situations.²⁰⁶ Perhaps the best path would be to encourage states to experiment with a few sensible, protection-oriented options. It may be just as wise to give governments choices as it is to empower refugees to make choices.

Regarding the bases for sharing responsibility, culpability is impractical in most situations and, although considerable cleverness is apparent in market-driven approaches to refugee protection, it is our view that responsibility for hosting refugees should rest not on economic efficiency alone, but on states' absorptive capacity and, critically, capacity to protect refugees. On the other hand, responsibility for financing protection should rest on a state's capacity to pay. This method of distributing responsibility requires the developed world to do more with respect to both the hosting of refugees and the funding of protection of refugees elsewhere. As a starting point, those states presently engaged in resettlement could aim at ensuring resettlement for all of the critical cases identified by UNHCR each year.

Garnering the political will to implement change is an enormous challenge, given the ability of states to free-ride and engage in unilateral strategies to avoid responsibility for refugees. Betts has argued that international cooperation in the refugee regime has historically occurred among states when refugee protection issues have been linked to other issues, such as development, security, peace-building and trade.²⁰⁷ According to Betts, countries are unlikely to cooperate with one another on refugee issues for purely altruistic reasons, but are more likely to cooperate in contributing to refugee protection if their cooperation can be linked to benefits in other areas.²⁰⁸

For developing states, linking refugee protection to national development as targeted development assistance perhaps stands as an example of issue-linkage in the refugee protection context that has some traction. For

²⁰⁵ Amman Summary Conclusions on International Cooperation, above n 5, 4.

²⁰⁶ Ibid 4–5.

²⁰⁷ Alexander Betts, 'North-South Cooperation in the Refugee Regime: the Role of Linkages' (2008) 14 *Global Governance* 157, 158.

²⁰⁸ Ibid 174–5.

developed states, the difficulties of deterrence, such as expense, harm to refugees and potentially counterproductive effects on such matters as regional stability, may at least serve to frame refugee protection in a way that encourages efforts to improve refugee protection in countries of first asylum and create more pathways for lawful movement, whether through resettlement or labour migration.²⁰⁹ As demonstrated by the failure of the UNHCR's initiative, Convention Plus, between 2002 and 2005, this approach has not yet proven successful, and it remains to be seen what impact the Syrian refugee crisis will have.

Finding the right mix or balance among the options for sharing people and financial resources is also difficult. We are attracted to creative ideas that seek to maximize the appreciation that there are benefits, including economic benefits, flowing from refugee protection. The tried and true mechanism of targeted development assistance, which reframes refugees as agents of development in impoverished countries and thus encourages recognition of refugees as something other than a burden, should be deployed regularly. Measures such as strategic resettlement, particularly matching resettlement places with local integration places, are also worth experimenting with. Unlike the trade of quotas in a refugee market, strategic resettlement can, if framed in the right way, enable refugees to be viewed as valuable and valued people.

²⁰⁹ Ibid; Alexander Betts, 'International Cooperation in the Global Refugee Regime' (Working Paper 2008/44, Global Economic Governance Programme, November 2008) 18–20.

PART II

Past and present regional arrangements for refugees

Since the development of the modern international refugee regime, states have on several occasions developed multilateral arrangements to address refugee situations in differing regional contexts. Between 1975 and 1996, states developed and implemented the Comprehensive Plan of Action for Indochinese Refugees (CPA) to address the forced displacement of persons following the end of the war in Vietnam. In 1981 and 1984, African states met with Western countries at the First and Second International Conferences on Assistance to Refugees in Africa (ICARA I and II) to develop a multilateral approach to Africa's protracted refugee situations. Between 1989 and 1994, Central American states participated in a regional arrangement – the International Conference on Central American Refugees (CIREFCA) – for resolving refugee issues in connection with the Esquipulas II peace plan in Central America. There are also some extant regional arrangements for protection of refugees which include elements of responsibility-sharing. In Europe, EU member states have developed the Common European Asylum System (CEAS) to regulate asylum policy in the EU. Twenty states in Latin America adopted the Mexico Declaration and Plan of Action (MPA) in a spirit of regional solidarity in 2004, in an attempt to improve the protection of refugees. It has been succeeded by the 2014 Brazil Declaration and Plan of Action.

Unlike past regional arrangements, the modern arrangements examined in this book are designed to manage ongoing processes, and they have no planned completion dates. They are neither pledging conferences like ICARA I, nor comprehensive plans of actions like the CPA or CIREFCA,

which were designed to bring particular refugee crises to an end. The modern arrangements may reflect states' recognition of the unfortunate fact that refugee flows are continuous phenomena. To some extent, then, these arrangements reinforce the partial universalization of international refugee law accomplished by the 1967 Protocol's removal of temporal and geographical restrictions on the definition of a refugee. On the other hand, underlying the acceptance of refugee flows as ongoing may be a pragmatic and somewhat less altruistic reality – the recognition that the international community may be unable or unwilling to develop political solutions to refugee crises that address root causes in order to ensure that refugee protection is truly temporary. This interpretation could explain some of the deterrence features within some modern regional arrangements.

These arrangements are all regional in the sense that they address refugee situations that are regional in location and/or impact. However, the response to the reality of refugee flows and forced migration is not necessarily the same in each region. In developing each of these arrangements, states and international organizations such as UNHCR have made choices about how to tackle the protection needs of refugees in each case. Some of the arrangements have focused on particular durable solutions. For example, ICARA I and II focused on the repatriation of refugees to their countries of origin, and failing that, temporary 'local settlement'. CIREFCA provided both local integration of refugees in the countries hosting refugees and repatriation of refugees to their countries of origin. The CPA was premised on temporary protection for refugees in countries of first asylum in exchange for the long-term resettlement of refugees in countries outside the region. The chapters highlight the reasons for the different approaches and the legacies of these approaches for refugees and for the states in the respective regions.

The differences in response may reflect differences in the nature of refugee flows in different regions, such as whether they are mainly intra- or extra-regional, different regional cultures and different capacities (whether real or perceived) for border control. Some of the arrangements for refugee protection may reflect imagined communities, which may, in turn, bolster and/or undermine the protection of refugees. For example, imagined community in the sense of shared values may provide a motivation for refugee protection. This motivation is demonstrated in the commitment to the principle of asylum evident in Latin America, albeit in a somewhat politicized form, as documented in Chapter 1, and in the commitment to human rights evinced by regional arrangements concerning human rights in Europe, Africa and Latin America. Imagined communities based on ethnicity, religion or other senses of belonging,

including membership in the Global North, for example, may, however, result in regional arrangements that seek to protect mainly intra-regional refugees, or, conversely, deny the reality of refugee flows within the region on the assumption that the region is not a refugee-producing region and/or seek to deter the arrival of extra-regional refugees. Border control capacity, or the perceived imperative to maintain the impression of border control, may also play a role in shaping the content of regional arrangements. Finally, it should be noted that regions are not simply self-contained or self-defining units and that governments the world over emulate the strategies of other governments. Thus, while we may find authentic expressions of regional identity within some arrangements, such as the commitment to solidarity contained in the MPA, there are also migratory practices that may find expression in regional arrangements or national laws and practices, such as safe third country practices, which arguably have been more successful in finding new homes than have the migrants whose movement they seek to regulate.

Regional cooperation also rests on factors such as perceived mutual national interests and/or the presence of a regional hegemon that drives the regional agenda. Thus, efforts to harmonize refugee status determination, reception conditions for asylum seekers and refugee rights may be driven by the desire to avoid perceived pull factors as much as by the desire to provide a principled bottom line of protection for refugees. As a consequence, some arrangements may *allocate* responsibility for refugee protection, but fail to fairly *share* responsibility. In some cases, too, the UNHCR is intimately involved in the efforts to promote regional arrangements, while in others regional powers may seek to marginalize UNHCR in order to promote their perceived national interests. The marginalization of UNHCR may result in an arrangement that does not adhere closely to the minimum standards set out in the Refugee Convention.

These arrangements have shaped and continue to shape our understanding of the ways in which states can and should act collaboratively to address the protection needs of refugees. Part II of this book examines and compares these five arrangements, devoting a chapter to each. Each chapter analyses the different elements of each agreement and considers the extent to which each arrangement created both short- and long-term protection dividends for refugees. The chapters examine the distribution of responsibility among states in each of the arrangements and how the arrangements contributed to fostering durable solutions for refugees. The extent to which a particular conception of regionalism might be reflected in the arrangements is another theme explored in this part of the book.

4. The Comprehensive Plan of Action for Indochinese Refugees

The Comprehensive Plan of Action for Indochinese Refugees (CPA) is an example of a responsibility-sharing agreement in the Southeast Asian region. It was intended to bring temporary and durable solutions to thousands of people seeking international protection from Vietnam and Laos between 1979 and 1996. Under the CPA, countries of first asylum in the region, such as Indonesia, the Philippines, Malaysia, Thailand and Hong Kong, agreed to give temporary protection to thousands of Vietnamese and Laotians arriving in their territory. In return, states from outside the region committed to resettle large numbers of these refugees. Although the name Comprehensive Plan of Action for Indochinese Refugees did not emerge until it was adopted at an international conference in June 1989, the foundations of the CPA were laid at the Meeting on Refugees and Displaced Persons in South-East Asia held in July 1979. The chapter will refer to both the 1979 arrangement and the CPA as needed.

THE 1979 ARRANGEMENT

Between 1975 and the 1979 meeting around one million people fled Vietnam, Cambodia and Laos; in April 1979 alone over 25 000 ‘boat people’ fled to nearby countries, and tens of thousands crossed the land border into Thailand.¹ Thousands of Vietnamese refugees died in the South China Sea, as Malaysia and Thailand turned away refugees by pushing their boats back into the sea.² Many Vietnamese were fleeing what Helton identified as the ‘harsh treatment and “re-education” of those associated with the old regime, deteriorating conditions at home,

¹ *Report of the Secretary-General on the Meeting on Refugees and Displaced Persons in South-East Asia*, UN GAOR, 34th sess, Agenda item 83, UN Doc A/34/627 (7 November 1979) [1]–[2].

² Arthur C Helton, ‘Asylum and Refugee Protection in Thailand’ (1989) 1 *International Journal of Refugee Law* 20, 23.

food shortage, drought, floods and a desire to avoid military service in the border clashes Vietnam was having with Pol Pot's regime in Cambodia'.³ Increasingly, minority groups such as the ethnic Chinese fled Vietnam to seek protection elsewhere.⁴ Refugees fled from Laos for similar reasons.⁵

On 20–21 July 1979, the UN Secretary-General, at the request of several states, convened the first international conference to deal with the problem. It brought together representatives from over 65 governments and others from international organizations and NGOs to reach a comprehensive agreement for the protection of the refugees. From the outset, the conference sought to apportion the responsibility of protecting refugees among states primarily on the basis of economic and social capacity, given the size of the outflow of refugees.⁶ Responsibility for refugees was assigned to states based on their categorization as countries of first asylum or of final settlement, while countries of origin were encouraged to respect freedom of movement.⁷

In his opening remarks to the conference, the UN Secretary-General highlighted the interrelationship of obligations and responsibilities in relation to these three categories of countries, emphasizing that 'countries of origin had an obligation to respect the right of emigration and family reunification, while avoiding any action leading to the departure of their people under conditions which put their lives in jeopardy'.⁸ Meanwhile countries of first asylum 'were expected to respect fully the principle of first asylum for refugees coming there by land and sea'.⁹ In turn, countries of final settlement were requested to take primary responsibility for the long-term resettlement of refugees outside the region and for financing resettlement processing centres in the countries of first asylum to ensure that these countries would not be overburdened with refugees or left with residual problems.¹⁰

³ Ibid 22.

⁴ Judith Kumin, 'Orderly Departure from Vietnam: Cold War Anomaly or Humanitarian Innovation?' (2008) 27 *Refugee Survey Quarterly* 104, 107–08.

⁵ W C Robinson, *Terms of Refuge: the Indochinese Exodus & the International Response* (Zed Books, 1998) 103–10.

⁶ *Report of the Secretary-General*, above n 1, [11]–[12].

⁷ Ibid [12].

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid. Although the agreement did not define 'residual problems', this terminology implicitly referred to the permanent stay of refugees in the countries of first asylum, as well as the perceived social and economic difficulties that such a situation would produce.

This allocation of responsibilities among states was intended to serve four purposes. First, it sought to address the shortage of resettlement places available for refugees in the region and the resultant backlog. Second, it aimed to slow down the alarming rate at which asylum seekers were departing Vietnam, particularly in the lead up to the conference. Third, it aimed to prevent first asylum states from turning back refugees arriving at their borders, by creating assurances for these states that they would not be left to deal with the refugees alone. Fourth, it sought to ensure that states from outside the region would provide financial assistance to the states of first asylum, which, apart from Hong Kong, were developing countries at the time. While it is unclear which actors initially proposed this political compromise behind closed doors, this agenda was clearly dominant from the outset of the conference and was popular among participating states.

At the conclusion of the conference, states agreed to this distribution of responsibilities and made firm commitments towards its implementation. In particular, states of final settlement, such as Australia, Canada, France, Germany, the United Kingdom and the United States, more than doubled the number of resettlement places available for Indochinese refugees, increasing them from 125 000 at the end of May 1979 to 260 000 by the end of the July 1979 meeting.¹¹ Indonesia and the Philippines immediately committed to develop two regional processing centres to provide temporary shelter for refugees, with funds provided by UNHCR.¹² States of first asylum agreed to adhere to the principles of asylum and *non-refoulement*, by allowing refugees to seek temporary refuge in their territory instead of turning boats back. Donor states pledged financial and in-kind support amounting to US\$160 million.¹³ Finally, Vietnam committed to further enhance the Orderly Departure Programme that it had recently developed with UNHCR, and to ‘make every effort to stop illegal departures’.¹⁴

On 30 May 1979, UNHCR and Vietnam had signed a Memorandum of Understanding (MOU) that permitted ‘the orderly departure of persons who wish to leave Viet Nam for countries of new residence’.¹⁵ This

¹¹ Ibid [18].

¹² Refugee status was granted *prima facie*, so the regional processing centres did not have to implement refugee status determination processes.

¹³ *Report of the Secretary-General*, above n 1, [18].

¹⁴ Ibid [16].

¹⁵ *Memorandum of Understanding Between the UN High Commissioner for Refugees (UNHCR) and the Government of the Socialist Republic of Vietnam Concerning the Orderly Departure of Persons Who Wish to Leave Vietnam for*

MOU aimed to minimize clandestine departures from Vietnam by creating orderly routes of departure through Hanoi and Ho Chi Minh City for the purposes of family reunion and ‘other humanitarian cases’.¹⁶ In signing this MOU, UNHCR responded to concerns from states of first asylum that migration from Vietnam had reached uncontrollable levels and that it was necessary to stem the flow. UNHCR also believed that in developing safer alternatives to the boat departures from Vietnam, it could minimize the potential for deaths at sea.¹⁷

In addition to these commitments, the 1979 conference also recommended that states meet to discuss practical arrangements for dealing with the rescue of refugees and other displaced persons in distress in the South China Sea.¹⁸ On 14 August 1979, UNHCR convened a meeting to bring together representatives from ten affected governments, as well as experts from the Inter-Governmental Maritime Consultative Organization and the World Meteorological Organization, to discuss the issue.¹⁹ At this meeting, participants agreed that it was necessary to engage with the shipping community to ensure that rescues at sea would take place when required.²⁰ Participants also considered the possibility of special resettlement arrangements for refugees following disembarkation.²¹ As Klug writes,

the Indochina crisis triggered, for the first time, international cooperation on rescue at sea, consisting of the following elements: disembarkation in the first port of call, resettlement guarantees by flag states and others, through the DISERO [Disembarkation Resettlement Offer] and RASRO [Rescue at Sea Resettlement Offer] schemes, and provision of care and maintenance of the rescued pending departure by UNHCR.²²

DISERO commenced in 1979, and RASRO in 1985.²³

Countries of New Residence, 30 May 1979 (‘1979 UNHCR–Vietnam MOU’), reproduced in Luise Driike, *Preventive Action for Refugee Producing Situations* (Peter Lang, 1993) 241.

¹⁶ Ibid [1].

¹⁷ See Kumin, above n 4, 105.

¹⁸ *Report of the Secretary-General*, above n 1, [32].

¹⁹ Ibid [33].

²⁰ Ibid [34].

²¹ Ibid.

²² Anja Klug, ‘Strengthening the Protection of Migrants and Refugees in Distress at Sea through International Cooperation and Burden-Sharing’ (2014) 26 *International Journal of Refugee Law* 48, 56–7.

²³ Ibid 57 note 46.

Finally, in response to the flight of refugees from Cambodia following the Vietnamese invasion and overthrow of the murderous Khmer Rouge, states agreed to provide US\$210 million for emergency relief to Cambodians in Cambodia and in Thailand. This financial assistance was intended to provide food for malnourished Cambodians and to address shortages in doctors, hospitals and drugs²⁴ and was part of a joint emergency relief programme operated by the UN Children's Fund (UNICEF), the International Committee of the Red Cross (ICRC) and the UN World Food Programme (WFP).²⁵

By the end of 1979, the agreement reached at the conference had produced many tangible benefits for both refugees and states. Boat arrivals decreased to approximately 2000 per month and the significant increase in resettlement had relieved much of the pressure on the camps; during 1979, 132 845 refugees departed for resettlement countries and a total of 140 436 refugees remained in the camps.²⁶ Luise Druke argues that '[c]onsidering how easily the crisis could have degenerated into an unprecedented and unpredictable situation, jeopardizing regional political and security interests, the results obtained from the 1979 Geneva Meeting helped contain the flow of refugees to manageable proportions and defuse serious tensions'.²⁷

However, as time went on, the burden-sharing arrangement that states had agreed to at the 1979 conference began to fray. When boat departures from Vietnam began to increase once again in 1986, states of final settlement did not offer enough resettlement places to keep pace with the increase in asylum seeker arrivals.²⁸ Many of the resettlement countries had come to believe that the reasons for flight from Vietnam had changed considerably since 1979 and that there was no longer the same moral imperative to provide resettlement. As a US Congress research study on the motivations of persons departing Vietnam stated in 1984, there was a substantial increase in the number of 'economic migrants' departing Vietnam and '[t]he international community, and particularly the UNHCR, must begin to acknowledge this shift by developing new

²⁴ *Report of the Secretary-General*, above n 1 [52–8].

²⁵ *Ibid* [54].

²⁶ Druke, above n 15, 83.

²⁷ *Ibid*.

²⁸ See Arthur C Helton, 'The Comprehensive Plan of Action for Indochinese Refugees: An Experiment in Refugee Protection and Control' (1990) 8 *New York Law School Journal of Human Rights* 111, 113–15.

alternatives such as repatriation, UNHCR screening and local settlement without any longer relying only on third country resettlement'.²⁹

In response, states of first asylum, such as Thailand and Malaysia, felt that they were once again overburdened by the arrival of Vietnamese asylum seekers. After initially appealing through the Association of Southeast Asian Nations (ASEAN) for resettlement states to increase their resettlement places for Indochinese refugees, some states of first asylum reneged on their commitments under the 1979 arrangement and recommenced forcibly pushing refugees back into the South China Sea.³⁰ In late 1987, Thai government officials publicly announced that no more boat people would be allowed to enter Thailand³¹ and Malaysia implemented a 'redirection policy' whereby the Malaysian Navy intercepted boats in Malaysian waters and towed them back to the High Seas.³² Hong Kong, in contrast, implemented screening and detention measures in June 1988 under which all new arrivals had to undergo a refugee status determination process.³³

THE COMPREHENSIVE PLAN OF ACTION

To address the change in circumstances and the breakdown in responsibility-sharing, the UN Secretary-General convened a second international conference in 1989. It brought together representatives of 75 countries, along with 14 intergovernmental organizations and 57 NGOs in order to develop a new comprehensive arrangement for the treatment of Vietnamese and Laotian asylum seekers in the region.³⁴ In contrast to the 1979 arrangement, states decided not to address the situation of

²⁹ US Congress, *Refugee and Migration Problems in South East Asia: 1984. A Staff Report for the use of the Subcommittee on Immigration and Refugee Policy*, Committee on the Judiciary, United States Senate, 98th Contr., 2nd Sess, August, 1984, iii, cited in Drüke, above n 15, 84.

³⁰ See Yen Tran, 'The Closing of the Saga of the Vietnamese Asylum Seekers: the Implications on International Refugees and Human Rights Laws' (1994) 17 *Houston Journal of International Law* 463, 474–5.

³¹ Helton, 'The Comprehensive Plan of Action', above n 28, 113.

³² Tran, above n 30, 475.

³³ See Helton, 'The Comprehensive Plan of Action', above n 28, 114–15.

³⁴ *Office of the United Nations High Commissioner for Refugees, International Conference on Indo-Chinese Refugees, Report of the Secretary-General*, UN GAOR, 44th sess, Provisional agenda item 111(c), UN Doc A/44/523 (22 September 1989) [10]–[13].

Cambodian refugees in the second conference because it was being addressed in ongoing Cambodian peace negotiations.³⁵

At the 1989 conference, states agreed once again that Southeast Asian countries would provide temporary refuge in exchange for resettlement places offered by countries such as the USA, Australia and Canada. However, the CPA proposed two additional mechanisms to address changes in political circumstances and reasons for flight, which were: (a) 'the early establishment of a consistent region-wide refugee status-determination process';³⁶ and (b) the development of a repatriation programme to Vietnam for persons found not to be in need of international protection.³⁷

Under the new arrangement, government bodies in the countries of first asylum were responsible for determining the status of the asylum seekers, with UNHCR providing supervision and guidance.³⁸ The arrangement provided for persons found to be refugees to be resettled to third countries,³⁹ while persons determined not to be refugees were to be returned to Vietnam.⁴⁰ The relevant law for determining the status of refugees throughout the region was the 1951 Refugee Convention and its 1967 Protocol, supplemented by the UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*.⁴¹ The Convention and

³⁵ These negotiations culminated in the 1991 *Framework for a Comprehensive Political Settlement of the Cambodia Conflict*, UN GAOR, 46th sess, Agenda Item 24, UN Doc A/46/608-S/23177 (30 October 1991).

³⁶ UN General Assembly, *Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees, Report of the Secretary-General* UN Doc A/44/523 (22 September 1989) <<http://www.unhcr.org/refworld/docid/3dda17d84.html>> Part II, D [6].

³⁷ *Ibid* Part II, F. The repatriation programme was initially made possible by the MOU between UNHCR and Vietnam. Under this MOU, the Vietnamese government agreed, *inter alia*, not to prosecute or implement other punitive measures for returned asylum seekers who left Vietnam without permission. See *Memorandum of Understanding Between the Socialist Republic of Vietnam and the United Nations High Commissioner for Refugees (UNHCR)*, 13 December 1988 ('1988 UNHCR-Vietnam MOU') [3](a), reproduced in Drüke, above n 15, 242-3.

³⁸ UN General Assembly, *Declaration and Comprehensive Plan of Action*, above n 36, Part II, D [6(a)].

³⁹ *Ibid* Part E (2).

⁴⁰ *Ibid* Part F [12].

⁴¹ *Ibid* Part II, D [6(b)&(c)]; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR, 1979 rev ed 1992).

Protocol became operational in the region under the CPA, despite the fact that many of the countries of first asylum were not party to either of them.

In addition to these mechanisms, the CPA stressed the importance of reinvigorating the Orderly Departure Programme (ODP) and implementing measures to deter clandestine departures.⁴² In particular, the CPA aimed to target persons ‘organizing clandestine departures’,⁴³ which may be one of the first incarnations of the current global preoccupation with people smugglers. The CPA also developed a mass media campaign that focused on the dangers of maritime travel, the new refugee status determination (RSD) process, the benefits of orderly departure and the ‘absence of any advantage, real or perceived, particularly in relation to third-country resettlement, of clandestine and unsafe departures’.⁴⁴ The aim of the ODP was that regular departure and migration procedures would eventually be ‘the sole mode of departure’.⁴⁵

After the 1989 conference concluded, it became clear that UNHCR had successfully been able to renegotiate the pragmatic balance of responsibilities among states for dealing with Indochinese refugees. This balance of responsibilities addressed the apparent change in circumstances regarding the reasons for flight of Vietnamese refugees⁴⁶ and the

⁴² UN General Assembly, *Declaration and Comprehensive Plan of Action*, above n 36, Part II, A(1).

⁴³ Nancy Viviani, *The Long Journey: Vietnamese Migration and Settlement in Australia* (Melbourne University Press, 1984) 85–6.

⁴⁴ UN General Assembly, *Declaration and Comprehensive Plan of Action*, above n 36, Part II, A(1)(b)(iii). In August 2012, the Australian government used similar language when it implemented a ‘no advantage’ policy with regard to asylum seekers. The policy was aimed at ensuring that asylum seekers received no benefit by ‘circumventing regular migration arrangements’ and arriving in Australia by boat (see Australian Government, *Report of the Expert Panel on Asylum Seekers* (August 2012) <http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert_panel_on_asylum_seekers_full_report.pdf> 8). The Refugee Council of Australia criticized the policy, arguing that it ‘lacked decency and humanity and further downgraded Australia’s international reputation on human rights’ (see Refugee Council of Australia, ‘“No Advantage” is Maximum Disadvantage for Boat Arrivals’ (21 November 2012) <http://www.refugeecouncil.org.au/n/mr/121121_noadvantage.pdf> 1).

⁴⁵ UN General Assembly, *Declaration and Comprehensive Plan of Action*, above n 36, Part II, B(3).

⁴⁶ For a critical perspective on the shift from viewing all Vietnamese asylum seekers as refugees to viewing them as predominantly economic migrants and the way in which RSD was implemented, see James C Hathaway, ‘Labelling the

waning interests of states to engage in cooperative, humanitarian measures. While there were repeated concerns that the arrangement would collapse,⁴⁷ the CPA managed to continue to operate until its conclusion in 1996.

THE OUTCOMES OF THE CPA

As an *ad hoc* response to the significant numbers of refugees seeking protection from Vietnam and Laos in the region, the CPA is often seen as ‘a qualified success’ in terms of responsibility-sharing.⁴⁸ It was successful in that it stopped countries like Thailand and Malaysia from pushing back boats and ensured that asylum seekers were allowed to land and receive temporary refuge. It also opened up resettlement places in countries like the USA, Canada and Australia and provided durable solutions to more than one million refugees. By engaging with the country of origin and developing ‘orderly’ routes of departure, the CPA reduced the number of refugees and asylum seekers embarking on dangerous boat journeys. Finally, the extensive ‘in-country’ monitoring that UNHCR conducted assisted in identifying shortfalls in the RSD procedures, protection needs for refugees, and the treatment of non-refugees following return to their country of origin. Between 1989 and

“Boat People”: the Failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indochinese refugees’ (1993) 15 *Human Rights Quarterly* 686.

⁴⁷ In a joint statement released on 16 May 1990, states of first asylum threatened that ‘[i]n the event of failure to agree even to an intermediate solution to the VBP [Vietnamese Boat People] problem, countries of temporary refuge must reserve the right to take such unilateral action to safeguard their national interest, including the abandonment of temporary refuge’ (‘Joint Statement by Countries of Temporary Refuge’, 16 May 1990, Manila, UNHCR Fonds 11, Series 3, 391.89, UNHCR Archives, cited in Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Cornell University Press, 2009) 118).

⁴⁸ Richard Towle, ‘Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?’ (2006) 18 *International Journal of Refugee Law* 537, 538; W C Robinson, ‘The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck’ (2004) 17 *Journal of Refugee Studies* 319, 321.

1995, UNHCR conducted over 18 000 monitoring visits to individual returnees in Vietnam following their return from countries of first asylum.⁴⁹

In relation to the ODP, W Courtland Robinson has argued that ‘the shift from dangerous, clandestine departure routes to legal migration channels for Vietnamese may be the CPA’s most significant and durable accomplishment’.⁵⁰ Although there was no formal review of the programme, Judith Kumin writes that more than 650 000 people were resettled under the ODP in over 30 countries during its 15-year life span.⁵¹ According to another source, in the period between 1989 and 1995, more than 500 000 Vietnamese refugees, including 130 000 former detainees of re-education camps, were resettled under the ODP, compared with 150 000 persons who sought asylum in neighbouring states of their own accord.⁵² Kumin argues that the inclusion of the ODP in the 1979 arrangement was a core feature that made every other element of the arrangement possible. Without Vietnam agreeing to make efforts to prevent clandestine departures, she suggests, states of first asylum and states of final settlement would not have agreed to provide temporary protection and resettlement options for Vietnamese and Laotian refugees.⁵³ Arthur Helton also states that many believed that the ODP played an important role in ensuring that the resettlement process was not ‘overwhelmed in its infancy’.⁵⁴

Nevertheless, at the same time, the implementation of the ODP led to questionable intrusions into the right to seek asylum. By stifling clandestine departures, the ODP in part operated as a mechanism to keep some

⁴⁹ UNHCR, *Information Package on the Comprehensive Plan of Action on Indo-Chinese Refugees (CPA): Statement by Mrs. Sadako Ogata, the United Nations High Commissioner for Refugees, to the United States Congressional Hearing on the CPA* (October, 1995) [23]–[26].

⁵⁰ Robinson, *Terms of Refuge*, above n 5, 198.

⁵¹ Kumin, above n 4, 117.

⁵² Letter from Pierre-Michel Fontaine, United Nations High Commissioner for Refugees (UNHCR) Regional Representative for Australia, New Zealand and the South Pacific, to the UNHCR, 7 November 1995, 2, in UNHCR, *Information Package on the Comprehensive Plan of Action on Indo-Chinese Refugees (CPA): Statement by Mrs. Sadako Ogata, the United Nations High Commissioner for Refugees, to the United States Congressional Hearing on the CPA* (October, 1995).

⁵³ Kumin, above n 4, 116.

⁵⁴ Helton, ‘Asylum and Refugee Protection’, above n 2, 25.

potential refugees trapped in Vietnam.⁵⁵ The ODP has also been criticized in relation to the way the Vietnamese used the programme to expel the unwanted ethnic Chinese minority.⁵⁶ As an article in the *Far Eastern Economic Review* in June 1979 revealed, '[i]t is Vietnamese policy ... to encourage "undesirables", mostly ethnic Chinese, to leave ... They use scare tactics ... After the government takes everything, they threaten the urban population with orders to move to New Economic Zones ... it is just like [the Khmer Rouge] did in Kampuchea ... except that instead of killing ... people, they ship them out.'⁵⁷

While states involved in the development of the 1979 conference were aware of this development, there were concerns that not assisting the ethnic Chinese to leave Vietnam would lead to double standards within the context of the Cold War. As the US Coordinator for Refugee Affairs stated in 1979, 'we do not want to give the Vietnamese ... the impression that they ought to just hang on to these people and persecute them. After all we spent a lot of time in the Helsinki Accords ... encouraging the Soviet Union to let people go who want to go and are being persecuted'.⁵⁸ China, on the other hand, as Kumin highlights, strongly opposed what it saw as the persecution and forcible exit of Vietnam's ethnic Chinese population.⁵⁹

With regards to the region-wide RSD process developed in the 1989 conference, there have been similarly mixed opinions about the success of the mechanism. On the one hand, the RSD process played an important political role in reinvigorating states' commitments to refugee protection by limiting the availability of resettlement places to those persons found to be refugees under the 1951 Refugee Convention and its 1967 Protocol. Nevertheless, at the same time, the implementation of RSD processes in the states of first asylum encountered many problems.

⁵⁵ Kumin, above n 4, 114–16.

⁵⁶ Ibid 107–9.

⁵⁷ Guy Sacerdoti, 'How Hanoi Cashes In: Boat Organisers and Former Communist Officials Tell of Taxes on the Refugee Trade' (1979) 104 *Far Eastern Economic Review* 24, cited in Refugee Review Tribunal, RRT Research Response, VMN32207, 22 August 2007 <https://www.ecoi.net/file_upload/2016_1299675754_vnm32207.pdf>.

⁵⁸ US Congress, House Committee on Foreign Affairs, Hearing before the Subcommittee on International Organization, *Briefing on the Growing Refugee Problem: Implications for International Organizations*, 96th Cong, 1st sess, 1979, cited in Kumin, above n 4, 109.

⁵⁹ See Kumin, above n 4, 108; also Hungdah Chiu, 'China's Legal Position on Protecting Chinese Residents in Vietnam' (1980) 74 *The American Journal of International Law* 685.

As Richard Towle has documented, many of the national bodies had no prior experience in determining the status of refugees and, consequently, they faced difficulties when they tried to do so for the first time.⁶⁰

The monitoring of the RSD processes demonstrated that states maintained divergent interpretations of the international legal definition of a refugee, which resulted in substantial variations in recognition rates, lack of procedural fairness and extensive delays, often of up to three or four years.⁶¹ The delays were particularly debilitating for asylum seekers, because they were not allowed to exit the detention centres or were restricted to refugee camps and, therefore, had limited opportunities for work and communication with persons outside the camps.⁶² Furthermore, the conditions of the detention centres and camps exposed many refugees, including women and children, to inhumane and degrading treatment, such as overcrowding,⁶³ high levels of violence and rape, which, in turn, fuelled increases in rioting and feelings of hopelessness among refugees.

While RSD was inconsistent during the CPA, it is equally concerning that the experience of the CPA did not translate into a longer-term commitment on the part of many of the participating states to refugee protection through ratification of the Refugee Convention and 1967 Protocol. Thailand, Malaysia and Indonesia permit UNHCR to exercise its mandate within their territories, but they do not conduct RSD and do not offer local integration to refugees.

There are similarly mixed opinions about the success of the repatriation programme. As a component of the CPA that in part sought to deter people who would not be considered refugees under the 1951 Refugee Convention from arriving in countries of first asylum, it was a successful 'stick' that resulted in a significant decrease in the numbers of arrivals in the countries of first asylum after 1989. Nevertheless, at the same time,

⁶⁰ Towle, above n 48, 543.

⁶¹ Ibid 542–54; Lawyers Committee for Human Rights, *Hong Kong's Refugee Status Review Board: Problems in Status Determination for Vietnamese Asylum seekers* (Lawyers Committee for Human Rights, 1992); Arthur C Helton, 'Refugee Determination under the Comprehensive Plan of Action: Overview and Assessment' (1993) 5 *International Journal of Refugee Law* 554; Robinson, *Terms of Refuge*, above n 5, 328–9; J Stuyt, 'The Comprehensive Plan of Action for Indochinese Refugees: a NGO Approach' (1991–92) 11 *Chinese (Taiwan) Yearbook of International Law and Affairs* 34, 39.

⁶² Human Rights Watch, *Abuses Against Vietnamese Asylum Seekers in the Final Days of the Comprehensive Plan of Action* (1 March 1997) <<http://www.refworld.org/docid/3ae6a7f10.html>> 6–7.

⁶³ Ibid 7.

many rejected asylum claimants were returned to Vietnam against their will and, given the flaws in the screening processes, some of these persons may have faced persecution upon return.⁶⁴

According to UNHCR, more than 73 000 Vietnamese asylum seekers and 24 000 Laotians returned to Vietnam and Laos between 1989 and 1995 under the repatriation programmes; in comparison, 80 000 Vietnamese and Laotians were granted refugee status and resettled at this time.⁶⁵ Many repatriations were conducted under tripartite arrangements that countries of first asylum made with Vietnam and UNHCR after the conclusion of the 1989 conference. While UNHCR sought to avoid any involvement with forcible returns, it did agree to provide logistical support, some funding for transportation costs, and monitoring services for rejected asylum seekers who voluntarily returned to Vietnam.⁶⁶ UNHCR's involvement in returns led many refugees to distrust the organization and its commitment to their protection.⁶⁷

The CPA provided that 'every effort will be made to encourage the voluntary return of such persons ... in conditions of safety and dignity',⁶⁸ but states of first asylum were faced with large numbers of rejected asylum claimants unwilling to return voluntarily to Vietnam. The possibility of forcible return of asylum seekers had been acknowledged under the CPA, as it stated that 'if, after the passage of a reasonable time, it becomes clear that voluntary repatriation is not making sufficient progress towards the desired objective, alternatives recognized as being acceptable under international practices would be examined'.⁶⁹ However, the USA strongly objected to the forcible return of persons found not to be refugees under the RSD mechanisms.

Both during and after the 1989 conference, states vehemently disagreed as to whether refugees should be forcibly returned to Vietnam if

⁶⁴ Ibid 12.

⁶⁵ Letter from Pierre-Michel Fontaine, above n 52, 2.

⁶⁶ UNHCR, *Information Package on the Comprehensive Plan of Action*, above n 49, [35]–[38].

⁶⁷ In his statement at the Fourth Steering Committee of the International Conference on Indochinese Refugees in 1991, the Chairman stated that 'UNHCR and its staff which had benefitted in the past from the trust and affection of the asylum-seekers are now labelled as "traitors" and treated as "enemies"' (Chairman's Statement, Fourth Steering Committee of the International Conference on Indochinese Refugees (Geneva, 30 April–1 May 1991) SC IV.Doc.3 (Restricted) 29 April 1991), UNHCR Fonds 11, Series 3, 391.89, UNHCR Archives.

⁶⁸ UN General Assembly, *Declaration and Comprehensive Plan of Action*, above n 36, [12]–[13(b)].

⁶⁹ Ibid [14].

found not to be refugees under the screening processes. When states of first asylum such as Hong Kong commenced policies of 'mandatory repatriation' in 1989, the USA complained that such practices did not fall within the terms of the CPA's commitment to only use methods of return that were considered 'acceptable under international practices'.⁷⁰ Hong Kong, on the other hand, viewed the forcible repatriation of non-refugees as an essential part of the RSD process and necessary to ensure that Hong Kong did not itself become overwhelmed with asylum seeker arrivals.⁷¹ One Hong Kong legislator labelled the USA's objections as 'false humanitarianism', and hypocritical given the USA's refusal to resettle failed asylum seekers under the screening process.⁷² Ultimately, the USA conceded on this issue, stating in 1995 that 'return home is the sole remaining option for those who are not refugees'.⁷³

As the CPA drew to a close in 1996, there were further concerns about the timeframe for completion of the arrangement and the increasing pressure to repatriate persons found not to be refugees to Vietnam. The decision to shut down the CPA in 1996 was primarily based on external factors in the countries of first asylum, rather than significant changes in circumstances in Vietnam. In particular, Hong Kong, under the influence of China, was interested in removing all Vietnamese asylum seekers from Hong Kong prior to the transfer of Hong Kong from British to Chinese control on 1 July 1997.⁷⁴ This led to allegations from NGOs and Hong Kong government employees that the Hong Kong government deliberately worsened the conditions of the detention centres in order to prompt more asylum seekers to return to Vietnam.⁷⁵ Furthermore, Human Rights Watch reported in March 1997 that the process of clearing out refugees from Hong Kong 'led to violence by both government forces and camp inmates and resulted in security forces using disproportionate force in operations to transfer the Vietnamese to other detention facilities to prepare for the trip home'.⁷⁶

⁷⁰ Robinson, *Terms of Refuge*, above n 5, 189.

⁷¹ See Hong Kong Legislative Council, *Official Record of Proceedings* (Hansard, 29 November 1989) 20 (Allen Lee Peng-Fei) <http://www.legco.gov.hk/yr89-90/english/lc_sitg/hansard/h891129.pdf> 18–21.

⁷² Ibid 29–32 (Hui Yin-Fat).

⁷³ Kevin Murphy, 'Go Back to Vietnam, U.S. tells Refugees' *New York Times*, 15 June 1995.

⁷⁴ Human Rights Watch, above n 62, 1.

⁷⁵ Ibid 2.

⁷⁶ Ibid.

Over the long term, the CPA also developed a new political and cultural discourse concerning asylum seekers in the Asia Pacific region that has had long-lasting effects on public attitudes towards refugees. Concepts and terms such as ‘boat people’, ‘economic migrants’ and ‘queue jumpers’, which had very little meaning in the context of refugee movement prior to the 1970s, all gained prominence during the CPA. The terms ‘economic migrants’ and ‘queue jumpers’ were developed to distinguish between what states then perceived as legitimate or genuine refugees and other types of migrants not considered in need of international protection. The terms also served the purpose of reinforcing states’ preferences for orderly departure under the CPA and for minimizing the need to provide protection to what seemed like a constant flow of arrivals from Vietnam.

In the report of the 1979 conference, the UN Secretary-General repeatedly referred to Vietnamese refugees departing by boat as ‘boat people’, presumably not cognizant at the time that states would later use the term pejoratively and discriminate in their treatment of refugees according to their mode of arrival.⁷⁷ Similarly, the use of the term ‘economic migrant’ became increasingly prominent as a term to describe asylum seekers departing Vietnam in the mid-1980s when they were no longer seen to be escaping the effects of war, but rather seeking economic betterment outside Vietnam. Finally, the term ‘queue jumper’ became widespread, mainly, but not exclusively, in Australia in the late 1970s and early 1980s to negatively portray refugees who used clandestine measures to depart Vietnam, instead of using the ODP.⁷⁸

⁷⁷ It is interesting to note that the term ‘boat people’ was not used in the report on the 1989 conference. Instead, these persons were referred to as Indo-Chinese refugees.

⁷⁸ For more on the changes in language to describe refugees, see B S Chimni, ‘The Geopolitics of Refugee Studies: A View from the South’ (1998) 11 *Journal of Refugee Studies* 350, 356–7. For more on the origins of the term ‘queue jumper’ in Australian political discourse, see Jack H Smit, ‘Malcolm Fraser’s Response to “Commercial” Refugee Voyages’ (2010) 8 *Journal of International Relations* 97; Moss Cass, ‘Stop This Unjust Queue Jumping’ *The Australian* (Sydney), 29 June 1978 <http://www.safecom.org.au/pdfs/moss-cass_queue-jumpers.pdf>; and Klaus Neumann, *Across the Seas: Australia’s Response to Refugees – A History* (Black Inc, 2015) 276 (attributing the phrase to Gough Whitlam). There are also examples of the concept in other countries in the region. For example, in the Hong Kong Legislative Council Poon Chi-Fai argued in 1991 that ‘one who seeks emigration in quest of a better life should follow the proper procedure and be fair enough to wait in line. One should not ignore other countries’ laws’ (Hong Kong Legislative Council, *Official Record of Proceedings*

As an example of the use of ‘queue jumping’ discourse within the CPA, the Australian delegate to the 1989 conference, Gareth Evans, stated that,

[t]he reality that we must all acknowledge is that there are many Vietnamese who will simply not be willing to wait in the Orderly Departure queue, and who will go on chasing the dream of a life elsewhere so long as the prospect of ultimate resettlement has not been absolutely excluded. And until we clearly draw that line, so as to make it clear that return of those trying to jump the queue is inevitable, that dream will remain a nightmare for the countries of the region who have to cope with the consequences.⁷⁹

The development of this public discourse among politicians and the media during the CPA has had lasting impacts on public attitudes towards refugees in countries in the Asia Pacific region. In studies examining community perceptions to asylum seekers in Australia since the CPA, researchers have found that, as a consequence of terms such as ‘queue jumpers’, refugees are often seen as a ‘deviant social group’ who take advantage of the system and threaten the sovereignty of host states.⁸⁰ Furthermore, negative attitudes and opinions towards asylum seekers are clearly influenced by the method by which asylum seekers arrive in Australia.⁸¹ Many of these public perceptions, in turn, influence hard-line government refugee policies.

The CPA also developed the ideas of first asylum and final resettlement as a means to balance the responsibility of protecting refugees among states.⁸² This has had enduring effects in the ways that states in the region develop policies regarding refugees. States continue to shape

(Hansard, 5 June 1991) <http://www.legco.gov.hk/yr90-91/english/lc_sitg/hansard/h910605.pdf> 110).

⁷⁹ Gareth Evans, International Conference on Indo-Chinese Refugees, Statement by the Australian Delegation, Delivered by Senator the Honourable Gareth Evans QC, Minister for Foreign Affairs and Trade, Geneva, 13 June 1989, UNHCR Fonds 11 Series 3, 391.89, UNHCR Archives.

⁸⁰ See Sharon Pickering, ‘Common Sense and Original Deviancy: News Discourses and Asylum Seekers in Australia’ (2001) 14 *Journal of Refugee Studies* 169 and Fiona H McKay, Samantha L Thomas and Susan Kneebone, “‘It Would be Okay If They Came Through the Proper Channels’: Community Perceptions and Attitudes toward Asylum Seekers in Australia’ (2012) 25 *Journal of Refugee Studies* 113, 128.

⁸¹ McKay, Thomas and Kneebone, above n 80, 128.

⁸² It should be noted that the seeds for these concepts might be seen in the attempts of the drafters of the Convention to establish a ‘burden-sharing’ provision in the Refugee Convention.

their responses to refugees according to whether they perceive themselves as being source, transit or destination countries for refugees in the region. Consequently, states in the Southeast Asian region, as Sara Davies highlights, continue to dismiss the idea that they have any moral or legal obligation to offer local integration as a durable solution for refugees arriving in their territory.⁸³

Despite significant advances in the economic capacity of states in Southeast Asia, states in the region continue to offer protection to refugees only on a temporary, limited and *ad hoc* basis.⁸⁴ Many Southeast Asian states are still not party to the 1951 Refugee Convention and/or the 1967 Protocol, and very few states in the region have developed national laws and procedures that respect, protect and fulfil the rights of refugees.⁸⁵ Furthermore, Southeast Asian states continue to refuse to grant refugees positive rights such as the right to work, even when there are severe shortages in labour and a high need for migrant workers.⁸⁶

Conversely, the commitment to resettlement in the West has not been maintained as a result of the shift from viewing all those fleeing Communism as worthy of protection⁸⁷ to the perception that after the Cold War most asylum seekers are merely 'economic migrants'. Moreover, during the CPA the concept of 'safe third countries' gained further prominence.⁸⁸ For example, following the boat arrival in Australia of 17

⁸³ Sara E Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Martinus Nijhoff, 2008) 18.

⁸⁴ Penelope Mathew and Tristan Harley, *Refugee Protection and Regional Cooperation in Southeast Asia: A Fieldwork Report* (Australian National University, March 2014) [1], [67].

⁸⁵ *Report from the Colloquium on Refugees, Regionalism and Responsibility* (Australian National University, 22–23 August 2013) 14–15.

⁸⁶ Mathew and Harley, above n 84, [1], [67].

⁸⁷ Suhrke explains the massive use of resettlement after the Second World War and during the CPA as a consequence of a sense of community and labour demand in the first case, and hegemonic pressure from the US in the second case (Astri Suhrke, 'Burden-sharing During Refugee Emergencies: The Logic of Collective Versus National Action' (1998) 11 *Journal of Refugee Studies* 396, 403–06).

⁸⁸ The concept had already arrived in Europe, as acknowledged during the second reading of the *Migration Legislation Amendment Bill* (No 4) in Australia. Senator Short stated that the safe third party concept had already been adopted in one form or another in Austria, Canada, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Sweden and the UK. See Commonwealth Senate No 167, 1994, Tuesday 18 October 1994 37th parliament 1st session 5th period, 1903, at 1906.

Vietnamese persons who had previously applied for refugee status in Indonesia and had been rejected under the CPA, the Australian government enacted legislation to deny refugee status and permit the return of like persons to 'safe third countries' in order to prevent 'forum shopping'.⁸⁹ Given subsequent developments in Australia and the Asia Pacific region, this legislation is historically significant for being one of the earliest occasions that Australia adopted policies to deny asylum seekers access to RSD procedures and return these persons to third countries.

CONCLUSION

The CPA can rightly be considered a qualified success in terms of securing protection, in the sense of *non-refoulement*, and durable solutions, particularly resettlement. It can also be viewed as a qualified success in that it shared responsibility more equitably than would otherwise have been the case. The qualifications to this success are that in countries of first asylum, protection from *refoulement* came at the expense of liberty as refugees were held in detention centres or refugee camps that also limited freedom of movement.⁹⁰ Further, although the term 'comprehensive' is frequently used to describe arrangements that use all of the durable solutions, local integration in countries of first asylum was not countenanced. This meant that refugees were used as a bargaining tool to gain resettlement, arguably entrenching an attitude that full refugee rights and durable solutions are not generally available in Southeast Asia.

The kind of regionalism at play here could, therefore, be described as a regionalism that views meaningful refugee protection and long-term responsibility for refugees as foreign. This means that the CPA is a 'regional' arrangement only in the sense that it deals with a particular refugee flow that was having severe regional impacts because displacement was largely confined to the immediate region as asylum seekers

⁸⁹ See *Migration Act 1958* (Cth) 91B, C and D.

⁹⁰ Regarding the Galang island camp in Indonesia, see Antje Missbach, 'Waiting on the Islands of "Stuckedness": Managing Asylum Seekers in Island Detention Camps in Indonesia from the Late 1970s to the Early 2000s' (2013) 6 *Austrian Journal of South-East Asian Studies* 281. Robinson writes that what was offered in the first asylum countries could hardly be called asylum 'when all that was available was temporary confined transit' (Robinson, *Terms of Refuge*, above n 5, 281). The conditions in the Philippines were the most humane. See Tran, above n 30, 492–3.

travelled overland or by boat. Durable solutions were provided by countries outside the region. The CPA might better be considered as a case of unilateralism, involving an appropriate number and mix of the most capable, vulnerable and responsible countries required to resolve a particular refugee flow.

Meanwhile, it is clear that Western involvement had a great deal to do with an ideological objection to Communism on the part of the USA. Thus a different kind of regionalism, or at least bipolarity, was at work as well – the division of the globe into capitalist and communist spheres. It is perhaps questionable whether the CPA would be repeated in today's world where the major cleavage is no longer created by differences in political systems but is based on economic development and the division of the globe into the Global North and Global South.

5. The International Conferences on Assistance to Refugees in Africa

The 1981 International Conference on Assistance to Refugees in Africa (ICARA I) and a second conference in 1984 (ICARA II) together present a further example of a regional approach to the protection of refugees. This regional arrangement focused on obtaining extra-regional funding from the international community to support the protection of large-scale intra-regional refugee and returnee populations in Africa.¹

In 1981 the UN Secretary-General noted that there were approximately five million refugees in the African region, pointing out the substantial increase in numbers since 1970, when there were around 750 000 refugees.² The majority of these refugees were being hosted in African countries that were among the least developed in the world. According to the Secretary-General, these countries barely had the capacity to provide the necessary resources for their own citizens, let alone for refugees.³

In response to this situation, ICARA I aimed to secure funding from donor states outside the region to support African states hosting refugees, while ICARA II sought to develop a longer-term approach of 'refugee aid and development' in the African region. From the outset, both of these conferences recognized that African states had primary responsibility for providing protection to displaced Africans, but, as they were developing countries, it was considered both proper and necessary to ask for international cooperation in financing this responsibility. The President of ICARA I stated, 'the refugee problem in Africa should be solved

¹ Executive Committee of the High Commissioner's Programme, 'International Solidarity and Burden-Sharing in all its aspects: National, Regional and International Responsibilities for Refugees', UN GAOR, 49th sess, UN Doc A/AC.96/904 (7 September 1998) [18].

² *International Conference on Assistance to Refugees in Africa: Report of the Secretary-General*, UN GAOR, 36th sess, UN Doc A/36/316 (11 June 1981) ('ICARA I') 7 [15].

³ *Ibid* [17].

within Africa'.⁴ By the same token, the Declaration and Programme of Action of ICARA II recognized the condition of refugees to be 'a global responsibility of the international community' and that there was a 'need for equitable burden-sharing by all its members, taking into consideration particularly the case of the least-developed countries'.⁵

While they requested extra-regional support, both of these conferences drew upon African states' willingness to engage with one another at the regional level in a spirit of solidarity forged at the height of the decolonization process in the 1960s. The Organization of African Unity (OAU), established on 25 May 1963, was established to promote unity and solidarity among African states, as well as coordination and cooperation for the purpose of improving the lives of African peoples.⁶ In the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, African states acknowledged that refugee problems were a source of friction among many states and that it was desirous at the regional level to eliminate that source of discord.⁷ ICARA I and II emphasized these commitments as a means to promote possibilities for local settlement, integration and voluntary repatriation of refugees in the region, and reiterated that granting asylum was 'a peaceful and humanitarian act'.⁸

As a pledging conference designed to gain extra-regional support for the situation of refugees in Africa, ICARA I brought together 99 states from around the world, along with over 120 inter-governmental organizations and NGOs. The objectives for the conference were: (a) '[t]o focus public attention on the plight of refugees in Africa'; (b) 'to mobilize additional resources for refugee programmes in Africa'; and

⁴ Ibid 12 [7]; see also *Recommendations from the Pan-African Conference on the Situation of Refugees in Africa*, Arusha, Tanzania (17 May 1979) <<http://www.refworld.org/docid/3ae6b37214.html>>.

⁵ *Second International Conference on Assistance to Refugees in Africa: Report of the Secretary-General*, UN GAOR, 39th sess, UN Doc A/39/402 (22 August 1984) ('ICARA II') Annex 1, A(1).

⁶ *Charter of the Organization of African Unity*, adopted 25 May 1963, 479 UNTS 39 (entered into force 13 September 1963); Marina Sharpe, 'Engaging with Refugee Protection?: The Organization of African Unity and African Union since 1963' (New Issues in Refugee Research, Research Paper No 226, UNHCR, December 2011) <<http://www.unhcr.org/4edf8e959.pdf>> 3.

⁷ *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) <<http://www.unhcr.org/45dc1a682.html>> Preamble.

⁸ ICARA I, above n 2, 12 [7]; ICARA II, above n 5, 22 B & C.

(c) 'to assist countries of asylum adversely affected by the large-scale presence of refugees to obtain international assistance for projects aimed at strengthening the ability of those countries to carry the extra burden placed on their services and facilities'.⁹

At the end of the conference, participating states expressed their support for these three objectives. States committed to donate US\$560 million 'towards alleviating the suffering of refugees in Africa'.¹⁰ In particular, the USA pledged US\$283 million (50 per cent of the total of pledges) during the conference and European states collectively pledged US\$179 million (31.6 per cent).¹¹ ICARA I also developed increased awareness on the part of audiences outside the region regarding the problems that refugees and states were facing in Africa.¹² Finally, African states presented numerous projects for funding to assist the protection of refugees and host communities in their countries.

Unlike the CPA, states and international organizations at ICARA I focused on facilitating the local settlement or integration of refugees in the African host countries, rather than seeking to redistribute the responsibility of physically hosting refugees. In particular, the conference did not facilitate the resettlement of refugees in third countries, even if host states faced a mass influx of refugees.

Under ICARA I, Western states accepted that they had a moral duty to finance projects that provided assistance to refugees in the African region. At the conclusion of the conference, UN Secretary-General Kurt Waldheim reflected on the amount that donor states pledged and tentatively concluded that 'the immediate priorities will be met and that a solid basis has been laid for the development of the necessary support to accommodate the long-term needs involved'.¹³ African states such as Cameroon similarly expressed their content with the outcomes of ICARA I, suggesting that it represented 'a first sign of significant international solidarity'.¹⁴

⁹ ICARA I, above n 2, [3].

¹⁰ Ibid 10 D [39], also Annex I, which refers to pledges totalling over US\$566 million.

¹¹ This amount includes the US\$68 million pledged by the European Economic Community (ibid Annex I).

¹² Shelly Pitterman, 'A Comparative Survey of Two Decades of International Assistance to Refugees in Africa' (1984) 31(1) *Africa Today* 25, 52.

¹³ ICARA I, above n 2, 12 [6].

¹⁴ Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Cornell University Press, 2009) 57.

However, as time went on, it became clear that there was a severe shortage of funds for some African nations that were particularly under pressure from the influx of refugees. As Gil Loescher documents, 'very few funds went to especially hard hit nations like Ethiopia and other countries in the Horn of Africa'.¹⁵ Instead, funds were primarily directed towards countries which, as James Milner highlights, were popular with Western donors 'within the geopolitical context of the Cold War'.¹⁶ Despite a warning from the Chairman of the African Group at ICARA that arrangements needed to be made 'for an equitable and appropriate allocation of unearmarked funds',¹⁷ donor states unilaterally earmarked their contributions after the conclusion of ICARA I for nations and projects that appealed to their national interests. In September 1981, the Post-ICARA Steering Committee regretfully recorded that out of the US\$451.9 million which donor states had pledged on an unspecified basis at the conference, only US\$144 million remained unearmarked.¹⁸

Problems also arose after ICARA I because of donor scepticism about the types of projects that African states wanted to be funded. As Robert Gorman highlights, many of the donor countries were worried that African states had 'simply dusted off a group of marginal shelf projects that had failed to attract previous bilateral support'.¹⁹ According to Gorman, the fact that African states only had about four to five months to prepare the projects exacerbated these concerns.²⁰ Additionally, African states also complained about the ways in which their own development needs were being overlooked. They were resentful that ICARA focused on the protection needs of refugees alone, instead of addressing the needs of all persons in the areas hosting refugees.

Participants recognized at ICARA I that their efforts to fully protect refugees in Africa were 'far from complete';²¹ and calls for a follow-up conference to ICARA I were officially recorded as early as October

¹⁵ Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford University Press, 2001) 227.

¹⁶ James H S Milner, *Refugees, the State and the Politics of Asylum in Africa* (Palgrave Macmillan, 2009) 27.

¹⁷ ICARA I, above n 2, Annex II, 1 [2].

¹⁸ Post-ICARA Steering Committee, *3rd Draft of Steering Committee of Post-ICARA Coordination Meeting*, UNHCR Fonds 11, HCR/NY/572, 391.62/460 (UNHCR Archives) (15 September 1981), cited in Betts, above n 14, 57.

¹⁹ Robert F Gorman, *Coping with Africa's Refugee Burden: A Time for Solutions* (Martinus Nijhoff, 1987) 16.

²⁰ Ibid.

²¹ ICARA I, above n 2, 13 [13].

1981.²² In its evaluation of ICARA I in 1984, UNHCR stated that the conference had succeeded in drawing attention to the plight of refugees and mobilizing resources that substantially alleviated some of the refugee situations in the African region. However, it 'did not produce the additional resources required by the host countries to strengthen their infrastructure'.²³ According to UNHCR and the UN General Assembly, a second conference was necessary to address this shortcoming. The UN General Assembly Resolution which called for the conference stated that the purposes of ICARA II were to review the results of ICARA I, to consider additional relief to refugees and returnees in Africa, and provide affected countries with assistance to strengthen their social and economic infrastructure to cope with refugees and returnees.²⁴

When the UN General Assembly requested the Secretary-General to convene ICARA II in 1984, 112 states and 145 governmental organizations and NGOs agreed to either participate in or attend the conference as observers. Unlike the first conference, ICARA II was not designed as a pledging conference for funds to protect refugees. Rather, it was envisaged as a first (or second) step in a much longer process geared towards the protection of refugees and the development of hosting states in Africa. ICARA II sought to implement some of the concepts and policies regarding refugee aid and development (RAD) that were gaining traction in UNHCR and other international organizations. UNHCR made it clear that ICARA II required much greater commitment from donor states to the long-term development of the social and economic infrastructure of African states hosting refugees. This was particularly important given the large-scale economic crisis that African states were facing at the time.²⁵

ICARA II transformed some of the conceptual thinking about RAD into a programme of action for addressing refugee protection at the regional level. As the President of ICARA II stated in his opening remarks, this conference should amount to the 'translation into reality' of the new concept that links refugee aid and development aid.²⁶ RAD was

²² UNHCR, *Addendum to the Report of the United Nations High Commissioner for Refugees*, UN GAOR, 36th sess, Supplement No 12 A, UN Doc A/36/12/Add.1 (12–21 October 1981) [39] (n).

²³ ICARA II, above n 5, 3 [1].

²⁴ *Ibid* [2].

²⁵ The Secretary-General acknowledged that the economic crisis that the African continent was facing at the time was far more serious than when ICARA I had taken place. See ICARA II, *ibid* 9 [22].

²⁶ *Ibid* 11 [35].

based on the principles that assistance should: (a) enable refugees to be self-sufficient;²⁷ (b) be beneficial to both refugees and the local population; (c) be development-oriented; and (d) be consistent with the host country's national development plan.²⁸

During the conference, African states requested funding for 128 different RAD projects at a total cost of approximately US\$362 million. This amount, as Jeff Crisp highlights, was almost as much as UNHCR had spent on its global operations in the previous year (US\$397 million).²⁹ Projects for which African states sought assistance included health infrastructure projects, such as building hospitals and medical clinics; agricultural projects, such as irrigation programmes and hydro-agricultural development; and education projects, such as the establishment of new schools and training programmes for teachers.³⁰ Water sanitation and road projects were also proposed.³¹

During the course of ICARA II, donor states committed to support approximately one third of the 128 projects presented, amounting to a total of approximately US\$81 million.³² Furthermore, states agreed to a Declaration and Programme of Action that made arrangements for further coordination between international organizations, such as UNHCR and UNDP, and the search for a durable solution, particularly voluntary repatriation and failing that, 'local settlement' as a temporary solution.³³

²⁷ In his statement at ICARA I, OAU Chairman Siaka Stevens cautioned that 'refugees should not be assisted in ways which would create overdependence'. Rather, it was important, according to Stevens, that refugees can support themselves as soon as possible (ICARA I, 8 [25]).

²⁸ Barry Stein and UNHCR, 'Returnee Aid and Development' EVAL/RAD/15 (UNHCR, 1994) <<http://www.unhcr.org/3bd40fb24.html>> (5).

²⁹ Jeff Crisp, 'Mind the Gap! UNHCR, Humanitarian Assistance and the Development Process' (2001) 35 *International Migration Review* 168, 171.

³⁰ See *Second International Conference on Assistance to Refugees in Africa: Report of the Secretary-General – Addendum*, UN GAOR, 39th sess, UN Doc A/39/402/Add.1 (5 November 1984) 10 (D. Needs for Assistance) ('*ICARA II Addendum*').

³¹ *Ibid.*

³² ICARA II, above n 5, 14 [55]; Gorman, above n 19, 39.

³³ ICARA II, above n 5, 22 A & B. Kibreab writes that '[l]ocal settlement as practised in Africa means placement of refugees in spatially segregated sites where their material needs (except land contributed by host countries) are met by the international refugee support systems. The goals of local integration (integration in first countries of arrival) and local settlement are often incompatible. In the former, the objective is to create a conducive atmosphere which could pave the way to integration (permanent solution), while in the latter case the objective is to segregate so that refugees do not become members of the host society. Local

(Local integration was also referred to as a possibility, but only where feasible.³⁴) ICARA II provided that UNHCR would be responsible for coordinating the implementation of refugee aid programmes with states, while UNDP would be responsible for the implementation of the development programmes in coordination with the countries of asylum.³⁵

With regards to durable solutions, ICARA II promoted voluntary repatriation as 'the ideal solution'.³⁶ However, in situations where this was not possible, it provided that 'conditions should be created within the country of asylum so that the refugees can temporarily settle or integrate into the community, i.e., participate on an equal footing in its social and economic life and contribute to its development' ('local settlement').³⁷ ICARA II did not contemplate the possibility of resettlement in countries outside the region.

At the time, ICARA II was seen as a major breakthrough for the protection of refugees in Africa. In his concluding remarks, the Conference President stated, 'once again, the international community has shown that, when humanitarian issues are on the agenda, divergences which may exist give way to a convergence of views, because the only concern that guides us is to aid our fellow human beings'.³⁸ However, in the aftermath of ICARA II, states made little progress in developing the programme of action and donor states provided little additional funding to the projects proposed at the conference. Despite significant diplomatic efforts to push for the implementation of the RAD concept, states remained reluctant to support it with long-term donor funding.

THE OUTCOMES OF ICARA

Many of the ambitions that states and international organizations articulated at the ICARA conferences were never realized. While ICARA managed to bring together all the relevant actors, the basic *quid pro quo* of ICARA – that donor states would provide financial and development

settlement is not perceived as providing a permanent solution. It is designed to concentrate refugees in specially designated sites where they would be assisted to become self-supporting until the circumstances that forced them to flee cease to exist' (Gaim Kibreab, 'Local Settlements in Africa: A Misconceived Option?' (1989) 2 *Journal of Refugee Studies* 468, 470).

³⁴ ICARA II, above n 5, 22 B [4].

³⁵ Ibid 17 [60].

³⁶ Ibid 22 [1].

³⁷ Ibid 22 [3].

³⁸ Ibid 17.

assistance to African states hosting large numbers of refugees and African states would, in return, provide protection to refugees in their territories – was never fully achieved.

Arguably, one of the great failures of ICARA was its limited success in allowing the local integration of refugees in the countries of first asylum so that they could become agents of development. Despite the reference in ICARA II to the promotion of ‘integration’, African states sought to prevent the permanent settlement of refugees in their territory and maintained refugee populations in camps detached from local communities.³⁹ They achieved this by denying refugees the possibility of spontaneous settlement in rural and urban areas, accommodating them instead in UN-funded camps and limiting opportunities for them to become self-sufficient.⁴⁰

Slaughter and Crisp suggest that there were several reasons why African states prevented the local integration of refugees. First, African states found it increasingly difficult to provide protection to refugees as their own development capacities diminished because of factors such as low rates of economic growth, political instability and the outbreak of the HIV/AIDS pandemic.⁴¹ Second, African states increasingly viewed refugees as ‘a source of political instability and tension’ due to their links to civil conflicts in neighbouring countries.⁴² Previously, refugees’ reasons for flight had been linked primarily to processes of decolonization in African states. Third, African states responded to the restrictive approaches to refugee protection that developed countries were taking at the time by limiting their support to refugees arriving at their territory in similar ways.⁴³ Kibreab links the phenomenon of local settlement to lack of capacity to cope with the needs of citizens and views it as a strategy to gain international assistance, and, indeed, posits that local integration in this context was unrealistic.⁴⁴

The lack of local integration as a viable option for refugees in host countries in Africa created problems for both refugees and states in the region. As time passed, many of these camp situations became protracted

³⁹ For more, see Kibreab, above n 33, 485.

⁴⁰ Amy Slaughter and Jeff Crisp, ‘A Surrogate State?: The Role of UNHCR in Protracted Refugee Situations’ (New Issues in Refugee Research, Research Paper No 168, UNHCR, January 2009) 4.

⁴¹ *Ibid* 3.

⁴² *Ibid*.

⁴³ *Ibid* 4.

⁴⁴ Kibreab, above n 33, 474.

and donor fatigue affected the ongoing funding of camps and the provision of services to refugees.⁴⁵

Additionally, some refugees chose to evade these camp settlements by settling in urban and rural centres in order to preserve their freedom of movement. These refugees, whose numbers are unknown, were often 'invisible' in these locations, in the sense that international organizations and states were unaware of their vulnerability and, consequently, developed very few programmes to address their needs.⁴⁶ As self-settling is often prohibited under the laws of host states, the decision of refugees to avoid camp dependency is made, as Katy Long and Jeff Crisp highlight, 'at the price of loss of international protection'.⁴⁷ At the time, UNHCR had not developed guidelines for providing protection to refugees in urban centres.⁴⁸ Furthermore, there was very little infrastructure in place for the protection of refugees outside the internationally supported camps.

In theory, ICARA II promoted voluntary repatriation as the preferred solution to the displacement of refugees in Africa.⁴⁹ The focus on voluntary repatriation was optimistic. Although some African states and donors hoped that the protection of refugees would be temporary and that they would be able to return voluntarily to their country of origin relatively quickly after ICARA, many of the causes for their exodus, such as protracted civil conflict and the fragility of democratic institutions following conflict, remained unresolved in their countries of origin.

The modalities of repatriation were also challenging. It was noted that UNHCR's mandate limited it from providing assistance to returnees beyond an 'initial period'.⁵⁰ ICARA II indicated that, for the reintegration of refugees into the country of origin to be successful, UNDP would need to be involved as early as possible to provide further rehabilitation assistance.⁵¹ UNHCR initiated a repatriation agreement in relation to Djibouti which made provisions for food and agricultural support to

⁴⁵ Jeff Crisp, 'No Solutions in Sight: the problem of protracted refugee situations in Africa' (Working Paper No 75, New Issues in Refugee Research, January 2003) 3, 4.

⁴⁶ For the problems facing spontaneously settled refugees, see Pitterman, above n 12, 41–4.

⁴⁷ Katy Long and Jeff Crisp, 'Migration, Mobility and Solutions: An Evolving Perspective' (2010) 35 *Forced Migration Review* 56.

⁴⁸ UNHCR, *UNHCR Policy on Refugee Protection and Solutions in Urban Areas* (UNHCR, September 2009) <<http://www.unhcr.org/4ab356ab6.pdf>> 2.

⁴⁹ ICARA II, above n 5, 22[1].

⁵⁰ *Ibid* 22 [2].

⁵¹ *Ibid*.

returnees.⁵² However, there were questions about the extent to which the return of refugees was voluntary. According to Crisp, the UNHCR-sponsored repatriation programme for Ethiopian refugees in Djibouti crossed 'the line between promoting repatriation and imposing it'.⁵³ Crisp states that between 1982 and 1984, the Djibouti government implemented several measures to force refugees to leave Djibouti, including reducing food rations, confining refugees in ill-equipped rural camps and sporadically forcibly sending refugees back to their country of origin. He argues that 'UNHCR was certainly unable, and perhaps unwilling, to prevent these abuses from taking place'.⁵⁴

The development of the RAD concept in ICARA was largely unsuccessful in gaining international support and providing protection to refugees. Ten years after ICARA, UNHCR's assessment of its promotion of RAD was that the efforts made in the area had limited results, 'mainly due to a lack of funding'.⁵⁵ UNHCR found that the projects that were not funded were those in Africa, where, paradoxically, 'large numbers of refugees are to be found in some of the least developed countries of the world'.⁵⁶

According to Barry Stein, the limited success of the RAD concept under ICARA was primarily due to the ambiguous nature of its purpose. Stein argues that RAD proposals in ICARA did not clarify whether the purpose was to promote the settlement and eventual integration of refugee populations in countries of asylum, or to ease the situation of refugees, the host community and state, pending the day when those refugees returned to their country of origin.⁵⁷ From a donor perspective, offering local integration would mean that there were no refugees and, therefore, no further funding was needed from donors.⁵⁸ African states, on the other hand, were worried that 'if development aid were to be targeted at refugee situations, it would lead to reduction in the level of

⁵² ICARA II Addendum, above n 30, 9 (B. Summary by Country: 4 Djibouti).

⁵³ Jeff Crisp, 'Ugandan Refugees in Sudan and Zaire: The Problem of Repatriation' (1986) 85(339) *African Affairs* 163,179.

⁵⁴ *Ibid.*

⁵⁵ Stein and UNHCR, above n 28, (17).

⁵⁶ Yvette Stevens, *Review of Efforts to Promote Refugee-related Development-type Projects* (UNHCR, 1991), cited in Crisp, above n 29, 172.

⁵⁷ Stein and UNHCR, above n 28, (6)-(17).

⁵⁸ Betts, above n 14, 72; Barry Stein, 'Regional Efforts to Address Refugee Problems' (Paper presented at the Annual Meeting of the International Studies Association, Toronto, 21 March 1997).

international assistance available for their regular development programmes and that it would imply their agreement to long-term or permanent settlement of refugees concerned'.⁵⁹

As Gaim Kibreab argues, African states and donors held differing views about the presence of refugees in Africa. Whereas donors sought to find durable solutions for refugees in countries of asylum, African states saw the presence of refugees in their country as temporary, lasting only until their repatriation became feasible.⁶⁰ According to Betts, the reason ICARA did not result in substantial commitment to refugee aid and development was because donor states and host states were not able to convince each other that the ICARA arrangement would serve their wider interests. As Betts put it, 'Northern states were not convinced that a commitment to provide additional development assistance would translate into durable solutions and so reduce their long-term humanitarian assistance obligations. Southern states were not convinced that a commitment to offering local integration or self-sufficiency to refugees would contribute to national development'.⁶¹

Betts argues that the only instance where donor states were prepared to commit significant funding to the protection of refugees in Africa was during ICARA I, and this was only because donor states recognized the strategic importance of protecting African refugees in containing communism. As he points out, the USA provided substantial financial assistance to refugees in Angola and Sudan who were escaping communist regimes, but offered little assistance to refugees hosted in Ethiopia, because of their links with Cuba and the USSR.⁶²

Another factor that contributed to the unwillingness of states to support the RAD initiative was the drought and famine that ravaged many African countries just weeks after the conclusion of ICARA II. This situation forced states and UNHCR, according to Jeff Crisp, to turn their attention to large-scale emergency relief programmes, rather than to longer-term development actions.⁶³ In the follow-up report to ICARA II on 5 November 1984, there was already some indication that some states, such as Japan, were focusing their efforts on the effects of severe famine and drought in Africa by prioritizing emergency food aid.⁶⁴

⁵⁹ Slaughter and Crisp, above n 40, 7.

⁶⁰ Kibreab, above n 33, 485, 488.

⁶¹ Betts, above n 14, 65.

⁶² *Ibid* 74.

⁶³ Crisp, above n 29, 173.

⁶⁴ ICARA II Addendum, above n 30, IV (Replies Received From Governments: Japan).

The drought and famine in 1984–1985 certainly contributed to the failure of ICARA, especially to the failure of a RAD approach to the region. Some have questioned whether the famine and drought were not simply the final nails in the coffin of an already failing regional arrangement. As Kibreab argues, '[i]t is difficult to state with certainty if the outcome of ICARA II would have been different in the absence of the devastating 1984–85 famine. It is often convenient to attribute the failures to the 1984–85 famine which undeniably overshadowed the goals of ICARA II'.⁶⁵

Another problem that may have contributed to the failure of the ICARA regional arrangement was the lack of adequate monitoring to identify protection gaps in the region and to follow up on the completion and effectiveness of projects. In comparison to the CPA, which implemented a significant monitoring programme led by UNHCR in the Southeast Asian region, ICARA was not properly monitored or evaluated.

CONCLUSION

When we contrast ICARA with the CPA, we see two very different approaches to refugee flows impacting on two particular regions. The one factor they have in common is that both arrangements attempted to draw in states from the Global North. Southeast Asian states threatened the very keystone of refugee protection – *refoulement* – and the response from an ideologically driven and perhaps guilt-ridden West was resettlement outside the region. In the case of ICARA, however, African states articulated a need for compensation for hosting refugees, and the response from outside the region was to share financial resources, often selectively given the Cold War context. This may reveal a number of things about the regions involved and about regionalism.

First, it is evident that Africa, unlike Southeast Asia, has a strong *legal* commitment to refugee protection, reflected in its own regional instrument and the number of parties to the universal instruments. A sense of pan-African solidarity is also evident.⁶⁶ This helps to explain why *refoulement* was not used as a bargaining chip. Instead, the standard of protection was the issue and African states chose to keep refugees visible,

⁶⁵ Kibreab, above n 33, 487.

⁶⁶ Alexander Betts, 'International Cooperation and the Targeting of Development Assistance for Refugee Solutions: Lessons from the 1980s' (New Issues in Refugee Research Working Paper No 107, UNHCR Evaluation and Policy Analysis Unit, September 2004) <<http://www.unhcr.org/415d0d982.pdf>> 6.

not by turning them away, but by sequestering them from the local community through 'local settlement'. Second, as Betts states, Western states could 'remain relatively passive in the face of what could be regarded as a collective action failure' because there was (arguably) no 'spillover' of the consequences of their neglect, as Africans generally sought asylum within Africa.⁶⁷

After ICARA, many commentators reflected on the failure of the conferences to provide lasting protection dividends for refugees and host communities. In a scathing assessment of the way in which the RAD initiative had withered away, George Okoth-Obbo wrote in 2001 that the fact that 'the international refugee assistance system is in the position now of being able to provide primarily only the so-called life saving and sustaining measures, has to be deplored as one of the most regressive steps that the international refugee system could have taken in this last decade'.⁶⁸ In a similar vein, one NGO delegate at the Addis Ababa Symposium on Refugees and Forced Population Displacements in Africa of 1994 stated that 'there is no shortage of declarations, recommendations, or plans of action to solve the refugee and displacement crisis in Africa. If even half of these were implemented, there would be virtually no refugees or displaced persons in Africa today and none for the whole twenty-first century'.⁶⁹

In the end, academics and policy-makers have generally viewed ICARA as a failed regional arrangement because of its inability to implement the protection goals for refugees that the situation demanded. In 1984, ICARA II was badged as a 'Time for Solutions', a slogan which, Slaughter and Crisp argue, 'began to seem very optimistic' as time went on.⁷⁰ While the strategies of protection and development aid certainly provided some benefits to refugees in the African region, insufficient funding, growing scepticism and unfortunate circumstances meant that the process never fully achieved what it set out to do.

⁶⁷ Ibid 15.

⁶⁸ George Okoth-Obbo, 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20(1) *Refugee Survey Quarterly* 79, 94.

⁶⁹ See George Okoth-Obbo, 'The OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa: A Review Article' (1995) Special Summer Issue of *International Journal of Refugee Law* 274, 297.

⁷⁰ Slaughter and Crisp, above n 40, 7.

6. The International Conference on Central American Refugees

The 1989 International Conference on Central American Refugees (CIREFCA) was held on 29–31 May 1989 and developed a plan of action to provide durable solutions for over two million refugees and other displaced persons in the Central American region.¹ This regional arrangement operated for five years between 1989 and 1994 and responded to the mass displacement of Central Americans caused by violent civil wars and economic crises in the 1980s. At the time, the UNDP Regional Director for Latin America and the Caribbean estimated that between seven and ten per cent of the total Central American population was displaced.²

CIREFCA was closely linked to the broader Central American peace process that began in 1987 with the ‘Procedure for the Establishment of a Firm and Lasting Peace in Central America’ (known as Esquipulas II), and the reinvention of Central American regionalism in the 1980s and 1990s for political and economic reasons.³ As part of Esquipulas II, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua agreed that

¹ See Executive Committee of the High Commissioner’s Programme, ‘International Solidarity and Burden-Sharing in all its aspects: National, Regional and International Responsibilities for Refugees’, UN GAOR, 49th sess, UN Doc A/AC.96/904 (7 September 1998) <<http://www.refworld.org/docid/4a54bc2f0.html>> [20].

² UN General Assembly, *Office of the United Nations High Commissioner for Refugees, International Conference on Central American Refugees: Report of the Secretary-General*, 3 October 1989, UN Doc A/44/527 <<http://www.refworld.org/docid/3ae68f404.html>> 15 [52].

³ *Procedure for the Establishment of a Firm and Lasting Peace in Central America, Seeking to Provide the Principles by which the Conflicts in Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua will be Resolved*, UN Doc A/43/521-S/19085 (31 August 1987) <http://peacemaker.un.org/sites/peacemaker.un.org/files/CR%20HN%20GT%20NI%20SV_870807_EsquipulasII.pdf>. See Rafael Sánchez, ‘Rebuilding the Central American Bloc in the 1990s: An Intergovernmentalist Approach to Integration’ in Finn Laursen (ed), *Comparative Regional Integration: Theoretical Perspectives* (Ashgate, 2003) 31, 32–6.

it was important for governments in the region to address the problems of refugees, returnees and other displaced persons. Section 8 of the Esquipulas II agreement stated that:

The Central American governments undertake to attend, as a matter of urgency, to the flows of refugees and displaced persons caused by the crisis in the region, providing them with protection and assistance, particularly in the areas of health, education, work and safety, and to facilitate their repatriation, resettlement or relocation provided that this is voluntary and carried out on an individual basis.⁴

Under the CIREFCA Declaration and Plan of Action, the five Central American states involved in Esquipulas II, along with Belize and Mexico, identified four groups of forced migrants in need of support in the region: (a) refugees;⁵ (b) returnees (people who had been refugees and decided to return⁶ but were still in a precarious position in their countries of origin); (c) internally displaced persons (IDPs);⁷ and (d) 'externally displaced persons', who were defined as 'people who, as a result of the crisis, have been unable to provide for their subsistence or lead a normal life, whether or not their lives, security or liberty have been threatened by the conflict'.⁸

As a response to the needs of these groups, Central American states collectively established voluntary repatriation programmes to assist with the reintegration of returnees in their home communities.⁹ States also developed projects to assist with the local integration of refugees and to humanely support IDPs in returning to their homes and rebuilding their communities. Unlike the CPA, CIREFCA only promoted the return of refugees to their country of origin if the refugee consented to return. The CIREFCA Plan of Action specifically stated that repatriation must be 'voluntary and individually-manifested' and that refugees have the right 'to reach a free decision concerning their return'.¹⁰ In situations where

⁴ *Procedure for the Establishment of a Firm and Lasting Peace*, above n 3, 7.

⁵ *Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons, International Conference on Central American Refugees* Doc CIREFCA/89/13/Rev.1 (31 May 1989), ('CIREFCA') <<http://www.refworld.org/docid/3fbb5d094.html>> Section II, Part 1A [4].

⁶ *Ibid* [5].

⁷ *Ibid* [6].

⁸ *Ibid* [7].

⁹ *Ibid* Section II, Part 1B [10], Section II, Part 1D1 [19]–[23].

¹⁰ *Ibid* [21].

refugees did not want to return to their country of origin, steps were taken to promote the local integration of the refugee in the host society. In contrast to the CPA, resettlement outside the region was considered the least preferred durable solution for refugees under CIREFCA. This was because UNHCR and states believed that the affected displaced persons formed 'an integral part of the efforts towards regional peace and development',¹¹ and sometimes also because of concerns about resettling Indigenous groups far away from their traditional communities.¹² The politics of CIREFCA also differed from the CPA in that Central American states had not threatened to *refoule* refugees if external support was not forthcoming.

From the beginning, the protection and reintegration of refugees was also closely linked to the social and economic development of the Central American region. Like ICARA, CIREFCA aimed to implement programmes that benefited both refugees and host communities. Similarly, CIREFCA sought to increase social and economic development in returnee communities. Many of the practices regarding refugee aid and development that the UN first put forward in ICARA influenced the approaches that UNHCR and states took to resolve the refugee situation in the Central American region.

Under the Plan of Action, each affected state submitted individualized project proposals to meet the needs of the four groups of forced migrants.¹³ Betts describes the project proposals as follows:

The project proposals varied from country-to-country depending notably on whether the state was primarily a country of origin or asylum and, in the latter case, how tolerant or restrictive that country was towards freedom of movement and the socio-economic integration of refugees. In Guatemala, the projects focused on facilitating reintegration for returnees in Huehuetenango and El Quiché by strengthening health, education and sanitation services, and improving basic infrastructure. In Costa Rica, the projects aimed primarily to promote labour market integration to allow refugees and another 250,000 'externally displaced' people from El Salvador and Nicaragua to socially and economically integrate through, for example, improved access to the jobs market and health care. In Mexico, they focused on self-reliance for Guatemalan refugees, notably through agricultural projects in Chiapas and the rural resettlement projects in Campeche and Quintana Roo. In Nicaragua, the focus was on rehabilitation and reintegration activities for returnees mainly from

¹¹ Ibid Section II, Part 1C [13] (a).

¹² Megan Bradley, 'Unlocking Protracted Displacement: Central America's "Success Story" Reconsidered' (2011) 30(4) *Refugee Survey Quarterly* 84, 97.

¹³ CIREFCA, above n 5, Section II, Part 1D2 [25].

Honduras. In Honduras, given the state's restrictions on freedom of movement, attention was paid to strengthening UNHCR assistance in camps, pending return to Guatemala and Nicaragua. In Belize the project focused on improving self-reliance and local integration opportunities for refugees, mainly through strengthening the existing integrated rural development project at the Valley of Peace and improving infrastructure in the Northern Orange Walk and Western Cayo Districts. In El Salvador, aside from nominal support for Nicaraguan refugees and returnees, PRODERE, in particular, envisaged meeting the basic needs of the country's IDPs.¹⁴

Overall, these projects attracted significant donor support. CIREFCA received a total of US\$420 million between 1989 and 1994, with nearly US\$80 million through UNHCR.¹⁵ This financial support came largely from the European Economic Community (which we will call the European Union or EU as it is now known). According to Betts, the EU was motivated by several factors, 'including solidarity with emerging Christian democratic governments, the desire to offset the influence of the U.S. in the region, and a wish to assert the EEC's growing global influence by promoting peace and development'.¹⁶ According to funding statistics published in 1994, the EU contributed US\$115 million and Sweden alone contributed a further US\$60 million.¹⁷ In addition to this funding, the Italian government further donated an additional US\$115 million towards the establishment of the affiliated Development Program for Displaced Persons, Refugees and Returnees in Central America (Programa de Desarrollo para Desplazados, Refugiados y Repatriados, or PRODERE).¹⁸

This project, which was run by UNDP/Office for Project Services, had four main objectives. First, it aimed to reinsert war-affected populations into the 'national, regional and local economic and social processes'.¹⁹

¹⁴ Alexander Betts, 'Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA' (New Issues in Refugee Research Working Paper No 120, UNHCR, January 2006) <<http://www.unhcr.org/43eb6a152.html>> 10–11.

¹⁵ Ron Redmond, 'The Human Side of CIREFCA' (1995) 99 *Refugees Magazine* 1.

¹⁶ Betts, above n 14, 28.

¹⁷ Refugee Policy Group and UNHCR, 'Review of the CIREFCA Process' EVAL/CIREF/15 (UNHCR, 1994) <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3bd410804&query=Review%20of%20the%20CIREFCA%20Process#hit3>> [148].

¹⁸ Ibid.

¹⁹ Peter Sollis and Christina M Schultz, 'Lessons of the PRODERE Experience in Central America' (Working Paper, Refugee Policy Group, 1995) <<http://>

Second, it sought to increase the provision of basic services to displaced Central Americans.²⁰ Third, it sought to promote 'productive services and activities using local resources and skills'.²¹ Fourth, it aimed to provide training programmes and credit services for displaced persons in the region.²²

International agencies, such as UNDP and the International Labour Organization (ILO), believed that grassroots involvement and NGO participation were essential to fulfilling PRODERE's mandate of improving living conditions through development and promoting human rights in the region. As Lazarte, Hofmeijer and Zwanenburg explain, 'PRODERE developed a strategy rather different from traditional technical cooperation programmes. Instead of intervening at the central government level or targeting one or more specific groups, PRODERE adopted a local development strategy based on a decentralized, integrated and bottom-up approach to development in limited geographical areas'.²³ This strategy was chosen because it was perceived that government neglect of particular communities in the countries involved had been a principal cause of the conflict.²⁴

In addition to these programmes of action, CIREFCA also developed a follow-up mechanism to address 'the needs of the beneficiary groups and solve them in an expeditious and flexible manner'.²⁵ This monitoring programme included national coordinating committees in each of the participating countries to formulate the details of relief and development projects and solicit international funding for these projects (some of which were more effective than others).²⁶

hdnret.org/623/1/Lessons_of_the_PRODERE_experience.pdf> 1, 2. PRODERE first defined these objectives following an identification mission that took place in 1988: *ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ Alfredo Lazarte, Hans Hofmeijer and Maria Zwanenburg, *Local Economic Development In Central America: The PRODERE Experience* (International Labour Organization, 1999) <http://www.yorku.ca/ishd/LED/CD.SP/Links%20BQ/70_Local%20Economic%20Development%20in%20Central%20America%20The%20PRODERE.pdf> 6.

²⁴ *Ibid.* 7.

²⁵ CIREFCA, above n 5, Section II, Part 2A [33].

²⁶ Refugee Policy Group and UNHCR, above n 17, [60]–[66].

THE OUTCOMES OF CIREFCA

In 1994, towards the end of CIREFCA, UNHCR and the EU funded a comprehensive review of the CIREFCA process that identified both significant achievements and shortcomings. According to the review, CIREFCA greatly strengthened the legal framework for refugee protection in the region as it made funding conditional on compliance with the principles of the 1951 Convention and the 1984 Cartagena Declaration.²⁷ Furthermore, the CIREFCA process was the impetus for Central American countries to protect refugees and find durable solutions for refugees in the region.²⁸ On the other hand, CIREFCA was largely unsuccessful in its protection of IDPs and externally displaced persons and did not establish mechanisms to track funding and monitor projects from the very beginning of the process.²⁹

One of the great successes of CIREFCA was the strengthening of a human rights discourse with respect to refugees in the region and the consolidation of the principles enshrined in the 1984 Cartagena Declaration on Refugees.³⁰ Prior to the development of CIREFCA, many countries in the Latin American region had endorsed the non-binding 1984 Cartagena Declaration,³¹ which includes a broader regional definition of refugeehood than that contained in the 1951 Refugee Convention. However, these countries had almost never applied this broader refugee definition in practice, nor did they have a clear understanding or interpretation of this definition.

As part of the CIREFCA process, UNHCR arranged for two judges of the Inter-American Court of Human Rights and one member of the Inter-American Commission on Human Rights to provide a legal opinion regarding the principles and criteria for the protection of refugees and other displaced persons in the region. The CIREFCA Legal Document, as it became known, presented one of the first interpretations of the Cartagena Declaration refugee definition. It has subsequently become, as Michael Reed-Hurtado argues, 'the most frequently, if not the only, source cited by most national authorities to interpret the regional refugee

²⁷ Ibid [169].

²⁸ Ibid [171]–[172].

²⁹ Ibid [13].

³⁰ *Cartagena Declaration on Refugees* (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984) in 'Annual Report of the Inter-American Commission on Human Rights' (1984–85) OAS Doc OEA/Ser.L/V/II.66/doc.10, rev 1, 190–3.

³¹ See the discussion of the Americas in Chapter 1.

definition in current day practice'.³² On the other hand, Reed-Hurtado is critical of this reification of the CIREFCA Legal Document and argues that the regional refugee definition still remains underdeveloped and 'falls short of being part and parcel of day-to-day practice in domestic jurisdictions'.³³

CIREFCA appears to have prompted countries in the region to ratify the 1951 Refugee Convention and implement national legislation with respect to refugees. Certainly, the timing of some ratifications tends to suggest this. Belize acceded to the 1951 Refugee Convention and its Protocol in June 1990; Honduras did likewise in March 1992.

In response to the growing recognition that refugee women were particularly vulnerable in the Central American region, UNHCR and states developed specific policies under CIREFCA to address gender issues in refugee protection for the first time in the region.³⁴ In 1992, a regional forum on 'A Gender Approach to the Work with Refugee, Returnee and Displaced Women' (known as FOREFEM) was held. A declaration and set of guidelines that highlighted refugee women and their needs were adopted, although their implementation quickly stalled.³⁵ However, women did benefit from UNHCR's work, and the forum had a longer-term impact. With the support of UNHCR during displacement many displaced women in the region – who had little education and were often Indigenous, illiterate and not Spanish-speaking – were able to become literate, organize politically, work in paid employment and challenge traditional gender biases with regards to land ownership.³⁶ As the assessment of FOREFEM noted, 'the disruption to societies and experience of exile provided an opening to re-examine

³² Michael Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America' (Legal and Protection Policy Research Series No 32, UNHCR Division of International Protection, June 2013) <<http://www.refworld.org/docid/51c801934.html>> 15.

³³ Ibid 33.

³⁴ The Declaration emphasized that it was 'important to pay due attention as a matter of priority, to the special needs of refugee women and children' (CIREFCA, above n 5, Section I, [14]).

³⁵ Women's Commission for Refugee Women and Children, *UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation* (Women's Commission, May 2002) <<http://www.refworld.org/docid/48aa83220.html>> 89, 90 (Annex IV: UNHCR's Approach to Gender Programming in Central America: A Case Study).

³⁶ Ibid 89.

gender roles and question longstanding inequalities'.³⁷ The evaluation of CIREFCA notes several impacts of FOREFEM, including the incorporation of gender into quick impact projects (QiPs) in Nicaragua and an agreement with the United Nations Development Fund for Women (UNIFEM) to develop a broader gender strategy within the region.³⁸

In terms of durable solutions, CIREFCA greatly benefited from having a flexible approach to long-term solutions that allowed displaced persons to have a say in choosing solutions that best suited their needs and wishes. While states generally considered the eventual return of refugees to their country of origin as the most desirable solution for bringing an end to the displacement, Central American states, as Megan Bradley highlights, were increasingly willing to locally integrate refugees in the host countries.³⁹ This meant that refugees had a choice as to whether they would prefer to stay in the country of asylum or return to their own country. A few thousand refugees were also resettled to states outside the region, such as USA and Canada, although these resettlements took place under programmes that were already in operation prior to the establishment of CIREFCA.⁴⁰

Under the CIREFCA process, local integration was a viable durable solution for refugees due to the strong emphasis on establishing protection services and development projects that benefited both refugees and local communities alike. The innovative use of QiPs during the CIREFCA process, which are small-scale, low cost, locally designed, and fast implementing,⁴¹ encouraged host communities to accept refugees because of the development incentives that refugees brought with them. The architects of the CIREFCA process also made particular efforts to ensure that refugees would complement rather than displace the domestic workforce. For example, UNHCR and states implemented new projects in urban areas that created employment opportunities for refugees and national workers.⁴²

³⁷ Ibid 95.

³⁸ Refugee Policy Group and UNHCR, above n 17, [236].

³⁹ Bradley, above n 12, 85, 91, 99.

⁴⁰ Ibid 97.

⁴¹ UNHCR, *Quick Impact Projects (QiPs): A Provisional Guide* (UNHCR, May 2004) <<http://www.unhcr.org/41174ce94.html>> 1.

⁴² See CIREFCA, *Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America* ('CIREFCA Legal Document'), January 1990 <<http://www.refworld.org/docid/4370ca8b4.html>> 23.

In rural areas that either hosted large numbers of refugees or had experienced significant levels of conflict, PRODERE established credit programmes for farmers and entrepreneurs, which enabled them to invest in small business opportunities. Lazarte, Hofmeijer and Zwanenburg report that between September 1991 and June 1995, just over US\$15 million in credits were disbursed to 334 062 beneficiaries in the region.⁴³ These loans allowed investment in areas such as livestock farming, coffee production, crop diversification and agro-industry.⁴⁴ The benefits of this programme were that it: (a) promoted economic sustainability in under-developed areas in Central America; (b) targeted the basic needs of communities as defined by the communities; (c) benefited all members of community, both local residents and refugees; and (d) facilitated conditions for the local integration of refugees within a short timeframe.

In terms of the return of refugees to their country of origin, CIREFCA generally ensured that repatriations only took place when the refugee consented to the return. Where refugees were unwilling to return to their own country, states provided refugees with the opportunity to integrate within the host country, or, in a small number of cases, resettle to a third country. The ability of refugees to choose the solution that most suited their needs meant that CIREFCA did not experience the backlash from refugee communities that Southeast Asian states and UNHCR faced in the latter stages of the CPA. It also meant that refugees experienced a greater sense of empowerment and responsibility for the solutions to their own displacement.

Despite this achievement, there were some difficulties in relation to the implementation of the voluntary return programmes. In the aftermath of the conflict, many of the refugees' former communities had few prospects for development and some of their lands had been occupied by new 'owners'. Furthermore, while states such as Guatemala and El Salvador publicly supported the return of displaced communities to their countries, there was scepticism, as Bradley highlights, that this was simply a message disseminated by some governments in order to gain legitimacy and present the image of a successful peace process.⁴⁵

UNHCR and UNDP stimulated the economic development of these returnee communities by implementing QiPs and microcredit programmes. However, refugees faced significant difficulties in recovering their land and possessions. On many occasions, returnee populations had

⁴³ Lazarte, Hofmeijer and Zwanenburg, above n 23, 14–15.

⁴⁴ Ibid 15.

⁴⁵ Bradley, above n 12, 103.

disputes with new occupants about land ownership that resulted in significant conflict between the groups and were seldom resolved.⁴⁶ Bradley argues that the CIREFCA Plan of Action largely ignored the legitimate claims of new occupants, many of whom were also displaced.⁴⁷ In addition, due to the lack of land distribution alternatives, many returning refugees simply became IDPs.⁴⁸

These problems in the recovery of land were compounded by violence, including state-sponsored violence. In its January 1996 report on the situation of returnee populations in Guatemala, for example, Human Rights Watch documented repeated cases of state violence against returning refugees, which it claimed cast 'serious doubts on the Guatemalan government's commitment to ensure safe repatriation'.⁴⁹ The deepening 'climate of insecurity' made the safe repatriation of refugees impractical on many occasions, according to Human Rights Watch, which gave the example of a patrol of Guatemalan soldiers opening fire on an unarmed group of former refugees.⁵⁰

In addition to the exposure of refugees to violence and possible *refoulement*, there have also been questions about the extent to which some of the returns that took place under CIREFCA were voluntary. In a study on the repatriation of Guatemalan refugees from Chiapas in Mexico in 1997, Steffanie Riess has argued that these refugees had no alternative but to return to Guatemala, because local integration in Mexico was impossible at that time.⁵¹ While Riess acknowledges that the pressures facing these refugees were 'particularly pronounced',⁵² given that they had postponed the decision to return until after the formal conclusion of the CIREFCA process and she is of the view that return was safe, the circumstances of these refugees nevertheless raise doubts about the levels of consent and consultation with refugee groups concerning repatriation under CIREFCA.

The protection of IDPs was also imperfect. While CIREFCA innovatively included IDPs as a category of persons warranting international

⁴⁶ Ibid 106; see also Human Rights Watch, 'Return to Violence: Refugees, Civil Patrollers and Impunity' (Report Vol 8 No 1B, 1996).

⁴⁷ Bradley, above n 12, 116.

⁴⁸ Ibid 106.

⁴⁹ Human Rights Watch, above n 46, 1.

⁵⁰ Ibid 2-3.

⁵¹ Steffanie Riess, "'Return is Struggle, Not Resignation: Lessons from the Repatriation of Guatemalan Refugees from Mexico' (Working Paper No 21, UNHCR, July 2000) 9.

⁵² Ibid 4.

protection, no international organization was assigned direct responsibility for ensuring that this protection and assistance was actually provided. At the time, UNHCR claimed that its mandate did not permit it to take a direct role in the protection of IDPs.⁵³ UNDP, on the other hand, focused on providing development assistance to persons based upon geographic location, rather than to specific populations. This meant that UNDP, under PRODERE, only provided protection to IDPs in areas where there were concentrations of displaced persons, while displaced persons in areas where UNDP was not working missed out.⁵⁴

It is likely that some IDPs benefited from the QiPs and development programmes that PRODERE developed for returnee refugees,⁵⁵ but there are no statistics that accurately record or measure the extent to which they benefited. The UNHCR/EU review of CIREFCA concluded that CIREFCA provided little assistance to IDPs beyond that which was already available prior to the CIREFCA process.⁵⁶ The main benefit that CIREFCA provided was increased exposure of their plight during the process, which supported the idea that IDPs had genuine protection needs that states should address. Practical benefits to Central American IDPs at the time, however, were limited.

Externally displaced persons, as they were called, similarly received little protection and assistance during CIREFCA. Despite being included as one of the four groups that participating states agreed to support, states did very little to address their needs as a vulnerable group in the region. As UNHCR reported after the end of CIREFCA, '[b]oth before and after CIREFCA, they [externally displaced persons] have most often been treated as undocumented or illegal aliens and have been subject to deportation, according to local policy'.⁵⁷ While CIREFCA broke new ground by considering the protection needs of these persons, the process was not particularly successful in moving beyond the recognition of the needs of this group.

Another problem with CIREFCA was the lack of clarity in the distribution of responsibilities among the participating international organizations, particularly UNHCR and UNDP. In comparison with ICARA, which spelt out that UNHCR would be responsible for aid while UNDP would be responsible for development, the CIREFCA process had

⁵³ See Refugee Policy Group and UNHCR, above n 17, [176].

⁵⁴ Ibid.

⁵⁵ See Sollis and Schultz, above n 19, 5 (discussing the situation in Guatemala).

⁵⁶ Refugee Policy Group and UNHCR, above n 17 [181].

⁵⁷ Ibid [182].

no such division of responsibility. As a consequence, both UNHCR and UNDP would take part in all the discussions and negotiations, but there was often ambiguity and disagreement as to how each organization should proceed.⁵⁸

These organizations also had different views about how to approach the needs of refugees in the region. Under the CIREFCA mandate, UNHCR, according to its own review, saw the process of providing protection and assistance to displaced persons as essentially being a two-step process – relief then development.⁵⁹ UNDP, on the other hand, under the PRODERE guidelines, saw the process as essentially a continuum.⁶⁰ This difference in opinion meant that some opportunities for collaboration were lost.⁶¹ One example of this failure was the lack of coordination between the two organizations with regards to IDPs. As the UNHCR/EU review stated, ‘[e]xpectations on the part of UNHCR that UNDP should initiate more projects to attend to the internally displaced were not fulfilled. Both institutions claimed it was not their role – UNDP, because it could not focus on specific population groups; UNHCR, because its mandate extended only to refugees’.⁶² Another obstacle to cooperation was the difference in fundraising capacity, with UNHCR being better equipped to do this than UNDP.⁶³

In comparison with this institutional difficulty, the inclusion and involvement of NGOs in the dialogues and negotiation processes was highly successful. Rather than relying on a top-down approach to refugee protection, CIREFCA promoted the active participation of civil society actors in the national and regional dialogues concerning the planning of each project as a means to identify specific protection needs and encourage local communities to take ownership of the process. The inclusion of civil society in the decision-making processes in CIREFCA led to more targeted development programmes under the PRODERE initiatives and greater cooperation among the inter-state, state and civil society actors.⁶⁴

Involving local communities also prompted greater financial support from international donors. In comparison with ICARA, in which donor

⁵⁸ Ibid [106].

⁵⁹ Ibid [108].

⁶⁰ Ibid.

⁶¹ Ibid [117].

⁶² Ibid [111].

⁶³ Ibid [96].

⁶⁴ Ibid [81]. However, the coordination was less than perfect: *ibid* [62]. For the views of some NGOs on the process, see Redmond, above n 15, 1, 2.

states questioned the legitimacy of the projects they were being asked to fund, states were far less sceptical about providing funding to the NGOs directly responsible for the implementation of the locally-established development projects under CIREFCA. According to UNHCR, most of the resources that CIREFCA mobilized ultimately were given to NGOs.⁶⁵ Projects funded by Central American governments, UNHCR and UNDP were implemented by NGOs.⁶⁶ Furthermore, donor states from outside the region sometimes provided funding exclusively to the NGOs, bypassing the governments of the states where the NGOs were based.⁶⁷

In addition to promoting grassroots approaches to refugee protection, CIREFCA was clearly linked to the resolution of the root causes of the refugee flows and to Esquipulas II's goal of promoting a 'firm and lasting peace' in the region. CIREFCA successfully integrated the elements of peace, refugee protection and development among states and other humanitarian actors in the region. As the review of CIREFCA concluded, '[i]f CIREFCA had not brought the problem of displacement to the forefront of the peace initiative in Central America, it is unlikely that uprooted populations in the region would have received the degree of protection, attention and funding that was directed towards them. ... CIREFCA reinforced the regional peace process and, in turn, was strengthened by that process.'⁶⁸ Roberto Rodriguez, former deputy director of the Human Rights division of the UN in El Salvador, adds that 'CIREFCA helped strengthen the peace process, which at that time was a little bit shaky ... Everything had to be discussed and negotiated with all concerned. This process of talking and talking and negotiating eventually created a new culture of dialogue between the sides, instead of violence'.⁶⁹

Betts agrees that CIREFCA contributed to the peace process, arguing that it did so in four ways. First, it provided 'a context for inter-state dialogue and consensus building' in a region 'in which politics had polarised along left/right and East/West lines throughout the Cold War'.⁷⁰ Second, CIREFCA dealt directly with groups of displaced persons whom Central American states perceived as obstacles to national and regional security.⁷¹ Third, the process contributed to national reconciliation on a

⁶⁵ Refugee Policy Group and UNHCR, above n 17, [156]–[157].

⁶⁶ Ibid.

⁶⁷ Ibid [157]–[162].

⁶⁸ Ibid [9]–[11].

⁶⁹ Redmond, above n 15, 1, 2.

⁷⁰ Betts, above n 14, 14.

⁷¹ Ibid.

local level by developing an 'integrated community development framework'.⁷² Finally, the mobilization of resources for the participating states prevented any state from undermining the peace process.⁷³

CONCLUSION

Over the long term, it is clear that CIREFCA led to a significant improvement in the quality of refugee protection and the institutional capacity of governments and NGOs to deal with refugee issues in the Central American region. Practices that were put in place to provide protection to displaced persons during CIREFCA continue to be used as protection tools in the Latin American region. For example, as will become clearer in Chapter 8, the Latin American region still deploys microcredit programmes and QiPs, retains the focus on geographical rather than population-based approaches to protection, maintains the strong presence of civil society actors in the area, and promotes solidarity among states and towards refugees. Furthermore, the emphasis on particularly vulnerable groups of refugees, such as women, continues to be a strong feature in the protection of refugees in Latin America. These lasting protection dividends point towards the success of CIREFCA in entrenching a human rights discourse and programme of action for refugees in the region.

It is perhaps debatable whether a firm and lasting peace in the region was established. Many of the countries involved in CIREFCA remain violent places.⁷⁴ Overall, however, CIREFCA should be viewed as a positive regional arrangement that provided substantial benefits to refugees and states in the region. It reflects a regional commitment to the provision of asylum and a strengthened sense of a regional imagined community at peace. It has also been an important step towards the Mexico Declaration and Plan of Action,⁷⁵ adopted at the 20-year review of the Cartagena Declaration and explored in Chapter 8.

⁷² Ibid 15.

⁷³ Ibid.

⁷⁴ See for example, UNHCR Regional Office for the United States and the Caribbean, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (UNHCR, 2014).

⁷⁵ *Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America* (16 November 2004) <http://www.oas.org/dil/mexico_declaration_plan_of_action_16nov2004.pdf>.

7. The Common European Asylum System

The Common European Asylum System (CEAS) is one of the most thoroughly developed regional arrangements for refugees. Under the CEAS, the European Union has focused on harmonizing the application of the refugee definition, i.e., endeavouring to ensure consistent interpretation of the definition across the EU. It has also sought to achieve consistency in procedures for determining status and reception conditions (that is, rights in regards to living conditions, such as access to the labour market, housing and health care) for asylum seekers across the EU. The EU has developed criteria for determining which state is responsible for assessing applications for asylum and has established the Asylum, Migration and Integration Fund (AMIF) (formerly European Refugee Fund (ERF)) to share financial resources in the provision of refugee protection.

DUBLIN AND THE ALLOCATION OF RESPONSIBILITY

A system for allocating responsibility for determining refugee status was the first step towards the CEAS. The system has been under construction since the 1980s, beginning with the Schengen Agreement¹ and the Dublin Convention.² It has been motivated by the irregular crossing of EU borders by asylum seekers who then moved onto other EU countries before applying for asylum – so-called ‘asylum shopping’. In theory its

¹ *Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders*, signed 19 June 1990 (1991) 30 ILM 84 (entered into force 1 September 1993) (‘Schengen Implementation Agreement’).

² *Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities*, signed 15 June 1990 [1997] OJ C 254/01 (entered into force 1 September 1997) (‘Dublin Convention’).

aim is to ensure that only one application is processed per asylum seeker and that one EU member state takes responsibility for the application.

The Dublin Convention was translated into a Regulation in 2003, which has since been amended. Under its latest iteration, the Dublin III Regulation, responsibility for assessing asylum seekers who have crossed the EU external border irregularly rests, in the first instance, with the first European state that these unauthorized migrants entered.³ (There are limits on the length of time that the first state entered by the asylum seeker bears responsibility. Responsibility only rests with the state of first entry for up to twelve months⁴ and ends once the asylum seeker has been living in another state or other states for five months.⁵)

Although there are other criteria for the allocation of responsibility, including lawful residence and considerations relating to family unity, which theoretically rank higher in the hierarchy of Dublin Regulation criteria,⁶ in practice, the country of unauthorized entry assumes great significance in the allocation. Furthermore, the discretionary clauses that permit states to depart from the hierarchy are rarely used.⁷ This is not surprising given that refugees who have entered lawfully are perceived as 'desirable migrants', regardless of their need for protection, whereas there are few legal channels for migration of those whose movement has been triggered by the need for protection. The Dublin III Regulation also permits EU member states to send asylum seekers to a third country, so long as this transfer is in compliance with the provisions of the recast Procedures Directive.⁸ The power to return asylum seekers to third countries, which has been in the Dublin Regulation from its conception

³ *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)* [2013] OJ L 180/31 ('Dublin III Regulation') Art 13.

⁴ *Ibid* Art 13(1).

⁵ *Ibid* Art 13(2).

⁶ *Ibid* Art 7.

⁷ Madeline Garlick, 'The Dublin System, Solidarity and Individual Rights' in V Chetail, P De Bruycker and F Maiani (eds), *Reforming the Common European Asylum System: the New European Refugee Law* (Martinus Nijhoff, forthcoming 2015) 17. See also Dublin III Regulation, above n 3, Art 17(1) and (2).

⁸ Dublin III Regulation, above n 3, Art 3(3). The Procedures Directive contains several provisions concerning 'safe' countries (*Council Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on*

and the use of which was previously subject to the protections of the Refugee Convention, as opposed to the detailed and more protection-sensitive recast Procedures Directive, was abused by Italy through its collaboration with Libya.⁹

The focus on point of first entry means that EU member states do not share the responsibility of assessing unauthorized arrivals on the basis of capacity, but rather leave the ‘burden’ where it first falls, which has serious consequences for the protection of asylum seekers.¹⁰ Returns to Greece under the Dublin Regulation had to be stopped from 2011 onwards as a result of a European Court of Human Rights (ECtHR) ruling that return was prohibited because of the inhumane and degrading conditions prevailing in Greece.¹¹ Greece had received many requests for asylum seekers to be returned there – a total of 9506 in 2009 and 6822 in 2010, although only about a thousand were actually returned in each year.¹²

The distribution of responsibility by this method does not utilize any of the criteria for determining the capacity of states to absorb or protect refugees discussed in Chapter 3, such as population density, GDP per capita, or environmental infrastructure. Thus it is inconsistent with Article 80 of the Treaty on the Functioning of the European Union, which provides that EU policies ‘shall be governed by the principle of solidarity and fair sharing of responsibility’.¹³ As commentators have pointed out, the Dublin Regulation may diminish, rather than build, solidarity among member states, and provide perverse incentives for gateway EU states to fail to meet the standards of treatment for refugees and asylum seekers set out in the other instruments comprising the

Common Procedures for Granting and Withdrawing International Protection (Recast) [2013] OJ L 180/60 (‘Recast Procedures Directive’) Arts 35–39).

⁹ See the discussion later in this chapter.

¹⁰ See generally, Jesuit Research Service Europe, *Protection Interrupted: The Dublin Regulation’s Impact on Asylum Seekers’ Protection (the DIASP Project)* (Jesuit Refugee Service, 2013); ECRE, *Dublin II Regulation: Lives on Hold* (2013).

¹¹ *M.S.S. v Belgium and Greece* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011).

¹² European Union Agency for Fundamental Rights, *Coping With a Fundamental Rights Emergency: The Situation of Persons Crossing the Greek Land Border in an Irregular Manner* (Thematic Situation Report, FRA, 2011) 36.

¹³ See *Consolidated Version of the Treaty on the Functioning of the European Union* [2012] OJ C 326/1.

CEAS.¹⁴ On the other hand, as Garlick notes, the inability to return asylum seekers to Greece as a result of decisions from the ECtHR and the Court of Justice of the European Union (CJEU) has effectively promoted solidarity.¹⁵

Another problem with the Dublin Regulation is that it does not actually result in much relocation. Only three per cent of asylum seekers are returned under Dublin,¹⁶ and transfers between states often cancel each other out.¹⁷ Asylum seekers have not been deterred from moving on to their preferred destination.¹⁸ This should not be surprising if the reasons for a preferred destination relate to inadequacies in reception or refugee status determination (RSD) in the country in which they first enter the EU; the presence of family members or a significant diaspora in the destination country who can assist with integration; better work prospects in the destination country;¹⁹ or if the ‘asylum shopping’ is in fact choreographed by people smugglers.²⁰ If states considered the potential long-term benefit of refugees, rather than simply the short-term costs, they might find choice,²¹ or at least consideration of the preferences of

¹⁴ For commentary, see Lillian M Langford, ‘The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of EU Solidarity’ (2013) 26 *Harvard Human Rights Journal* 217.

¹⁵ Garlick, ‘The Dublin System, Solidarity and Individual Rights’, above n 7, 7.

¹⁶ European Asylum Support Office (EASO), *Annual Report on the Situation of Asylum in the European Union 2013* (2014) 30.

¹⁷ Elspeth Guild et al, Civil Liberties, Justice and Home Affairs Committee, ‘New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection’ (2014) 39 (*New Approaches, Alternative Avenues and Means of Access Study*).

¹⁸ Susan Fratzke, *Not Adding Up: the Fading Promise of Europe’s Dublin System* (Migration Policy Institute Europe, March 2015) 7.

¹⁹ Cf, *ibid*, 20; Minos Mouzourakis, ‘“We Need to Talk About Dublin” Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union’ (Working Paper Series No 105, Refugee Studies Centre, December 2014) 8, 21.

²⁰ Richard Williams, *Beyond Dublin: A Discussion Paper for the Greens/EFA in the European Parliament* (18 March 2015) 7.

²¹ The UN Special Rapporteur on the human rights of migrants has argued for free choice to prevail: Report of the Special Rapporteur on the human rights of migrants, Francois Crépeau, *Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants*, A/HRC/29/36 (8 May 2015) [66]. See also the proposal by an NGO consortium discussed in Williams,

asylum seekers to be in their own best interests. This approach was proven to be effective in the CIREFCA arrangement explored in Chapter 6.

Furthermore, while the system aims to prevent multiple applications, it in fact results in multiple processing and associated costs with respect to individual asylum seekers.²² The ineffectiveness of the system has led some commentators to conclude that the appeal of Dublin is mainly symbolic, signifying control of borders in the name of EU citizens' welfare.²³ Mouzourakis critiques the symbolic value in light of the cost involved, particularly at a time of austerity.²⁴

THE HARMONIZATION INSTRUMENTS

Other components of CEAS, the 'Qualification Directive',²⁵ the 'Reception Directive'²⁶ and the 'Procedures Directive',²⁷ dictate the minimum standards for the treatment of asylum seekers and detail the procedures required for the determination of refugee status in EU member states.²⁸ The Qualification Directive also establishes complementary protection for persons who do not meet the 1951 Convention's refugee definition but are nonetheless at real risk of serious harm if returned to their country of origin.²⁹

The development of these instruments began in 1999 at the European Council's special meeting at Tampere, Finland. Like the Dublin III Regulation, they could also be viewed as evincing a preoccupation with

above n 20, 21. This proposal included a 'financial compensation fund' for uneven distribution of asylum seekers and refugees amongst EU countries.

²² Cf Mouzourakis, above n 19, 19.

²³ Mouzourakis, above n 19, 24.

²⁴ Ibid 26. See also, Williams, above n 20, 12.

²⁵ *Council Directive 2011/95/EU of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted* [2011] OJ L 337/9 ('Recast Qualification Directive').

²⁶ *Council Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection* [2013] OJ L 180/96 ('Recast Reception Directive').

²⁷ Recast Procedures Directive, above n 8.

²⁸ Controversially, the harmonized definition is only for citizens of countries outside the EU, as it is assumed that EU countries are safe.

²⁹ Recast Qualification Directive, above n 25, Art 2(f).

‘asylum shopping’, particularly where the minimum standards adopted in these instruments fail to conform with international minimum standards set out in, *inter alia*, the Refugee Convention.

Nevertheless, the preparation of these instruments has not just been a race to the bottom. In some ways they have set out standards that are higher than those offered previously by EU member states, as exemplified by their assurance of protection from persecution by non-state actors.³⁰ Furthermore, the rhetoric has moved away from focusing on ‘asylum shopping’ to protection and solidarity. Thus, for example, the preamble of the Reception Directive states that

[a] common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union’s objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union. Such a policy should be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States.³¹

In some respects, then, the CEAS may be viewed as giving flesh to the 1951 Refugee Convention by detailing arrangements for the allocation and discharge of responsibility to protect refugees at the regional level. On the other hand, there have been deviations from the international standards and best practice, both in the letter of the CEAS instruments and in their application. The flaws were so obvious that they led to the recasting of the instruments.³² Although a full assessment of the extensive literature on these flaws is beyond the scope of this chapter,³³ a few salient points concerning the quality of decision-making at first instance, the assumption of safety within the EU and the failure to share responsibility are made here.

³⁰ Ibid Art 6.

³¹ Recast Reception Directive, above n 26, Preamble (2).

³² See European Commission, ‘Green Paper on the Future Common European Asylum System’ (COM 301 final, 2007); European Commission, ‘Policy Plan on Asylum: An Integrated Approach to Protection Across the EU’ (COM 360 final, 2008).

³³ For insightful, prompt and extensive analysis of the second phase instruments, see Steve Peers, *The Second Phase of the Common European Asylum System: A Brave New World – or Lipstick on a Pig?* (Statewatch, 2013) <<http://www.statewatch.org/analyses/no-220-ceas-second-phase.pdf>>; see also UNHCR, ‘Moving Further Toward a Common European Asylum System: UNHCR’s Statement on the EU Asylum Legislative Package’ (June 2013) <<http://www.unhcr.org/51b7348c9.html>>.

One serious issue concerning application of the CEAS has been access to legal representatives, which has often been limited to the appeal of decisions,³⁴ in spite of the advantages of early representation to ensure that fewer mistakes are made at first instance and, therefore, that fewer appeals are launched. The new Procedures Directive provides for a right to legal assistance and representation at all stages of the asylum procedure (at the asylum seekers' own cost),³⁵ including free legal assistance and representation in appeals procedures on request (subject to possible exceptions, such as where the applicant has resources to pay),³⁶ and 'legal and procedural information free of charge in procedures at first instance' (subject also to possible exceptions).³⁷ This has been criticized on the basis that 'legal representation ... differs considerably from legal information. However detailed and precise, information about the asylum process does not amount to the assistance provided by a qualified legal advisor enabling the asylum seeker to support his or her case throughout the different stages of the application.'³⁸

The quality of many first instance interviews with asylum seekers has also been a concern.³⁹ The new Procedures Directive contains some new elements concerning the personal interview, including that: if reasonably requested, interviewers and interpreters should be of the same sex as the asylum seeker where possible;⁴⁰ interviews with children are carried out in a 'child-appropriate manner';⁴¹ the interview 'shall ensure that the applicant is given an adequate opportunity to present elements needed to substantiate the application';⁴² and there is a report or transcript of every interview which the applicant can see.⁴³ Training delivered by the new European Asylum Support Office (EASO), discussed below, may be very important in improving first instance decisions within the EU.⁴⁴ The

³⁴ EASO, *Annual Report on the Situation of Asylum in the European Union 2012* (Publications Office of the European Union, 2013) 67.

³⁵ Recast Procedures Directive, above n 8, Art 22.

³⁶ *Ibid* Art 20.

³⁷ *Ibid* Art 19.

³⁸ *New Approaches, Alternative Avenues and Means of Access Study*, above n 17, 76.

³⁹ EASO, *Annual Report ... 2012*, above n 34, 76.

⁴⁰ Recast Procedures Directive, above n 8, Art 15(3)(a).

⁴¹ *Ibid* Art 15(3)(e).

⁴² *Ibid* Art 16.

⁴³ *Ibid* Art 17.

⁴⁴ EASO developed a training module on interview techniques in 2012 (EASO, *Annual Report 2012*, above n 34, 78).

Procedures Directive also allows acceleration of apparently strong claims to refugee status,⁴⁵ which should be beneficial to both states and refugees.

A particularly serious limitation of the CEAS, in terms of the letter of the law, is its exclusive focus on extra-regional refugees. All the relevant instruments offer protection to ‘third country nationals’ (or stateless persons), meaning citizens of states that are not EU members. This reflects the Spanish, or Aznar, Protocol adopted following Spain’s reaction to the recognition of refugee status for members of the Basque separatist movement, Euskadi Ta Askatasuna (ETA) by other EU member states.⁴⁶ Thus, the relevant legal instruments operate on the assumption that no EU countries will produce refugees and that all EU countries are safe for refugees fleeing from non-EU member states. The first assumption ignores the obvious fact that European countries have produced numerous groups of refugees in the past and continue to do so, as evidenced by successful claims for refugee status in other countries such as Canada.⁴⁷ European courts have challenged the second assumption inherent in the CEAS, namely that all EU countries are safe for refugees. In *M.S.S. v Belgium and Greece*,⁴⁸ the Grand Chamber of the European Court of Human Rights examined the reception conditions of asylum seekers returned from Belgium to Greece under the Dublin II Regulation and found that Belgium knew or ought to have known that Greece was not meeting its international human rights commitments.⁴⁹ The ECtHR held, *inter alia*, that both Greece and Belgium were liable for violations of Article 3 of the European Convention on Human Rights (ECHR), which prohibits torture or inhuman or degrading treatment or punishment. The substandard conditions of detention in which many asylum seekers were held in Greece, the destitution they were subjected to when living in the Greek community, and the substandard Greek refugee status determination system were thus considered to constitute or result in inhuman and degrading treatment.

⁴⁵ Recast Procedures Directive, above n 8, Art 31(7).

⁴⁶ *Protocol (No 29) on Asylum for Nationals of Member States of the European Union* [2006] OJ C 321 E/1, 306–07; see also Elspeth Guild, ‘The European Geography of Refugee Protection: Exclusions, Limitations and Exceptions from the 1967 Protocol to the Present’ (2012) 17 *European Human Rights Law Review* 413, 418–20.

⁴⁷ Guild, above n 46, 420.

⁴⁸ *M.S.S. v Belgium and Greece* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011).

⁴⁹ *Ibid* [348].

Similarly, in *Case C411/10 (N.S. v SSHD)* and *M.E. (C-493/10), A.S.M., M.T., K.P., E.H.*,⁵⁰ the CJEU examined the norm of *non-refoulement* attaching to the prohibition on torture and related ill-treatment contained in Article 4 of the Charter on Fundamental Human Rights of the European Union,⁵¹ and held that the applicants could not be returned to Greece, owing to the established risk of inhuman or degrading treatment. The CJEU stated that '[i]t is not inconceivable that the system may, in practice, experience major operational problems in a given member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights'.⁵²

In *Tarakhel v Switzerland*, the ECtHR held that Switzerland would be in violation of Article 3 if it returned Afghan asylum seekers and their children to Italy given the paucity of accommodation and other facilities for vulnerable asylum seekers, and that assurances were required that adequate facilities would be provided in this case.⁵³

The ECtHR has in the past also identified serious flaws with European practices regarding interception and return of asylum seekers to countries outside the EU. In *Hirsi Jamaa and Others v Italy*,⁵⁴ the Court found that Italy violated the prohibition on collective expulsion contained in the fourth protocol to the ECHR, along with Article 3 of the ECHR, when it intercepted migrants and asylum seekers journeying by sea and returned them to Libya.

European authorities have made some improvements in response to this case law. The Dublin III Regulation contains an early warning mechanism that attempts to avoid such judicial challenges in the future.⁵⁵ EU member states have also committed, through EASO, to monitor and

⁵⁰ *N. S. v Secretary of State for the Home Department and M. E. and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (Court of Justice of the European Union, C-411/10 and C-493/10, 21 December 2011).

⁵¹ *Charter of Fundamental Rights of the European Union* [2010] OJ C 83/02.

⁵² *N. S. v Secretary of State for the Home Department and M. E. and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (Court of Justice of the European Union, C-411/10 and C-493/10, 21 December 2011) [81].

⁵³ *Tarakhel v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 29217/12, 4 November 2014).

⁵⁴ *Hirsi Jamaa and others v Italy* (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012).

⁵⁵ Dublin III Regulation, above n 3, Art 33.

improve the conditions for asylum seekers in Greece (see the discussion of the ERF later in this chapter).

These developments may well avoid some of the hardship endured by the asylum seekers on whose behalf the judicial challenges were brought, but they raise questions about whether, in the absence of a complete rethink of the Dublin rules, there has been much practical commitment to solidarity with a state that is suffering ‘particular pressure’. Steve Peers has written of the second phase CEAS instruments that ‘[o]n balance, the overall scoreboard is modestly positive, but as regards the Dublin rules in particular there have only been cosmetic changes to the previous objectionable legislation. This legislation in particular deserves the description of being merely “lipstick on a pig”.’⁵⁶

THE EUROPEAN ASYLUM SUPPORT OFFICE

In order to translate the standards in the CEAS instruments into practice, the EU has established the European Asylum Support Office (EASO), which is intended to support states as they develop their asylum systems.⁵⁷ It became operational in February 2011.⁵⁸ EASO’s activities during 2012 included organizing meetings and workshops on asylum policy and country of origin information (COI), publishing COI reports, training, quality improvement (such as in the treatment of unaccompanied minors), data analysis, and operational support to countries under pressure. It has also taken steps with regard to intra-EU relocation, resettlement and the CEAS’s external dimension.⁵⁹ Importantly, in September 2012 EASO established a Consultative Forum to exchange information with civil organizations and bodies working in asylum policy areas.⁶⁰ In 2014, EASO piloted ‘joint’ processing arrangements in order

⁵⁶ Peers, above n 33, 16. Garlick argues that Dublin has also ‘served as a distraction from the central task of building effectively-functioning asylum systems at national level.’ Madeline Garlick, ‘Protecting Rights and Courting Controversy: Leading Jurisprudence of the European Courts on the EU Dublin Regulation’ (2015) 29 *Journal of Immigration, Asylum and Nationality Law* 192, 201.

⁵⁷ *Regulation (EU) No 439/2010 of the European Parliament and the Council of 19 May 2010 establishing a European Asylum Support Office*, OJ 2010, L 132/11.

⁵⁸ European Asylum Support Office, ‘EASO History’ <<http://easo.europa.eu/about-us/easo-history/>>.

⁵⁹ EASO, *Annual Report 2012*, above n 34, 42.

⁶⁰ *Ibid* 43.

‘to test elements of the workflow and processes in the asylum procedure and reception, which can be performed jointly by different Member States and supported by EASO Processing Support Teams (experts of EASO and [Member States]) ...’.⁶¹ Evidence to date suggests that these pilot programmes have primarily focused on the performance in asylum interviews.⁶²

Responding to the problems faced by EU gateway states,⁶³ EASO deployed Asylum Support Teams to Greece to deal with a backlog of claims⁶⁴ and helped establish a new asylum service in 2013, a new first reception service and an appeals authority.⁶⁵ It also implemented a special support plan to assist Italy in areas such as data collection and analysis, country of origin information, reception conditions and emergency capacity.⁶⁶ Funding of €19.95 million for 2011–2013 from the ERF supported the changes in Greece.⁶⁷ The new asylum system in Greece holds promise, as it is comprised of civilian bodies staffed with trained professionals.⁶⁸ In 2013, the European Commission noted an

⁶¹ EASO, *Annual General Report 2014* (June 2015) <<https://easo.europa.eu/wp-content/uploads/BZAD15001ENN.pdf>> 22.

⁶² *New Approaches, Alternative Avenues and Means of Access Study*, above n 17, 83; EASO, *Newsletter March 2015*, <<http://www.emnbelgium.be/sites/default/files/attachments/easo-newsletter-march-2015.pdf>> 9–10.

⁶³ Garlick notes that it is disputed whether Dublin impacts more on ‘border’ (gateway states) or ‘non-border’ states. Madeline Garlick, ‘The Dublin System, Solidarity and Individual Rights’, above n 7, 5. However, it is certainly clear that Greece, Italy and Malta have been impacted by the present influx of asylum seekers and that Dublin does not alleviate the situation and may exacerbate it. Garlick concludes that ‘[e]ven if the absolute numbers of asylum-seekers actually transferred back to Member States at the external borders of the Union are limited, relative capacity also means that these numbers can impact significantly on Member States with weaker systems.’ *Ibid.* See also Fratzke, above n 18, 9.

⁶⁴ See EASO, ‘EASO Operating Plan for Greece Interim Assessment of Implementation’ (28 July 2014) <<https://easo.europa.eu/wp-content/uploads/Interim-assessment-on-the-implementation-of-the-EASO-Operating-Plan-for-Greece.pdf>> 7–10.

⁶⁵ EASO, *Annual Report 2012*, above n 34, 44–5.

⁶⁶ EASO, ‘EASO and Italy Sign Special Support Plan’ (Press release, 4 June 2013) <<https://easo.europa.eu/wp-content/uploads/EASO-Italy-Special-Support-Plan-Press-Release.pdf>>; EASO, *Annual Report 2012*, above n 34, 46; EASO, *Annual Report 2013* above n 16, 57–8.

⁶⁷ European Commission, ‘Communication from the Commission to the European Parliament and the Council: 4th Annual Report on Immigration and Asylum 2012’ (Report, COM 422 final, 2013) 12.

⁶⁸ EASO, *Annual Report 2012*, above n 34, 44.

increase in the asylum recognition rate in Greece in first instance decisions from less than one per cent to over fifteen per cent.⁶⁹ On the other hand, a paper prepared for the Greens/European Free Alliance in the European Parliament reported that ‘[a] group of about 200 Syrians camped out in Athens’ Syntagma square at the end of 2014 for nearly a month, protesting at their lack of accommodation, health care and access to the asylum procedure ...’.⁷⁰ Garlick notes that the effective deployment of Asylum Support Teams has been diminished because of the difficulty in finding sufficient numbers of experts for deployment for satisfactory periods of time.⁷¹ She notes, by contrast, that member states have been more willing to cooperate to support border operations through Rapid Border Intervention (RABIT) Teams.⁷²

Gateway states should not shirk all responsibility for improving their asylum systems, as they have, after all, been party to the Refugee Convention and Protocol for decades. While they may be under particular pressure as gateway states, other EU states, most notably Germany, also protect large numbers of refugees. Nevertheless, Langford’s comment that the violations in Greece are ‘not simply due to a lack of political will, but ... a result of inadequate financial resources and a failure on the part of other member states to share responsibility for accommodating asylum seekers’⁷³ holds some truth. The assistance offered to Greece through EASO and the ERF is, to a certain extent, a recognition of this. However, EASO’s present focus on the compliance of gateway states fails to deal with the inherent unfairness of the Dublin Regulation system.

SHARING FINANCES

The EU has financed its member states’ efforts in receiving and managing refugees and displaced people through the European Refugee Fund (ERF), in place from 2000 to 2013, and, from 2014, the Asylum, Migration and Integration Fund (AMIF).⁷⁴ Efforts to share resources with

⁶⁹ EASO, *Annual Report 2013*, above n 16, 23, note 23.

⁷⁰ Williams, above n 20, 8.

⁷¹ Garlick, ‘The Dublin System, Solidarity and Individual Rights’, above n 7, 21.

⁷² Ibid.

⁷³ Langford, above n 14, 262.

⁷⁴ *Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration*

refugee-hosting countries outside the EU include the EU Regional Trust Fund in Response to the Syrian Crisis.⁷⁵

The focus of the ERF was on assisting member states to implement the CEAS. It co-financed actions that improved accommodation infrastructures and services for receiving refugees and asylum seekers, provided legal and social assistance for asylum seekers, and resettled or relocated refugees and asylum seekers.⁷⁶ For the period 2008–2013, EU member states allocated €628 million to the ERF,⁷⁷ reduced to €614 million following transfer in 2010 of some funding to EASO.⁷⁸ Each EU member state received a fixed amount of funding from the ERF and the remainder of the fund was allocated on the basis of the number of refugees received and resettled by member states.⁷⁹

Although member states used the ERF to good effect, they failed to grapple properly with questions of capacity, so the ERF distribution did not tackle inequitable distribution of responsibility. As Thielemann argued at the end of its first five-year funding cycle, the ERF's redistribution of financial resources according to the number of refugees

Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [2014] OJ L 150/168 ('AMIF Regulation') <http://ec.europa.eu/dgs/home-affairs/financing/fundings/pdf/overview/regulation_eu_no_5162014_of_the_european_parliament_and_of_the_council_en.pdf>. The regulation entered into force on 21 May 2014, and applies from 1 January 2014 (ibid Art 63).

⁷⁵ *European Commission Decision on the establishment of a European Union Regional Trust Fund in response to the Syrian crisis, 'the Madad Fund'*, C(2014) 9615 (10 December 2014) <http://ec.europa.eu/enlargement/neighbourhood/pdf/key-documents/syria_2014_9615_f1_comission_decision793137.pdf>.

⁷⁶ European Commission, Migration and Home Affairs, 'Refugee Fund' <http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/refugee-fund/index_en.htm>.

⁷⁷ *Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme Solidarity and Management of Migration Flows and repealing Council Decision 2004/904/EC* [2007] OJ L 144, Art 12.

⁷⁸ *Decision No 458/2010/EU of the European Parliament and of the Council of 19 May 2010 amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2010 by removing funding for certain Community actions and altering the limit for funding such actions* [2010] OJ L 129/1 [8].

⁷⁹ *Decision No 573/2007/EC*, above n 77, Art 13.

received meant ‘that countries with large absolute numbers have benefited disproportionately, while other countries with much greater relative burdens (e.g. relative to population or size of GDP) have benefited less’.⁸⁰ Furthermore, the relatively small sum of funds provided meant that there was little incentive for states to accept more refugees.⁸¹ According to Thielemann, these provisions were inconsistent with the ERF’s aim to promote a ‘balance of efforts’ in receiving and bearing the consequences of displaced persons.⁸²

AMIF bases its funding allocation on a minimum amount, fixed for all countries except Cyprus and Malta, at €5 million together with a figure based on a combination of the average amount allocated under the ERF, the European Fund for the Integration of Third-Country Nationals and the European Return Fund during 2011–2013.⁸³ Because funding under AMIF depends on statistics for asylum seekers from previous years, AMIF replicates some of the unfairness of the ERF’s funding base. Garlick argues that ‘states which may have low numbers of asylum seekers by comparison with the top ... receiving states, may nevertheless have a significant [need] for support to address gaps in their asylum systems which are exposed when numbers rise, albeit only by a few thousand.’⁸⁴ The AMIF budget projected for 2014–2020 is €3.13 billion, which is more than the combined budget (€2.2 billion) for 2007–2013 of the three funds it replaces.⁸⁵ An allocation of €2.7 billion has been made for national programmes, while €385 million is for EU actions.⁸⁶ Eighty-five per cent of the funding for national programmes is pre-determined on the basis of average allocations under the three previous funds, while 20 per cent will be distributed on the basis of member states’ willingness to engage in resettlement or relocation activities and

⁸⁰ Eiko R Thielemann, ‘Symbolic Politics or Effective Burden-Sharing? Redistribution, Side-payments and the European Refugee Fund’ (2005) 43 *Journal of Common Market Studies* 807, 820.

⁸¹ *Ibid.*

⁸² *Ibid.* 808.

⁸³ AMIF Regulation, above n 74, Preamble [37].

⁸⁴ Garlick, ‘The Dublin System, Solidarity and Individual Rights’, above n 7, 22.

⁸⁵ European Council on Refugees and Exiles, *Information Note on the Regulation (EU) No 2014/516 of the European Parliament and the Council of 16 April 2014 establishing the Asylum Migration and Integration Fund* (ECRE, April 2015) <<http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1064>> 9.

⁸⁶ *Ibid.*

‘specific actions’ (mainly joint actions such as joint return operations).⁸⁷ Twenty per cent of the funding for national programmes must be directed towards asylum activities and 20 per cent to integration activities.⁸⁸

The European Council on Refugees and Exiles has identified a number of welcome attributes in AMIF, as compared with the ERF, such as the increase in the lump sum provided for each person resettled,⁸⁹ increased scope for emergency assistance,⁹⁰ and a move to multiannual programming.⁹¹ While the situation with respect to funding of refugee protection may have improved, efforts to share responsibility by hosting refugees have been limited, and not simply by the machinations of the Dublin Regulation system. In the ensuing paragraphs we examine EU efforts in dealing with the mass influx of refugees, in relocating refugees and asylum seekers within the EU, in resettling refugees from outside the EU, in capacity-building in countries neighbouring the EU, and in responding to maritime arrivals.

MASS INFLUX AND THE TEMPORARY PROTECTION DIRECTIVE

In 2001, the EU issued a Council Directive on minimum standards for providing temporary protection in the event of a mass influx of displaced persons into a member state of the EU.⁹² This Directive was adopted following the displacement of people from the former Yugoslavia. The purpose of the Temporary Protection Directive is to ensure that EU member states balance efforts in receiving and dealing with a mass influx

⁸⁷ Ibid.

⁸⁸ States can derogate from this direction of funding, but only if they can show that the objectives of the AMIF Regulation will still be served; member states who are struggling with providing asylum services will not be permitted to so derogate (ibid 10).

⁸⁹ Ibid 5.

⁹⁰ Ibid 12.

⁹¹ Ibid 16.

⁹² *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof* [2001] OJ L 212/12 (‘Temporary Protection Directive’). It should be noted that the definition of a mass influx is overly generous to states; it refers to ‘a large number of displaced persons’, rather than to numbers that cause states’ systems to be overwhelmed (ibid Art 2(d)).

of refugees. Under this Directive, it is the Council of the European Union that determines whether there is, in fact, a mass influx of displaced persons, once the European Commission has made a proposal (which in turn may be responding to a request from an EU member state).⁹³ If the Council decides that there is a mass influx of displaced persons, the temporary protection measures take effect, initially for one year.⁹⁴ Under Articles 9 to 16 of the Directive, those to whom temporary protection is afforded are to be provided with residence permits and access to housing, health care and education. They are also entitled to work and be reunited with family members, subject to certain conditions. Measures taken under the Temporary Protection Directive could benefit from ERF funding⁹⁵ and member states can indicate their capacity to receive additional persons based on a spirit of solidarity.⁹⁶

The Temporary Protection Directive has never been used. The European Commission opined in 2011 that there had been no mass influx since the Kosovar crisis in 1999 and that ‘the events of 2011 in the Southern Mediterranean have not led to an influx of persons into the EU of a comparable scale.’⁹⁷ An Italian request in 2011 to invoke the Temporary Protection Directive in response to the outflow of people from Tunisia and Libya during the Arab Spring was not accepted.⁹⁸ At the time of writing the Temporary Protection Directive was under review.

RELOCATION OF REFUGEES AND ASYLUM SEEKERS WITHIN THE EU

Other efforts to share responsibility within the EU for hosting refugees have been small scale. Since 2009, Malta has received a relatively significant influx of applicants for international protection as compared

⁹³ Ibid Art 5.

⁹⁴ Ibid Art 4.

⁹⁵ Ibid Art 24.

⁹⁶ Ibid Art 25.

⁹⁷ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Enhanced Intra-EU Solidarity in the Field of Asylum: An EU Agenda for Better Responsibility-Sharing and More Mutual Trust’ (Report, COM 835 final, 2011) 9.

⁹⁸ See Bruno Nascimbene and Alessia Di Pascale, ‘The “Arab Spring” and the Extraordinary Influx of People who Arrived in Italy from North Africa’ (2011) 13 *European Journal of Migration and Law* 341, 346–8.

with its population.⁹⁹ Consequently, an intra-EU relocation project from Malta (EUREMA) was established to relocate people to other EU states.¹⁰⁰ In addition, some states established bilateral arrangements with Malta for relocation. Under the first phase of EUREMA, which ended in 2011, 227 people were relocated to six of the ten states participating in EUREMA: France, Germany, Luxembourg, Portugal, Slovenia and the United Kingdom.¹⁰¹ Garlick states that over both phases (the period of 2009–2013), ‘some 647 people were relocated in total from Malta or moved on to other states; while in the same period, approximately 628 were transferred back to Malta under Dublin.’¹⁰²

EASO reported that views about intra-EU relocation were mixed. While some states viewed it as a positive exercise and a show of intra-EU solidarity, other states expressed the view that ‘regular and protracted use of stand-alone relocation in situations of disproportionate pressure could act as a pull factor for irregular migration and thus exacerbating the pressure rather than reducing it.’¹⁰³ Concern was also expressed about possible impact on resettlement quotas and the point that ‘intra-EU relocation should not be confused with resettlement of refugees from third countries’ was stressed.¹⁰⁴ Difficulties accessing timely EU funding were also noted.¹⁰⁵ Importantly, too, just as resettlement is viewed as a charitable or discretionary exercise above and beyond the obligations of asylum, most ‘maintained that participation in relocation should remain

⁹⁹ In 2013, for example, Malta received 20.2 asylum seekers for 1000 members of its population – the highest number of asylum seekers in proportion to population of 44 industrialized countries (UNHCR, *UNHCR Asylum Trends 2013: Levels and Trends in Industrialized Countries* (UNHCR, 2014) <<http://www.unhcr.org/5329b15a9.html>> 15).

¹⁰⁰ One difference between intra-EU relocation and resettlement to third states *should* be that in relocation protection responsibilities are transferred (thus a similar protection status or determining status is provided), whereas in resettlement the durable solution of permanent stay and the prospect of citizenship is offered. However, the AMIF Regulation (above n 74, Art 2) defines resettlement as a process whereby the resettled person may reside in an EU member state with refugee or subsidiary protection status or ‘any other status which offers similar rights and benefits under national and Union law’.

¹⁰¹ EASO, *Fact Finding Report on Intra-EU Relocation Activities from Malta* (EASO, 2012) <<http://www.refworld.org/pdfid/52aef8094.pdf>> 4.

¹⁰² Garlick, ‘The Dublin System, Solidarity and Individual Rights’, above n 7, 23.

¹⁰³ EASO, *Fact Finding Report*, above n 101, 16.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid* 14–15, 16.

voluntary, based on a political decision.¹⁰⁶ AMIF attempts to build solidarity among EU states through an incentive for relocation – a lump sum of €6000 for each relocated person.¹⁰⁷ One report states that

there were a number of challenges documented in relation to the project, including some people who were relocated who subsequently asked to return to Malta. While this was perceived as ingratitude by some States, a fact-finding report on the projects also documented failures to provide the full range of entitlements that had been promised, in relation to support, accommodation and access to schooling for children, among other things, as well as the difficulty of settling a small number of transferees in a new community with limited or no diaspora population from the countries or regions of origin of those transferred.¹⁰⁸

In mid-2015, responding to the increased number of boat arrivals from across the Mediterranean, the European Commission proposed the relocation of 40 000 asylum seekers from Italy and Greece based on a formula of size of population (40 per cent), GDP (40 per cent), average number of resettled refugees and asylum seekers over 2010–2014 (10 per cent) and the unemployment rate (10 per cent).¹⁰⁹ The proposal was debated at the European Council on 25–26 June 2015.

Although the European Council accepted that the 40 000 people should be relocated from Italy and Greece, the mandatory quotas proposed by the European Commission were not accepted. Instead, the European Council proposed that member states ‘agree by consensus by the end of July [2015] on the distribution of such persons, reflecting the specific situations of member states.’¹¹⁰ On 20 July 2015, the Council agreed by consensus on the distribution of 32 256 asylum seekers ‘in clear need of international protection’ and it was due to agree by December 2015 on

¹⁰⁶ Ibid 17.

¹⁰⁷ AMIF Regulation, above n 74, Art 18.

¹⁰⁸ *New Approaches, Alternative Avenues and Means of Access Study*, above n 17, 56. See EASO, *Fact-finding Report*, above n 101, 15.

¹⁰⁹ European Commission, ‘Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece’ (COM (2015) 286 final, 27 May 2015) <<http://www.refworld.org/docid/556884004.html>>.

¹¹⁰ European Council General Secretariat, ‘European Council Meeting (25 and 26 June 2015) – Conclusions’, EUCO 22/15, CO EUR 8 CONCL 3, 26 June 2015 [4](b).

the distribution of the remainder. A decision reflecting the modalities for relocation was adopted by the Home Affairs Ministers on 14 September 2015.¹¹¹

Although this first attempt to secure mandatory quotas was not successful, a second proposal for the mandatory quota system in respect of an additional 120 000 asylum seekers from Hungary, Greece and Italy was adopted by a majority vote of the European Parliament on 22 September 2015.¹¹²

It is notable that no choice is permitted by asylum seekers under these relocations, in contrast with both EUREMA and the Temporary Protection Directive which are premised on ‘double voluntariness’ – that is consent on the part of states and the individuals involved. The insistence on coercion may be unhelpful because it is likely to result in attempts to subvert the system,¹¹³ and results in enforcement costs.¹¹⁴ It is apparent that there has been little appetite so far for a wholesale change to the Dublin Regulation, as opposed to temporary derogations like these relocation efforts. A review by the Commission under way at the time of writing could, however, result in changes to the criteria for allocating responsibility.

RESETTLEMENT

The EUREMA project shows that even within the EU, solidarity through relocation has been muted, although the Syrian refugee crisis has stimulated more relocation efforts. When the focus moves from arrival points at the gateways of Europe to encompass Europe’s neighbouring countries and those at the front line of the mass movements of people from the Middle East and North Africa, the lack of solidarity becomes even more apparent. EASO’s summary compares the numbers and notes the obstacles for Syrians seeking to travel to the EU, and illustrates the point well:

¹¹¹ *Council Decision (EU) 2015/1523 of 14 September 2015 on Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece* [2015] OJ L 239/146.

¹¹² EU Parliament, ‘MEPs give go-ahead to relocate an additional 120,000 asylum seekers in the EU’ (Press Release, 17 September 2015) <http://www.europarl.europa.eu/pdfs/news/expert/infopress/20150915IPR93259/20150915IPR93259_en.pdf>.

¹¹³ Guild et al, *New Approaches, Alternative Avenues and Means of Access Study*, above n 17, 55.

¹¹⁴ *Ibid* 18.

The civil war in Syria was the most important cause of forced displacement in 2012. According to UNHCR as of 15 January 2013, there were 638 286 Syrian refugees registered or awaiting registration in Lebanon, Jordan, Turkey and North Africa, a near tenfold increase compared to May 2012. However, already by May 2013, this number rocketed, with humanitarian agencies estimating that these countries were hosting over 1,5 million Syrian refugees. In 2012, Syrian applicants in the EU (24 110) were a small fraction of these critical numbers, though this represented a 206% increase in comparison to 2011 (when the total was 7885). The applications made by Syrian nationals increased very rapidly from summer 2012 to November, when they dropped off considerably to levels seen in mid-July (approximately 2750 per month). This was mostly due to the fact that a significant proportion of applications were from Syrians already in the EU who decided to make *sur place* applications as the situation worsened in their country and precluded their return. As the stock of persons finished making their applications for protection, the numbers of applications dropped as only Syrians who were actually travelling to the EU directly from Syria or a transit country and crossing the EU external border were left to make applications. Their numbers were diminished by the closure of embassies in Syria and much reduced opportunities. Those fleeing thus had to obtain legitimate documentation for travel to the EU.¹¹⁵

In general, Europe's resettlement efforts have not been remarkable. Some EU member states, such as Denmark, Finland, Ireland, the Netherlands, Sweden and the United Kingdom, have a tradition of resettlement.¹¹⁶ Even so, the numbers are very small. EASO documented a total of 4403 resettlement departures to EU member states assisted by UNHCR in 2012.¹¹⁷ The figure for 2013 was 5500.¹¹⁸ Analysed in terms of either raw numbers or per capita, the total number of resettlement places offered by Europe does not compare favourably with the United States (66 300 in 2012), Canada (9600 in 2012), or Australia (5900 in 2012).¹¹⁹ As the European Parliament's Committee on Migration, Refugees and Displaced Persons noted, '[a]lthough European States comprise nearly two-thirds of those countries offering resettlement places annually,¹²⁰ they provided just 5,500 places out of over 80,000 resettlement places

¹¹⁵ EASO, *Annual Report 2012*, above n 34, 14.

¹¹⁶ *Ibid* 59.

¹¹⁷ *Ibid* 60.

¹¹⁸ Council of Europe: Parliamentary Assembly, 'Resettlement of Refugees, Towards Greater Solidarity' (Report, Council of Europe, 1 October 2012) 1.

¹¹⁹ UNHCR, *Global Trends 2012: Displacement: The New 21st Century Challenge* (UNHCR, 2013) 19.

¹²⁰ In 2013, 27 countries offered resettlement places.

available globally in 2013. The United States alone provides two-thirds of the resettlement places made available in the world each year.¹²¹

The fact that, proportionally, Europe receives more asylum seekers than other parts of the industrialized world, including North America,¹²² may help explain the historically low European participation in resettlement as compared with some other industrialized countries. It is, however, difficult to defend the resettlement statistics when one considers that the ratio of Syrian refugees in Lebanon to Lebanese locals is now 1:4. It has also been noted that the EU has in fact been receiving 'a diminishing number of asylum seekers since 1999 until 2012 relative to its increasing size and wealth (notwithstanding the 2008–2013 recession). An EU of 15 Member States received more asylum seekers (and had higher recognition rates for persons in need of international protection) than an EU of 28 Member States in 2013.'¹²³

In 2012, the Joint EU Resettlement Programme¹²⁴ was adopted, pursuant to which common priorities are set and funding allocated through the ERF/AMIF, which could in theory work to increase Europe's focus on resettlement. Both the ERF Regulation and its replacement, the AMIF Regulation, provide incentives for resettlement in the form of a lump sum for each resettled person.¹²⁵ The Syrian crisis may be encouraging EU member states to increase resettlement places, as European countries respond to UNHCR calls for resettlement places for Syrians by taking 30 000 persons in 2013–2014 and a further 100 000 in 2015–2016.¹²⁶ As discussed in Chapter 3, in mid-2015 the European Commission proposed resettlement of an additional 20 000 refugees from priority areas using the distribution factors of population size, GDP, average contribution to refugee protection in the preceding four years and

¹²¹ Council of Europe, Parliamentary Assembly, above n 118, 11.

¹²² Europe received 484 600 new asylum seekers in 2013, as compared with 98 700 new asylum seekers in North America: UN High Commissioner for Refugees (UNHCR), 'UNHCR Asylum Trends 2013: Levels and Trends in Industrialized Countries' (Report, UNHCR, 21 March 2014) 2–3.

¹²³ *New Approaches, Alternative Avenues and Means of Access Study*, above n 17, 88.

¹²⁴ *Decision No 281/2012/EU of the European Parliament and of the Council of 29 March 2012 amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows'* [2012] OJ L 92/1.

¹²⁵ AMIF Regulation, above n 74, Art 17.

¹²⁶ Council of Europe, Parliamentary Assembly, above n 118, 16–17.

the unemployment rate.¹²⁷ As with the proposal for relocation of 40 000 asylum seekers from Italy and Greece discussed earlier in this chapter, the concept of mandatory quotas proposed by the European Commission was not accepted. Instead, the European Council came to an agreement that ‘all Member States will participate including through multilateral and national schemes in the resettling of 20,000 displaced persons in clear need of international protection, reflecting the specific situations of Member States.’¹²⁸ In the end over 22 000 places were offered by EU states. The Commission will make a proposal for a permanent resettlement scheme in 2016, building on the experience with the pilot scheme for the 20 000-odd refugees in 2015. This is envisaged as a true joint scheme whereby a permanent, annual quota of refugees is resettled according to factors relating to capacity.¹²⁹

Another notable way in which EU countries assist the resettlement process are the emergency transit centres in Romania and Slovakia, which enable UNHCR to take refugees in need of resettlement out of threatening situations and process their resettlement applications in a safe place. These two centres facilitated the evacuation of 218 refugees from unsafe situations during 2012.¹³⁰ Although the centres are valuable, the number of people assisted by them is small.

REGIONAL PROTECTION PROGRAMMES

Resettlement is one aspect of the ‘external dimension’ of the EU’s asylum and migration policy. In addition to the small but growing efforts concerning resettlement in the EU, there has been a trend towards capacity-building in third countries as part of the ‘external dimension’, through EU Regional Protection Programmes (RPPs).¹³¹ These seek to

¹²⁷ European Commission, *Commission Recommendation of 8.6.2015 on a European Resettlement Scheme*, C(2015) 3560; European Commission, *Annex to the Commission Recommendation on a European Resettlement Scheme*, C(2015) 3560 (8 June 2015).

¹²⁸ European Council General Secretariat, above n 110, [4](e).

¹²⁹ European Commission, ‘Managing the Refugee Crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration’ (23 September 2015) COM (2015)490 final, 13.

¹³⁰ Council of Europe: Parliamentary Assembly, ‘Resettlement of Refugees, Towards Greater Solidarity’ (Report, Council of Europe, 1 October 2012) 16.

¹³¹ European Commission, ‘Communication ... 4th Annual Report on Immigration and Asylum 2012’, above n 67, 13–14; EASO, *Annual Report 2012*, above n 34, 63–4.

improve refugee protection (for example, by supporting RSD and reception) and to offer durable solutions, including resettlement.¹³²

Five RPPs and Regional Development and Protection Programmes (RDPPs) have been established in Eastern Europe (focused on Belarus, Moldova and Ukraine), the Great Lakes of Africa (focused on Tanzania), the Horn of Africa (focused on Kenya, Djibouti and Yemen), Eastern North Africa (focused on Tunisia, Libya and Egypt) and the Middle East (focused on Lebanon, Jordan and Iraq).¹³³ The last of these is a response to the Syrian refugee crisis and essentially attempts to implement the Refugee Aid and Development/Targeted Development Assistance concept. As explained in a discussion paper published by the European Council on Refugees and Exiles (ECRE), the RDPP aims to '[offset] the negative impacts of refugees' presence on hosting countries and [to support] their positive impacts.'¹³⁴

The ECRE discussion paper describes some of the activities undertaken under the RPPs and RDPPs. There is considerable variation between the programmes, but each has included such activities as: ensuring border officials are knowledgeable about asylum and refer asylum cases to the correct authorities; training in RSD and COI; improving education opportunities in refugee camps; and resettlement. As the discussion paper states, 'RPP projects have contributed to the overall improvement of conditions, and the capacities of the authorities at the national level',¹³⁵ noting that the projects have been 'large and diverse in scope and objectives, but with limited funding'.¹³⁶ The paper also questions the extent to which RPPs are really additional to or different from regular projects put in place in refugee hosting countries by UNHCR,¹³⁷ and the extent to which the RPPs are 'regional':

What is the main objective of addressing the region rather than the country, even if most – if not all the activities – are at the national level? What is the added value of a regional approach and what, thus far, have been the main challenges that have prevented it from happening? Similarly, what do we

¹³² European Commission, Migration and Home Affairs, 'External Aspects: Regional Protection Programmes' (14 August 2013) <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/external-aspects/index_en.htm>.

¹³³ Ibid; Aspasia Papadopoulou, 'Regional Protection Programmes: an effective policy tool?' (Dialogue on Migration and Asylum in Development: Discussion Paper, European Council on Refugees and Exiles, January 2015).

¹³⁴ Papadopoulou, above n 133, 14.

¹³⁵ Ibid 15.

¹³⁶ Ibid 17.

¹³⁷ Ibid.

mean by ‘protection’ and how large is the scope? Finally, what is a ‘programme’ and do the projects funded by the EU really qualify to be called a Programme in each of these cases? Presently, the RPP examples in different regions have demonstrated a predominance of national level projects funded by the EU and implemented by UNHCR, most of which have been providing classic UNHCR services. It would be misleading to call them a regional programme due to the fact that regional activities were limited and may not have included all countries impacted by either the initial refugee flow, or secondary movements occurring in the search for self-reliance.¹³⁸

The discussion paper notes that the resettlement component of RPPs has been weak. While there are financial incentives to resettle from the regions covered by RPPs, resettlement numbers have remained small.¹³⁹ RPPs could, therefore, be criticized as aiming to confine people to regions on the periphery of the EU.

The number of boat arrivals in Europe, which, although small compared with the number of refugees crossing land borders, increased in 2008, in 2011, 2013 and again in 2015. There have been several tragedies at sea and the phenomenon has created difficult conditions for some EU states,¹⁴⁰ prompting the EU Fundamental Rights Agency (FRA) to advocate for EU action to improve the protection space in transit countries.¹⁴¹ Viewed from this perspective, the concept of RPPs is certainly worthwhile, but it is clear that improving protection in transit countries is a very long-term project.¹⁴²

MARITIME ARRIVALS

FRA has also called for a ‘functioning rescue system in the Mediterranean’,¹⁴³ noting the problems that arise from the lack of clear rules concerning disembarkation,¹⁴⁴ as well as joint processing by all the

¹³⁸ Ibid 16.

¹³⁹ Ibid 17.

¹⁴⁰ For analysis, see European Union Agency for Fundamental Rights, *Fundamental Rights at Europe’s Southern Sea Borders* (FRA, 2013) ch 1. Since mid-2013 there have been more tragedies, most notably a sinking off Lampedusa in October 2013 and another off the coast of Libya in April 2015.

¹⁴¹ Ibid 10.

¹⁴² FRA (ibid 49) notes that ‘none of the neighbouring coastal states provide effective protection to persons seeking asylum’.

¹⁴³ Ibid 10.

¹⁴⁴ Ibid 51.

relevant states,¹⁴⁵ and various improvements in the treatment of migrants during rescue, on disembarkation and during returns.¹⁴⁶ As discussed in Chapter 3, UNHCR and the IMO have also been looking for solutions in dealing with maritime arrivals.¹⁴⁷ The situation in the Mediterranean in 2014 and 2015 has brought the issue to a head, with EU member states at loggerheads over whether or not proactive search and rescue operations act as a ‘pull factor’.

During 2014, Italy ran Operation Mare Nostrum, a proactive search and rescue operation over a vast area, but this was replaced by a Frontex¹⁴⁸ operation (Operation Triton) with a limited radius, funding and brief; the mission of Operation Triton has since been expanded. The sinking of a boat off Libya’s coast drew further reactions from Europe, including the establishment of EU Naval Force – Mediterranean (EUNAVFOR Med) and an initiative by the UK and France to seek a UN Security Council Resolution on the issue.¹⁴⁹

The mission of EUNAVFOR Med is ‘to identify, capture and dispose of vessels as well as enabling assets used or suspected of being used by migrant smugglers or traffickers’.¹⁵⁰ Its first phase focused on surveillance and assessment, but the second phase would move to enforcement action on the High Seas. The limits of the first phase were necessary given that the primary rules governing the High Seas are freedom of the seas and the principle that the flag state has jurisdiction over what happens on board a ship.¹⁵¹ The Security Council adopted a resolution on

¹⁴⁵ Ibid 52.

¹⁴⁶ Ibid chs 5–8.

¹⁴⁷ In addition to the initiatives discussed in Chapter 3, it should be noted that UNHCR has adopted a 12-point plan entitled ‘Central Mediterranean Sea Initiative (CMSI): EU Solidarity for Rescue-at-Sea and Protection of Refugees and Migrants’ (13 May 2014).

¹⁴⁸ Frontex is the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU, established by Council Regulation (EC) No 2007/2004, 26 October 2004, OJ L 349/1.

¹⁴⁹ Niels Frenzen, ‘UK and France to Seek UN Security Council Authorisation for Military Action Against Smuggler Boats’ (24 April 2015) <<http://migrantsatsea.org/2015/04/24/uk-and-france-to-seek-un-security-council-authorisation-for-military-action-against-smuggler-boats/>>.

¹⁵⁰ Council of the European Union, ‘Council Launches EU Naval Operation to Disrupt Human Smugglers and Traffickers in the Mediterranean’ (Press release 482/5, 22 June 2015) <<http://www.consilium.europa.eu/en/press/press-releases/2015/06/22-fac-naval-operation/>>.

¹⁵¹ See Article 87 of the UN Convention on the Law of the Sea concerning freedom of the High Seas, Article 92 UNCLOS concerning jurisdiction of the

9 October 2015.¹⁵² In the resolution, the Council calls upon member states to inspect vessels ‘that they have reasonable grounds to believe have been, are being, or imminently will be used by organised criminal enterprises for migrant smuggling or human trafficking from Libya’ on the high seas off the coast of Libya which are stateless, or with the consent of the flag state.¹⁵³ In addition, it authorized for one year the seizure of flagged vessels so inspected.¹⁵⁴ The Council then ‘under-scored’ that ‘further action with regard to such vessels inspected under the authority of paragraph 7, including disposal, will be taken in accordance with applicable international law with due consideration of the interests of any third parties who have acted in good faith.’¹⁵⁵ The Council also called upon states and regional organizations acting under the Resolution ‘to provide for the safety of persons on board as an utmost priority and to avoid causing harm to the marine environment or to the safety of navigation.’¹⁵⁶

A FLOOD OF PROPOSALS

In response to the stream of unauthorized arrivals into Europe over 2014 and 2015, many ideas about better responses to the crisis have emerged. One alternative to deterrence and forcible destruction of smugglers’ boats is to attempt to increase the means of lawful entry into the EU, thereby diminishing the market for smuggling. FRA has developed a toolbox of legal entry channels.¹⁵⁷ The Special Rapporteur on the human rights of migrants has pointed to the pressing demographic changes, such as the aging workforce in Europe, as an argument in favour of migration policies that ‘facilitate mobility and celebrate diversity.’¹⁵⁸ Others have proposed models of responsibility-sharing based on a distribution key

flag state, Article 105 UNCLOS concerning seizure of a pirate ship, and Article 110 UNCLOS regarding the right of visit.

¹⁵² *Maintenance of International Peace and Security*, SC Res 2240, UN SCOR, 7531st mtg (9 October 2015). Analysis of this resolution is beyond the scope of this book, however it certainly ventures into uncharted waters.

¹⁵³ *Ibid* [5] and [6].

¹⁵⁴ *Ibid* [8].

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid* [10].

¹⁵⁷ FRA, ‘Legal entry channels to the EU for persons in need of international protection: a toolbox’ (FRA Focus, 02/2015).

¹⁵⁸ Report of the Special Rapporteur on the Human Rights of Migrants, n 21 above, [76]–[78].

similar to the key underlying the quota system adopted for the relocation of the 120 000 asylum seekers from Hungary, Italy and Greece, as a premise for not only relocation schemes, but for 'redistribution of relevant financial resources or for common resettlement schemes at the EU level'.¹⁵⁹ One paper has advocated for a combination of a tradable refugee-admission quota combined with a matching mechanism (i.e. between states and individuals) in order to give some weight to asylum seeker preferences.¹⁶⁰ Others have suggested a more extensive financial compensation mechanism that is capacity-based, rather than based on absolute numbers of applications, along with voluntary physical relocation of asylum seekers.¹⁶¹ Others still have suggested as a preliminary step to work within Dublin but ensure proper RSD and reception across the EU and lessen the coercive aspects by using the Dublin interview process to identify asylum seekers' preferences and explore the matter with the preferred destination state.¹⁶² Another report has recommended expansion of means of lawful entry into the EU, mutual recognition of positive asylum decisions, and alternatives to Dublin based either on asylum seeker choice, or preference matching, or a distribution key combined with financial support for the states concerned.¹⁶³ Notably, the Australian model of extra-territorial processing has not resulted in firm proposals in Europe.¹⁶⁴

¹⁵⁹ Martin Wagner and Albert Kraler, 'An Effective Responsibility-Sharing Mechanism' (Thematic Paper, ICMPD Asylum Programme for Member States, October 2014) 34.

¹⁶⁰ Hillel Rapoport and Jesus Fernandex-Huertas Moraga, 'Tradable Refugee-admission Quotas: A Policy Proposal to Reform the EU Asylum Policy' (Working Paper, RSCAS 2014/101, European University Institute, October 2014).

¹⁶¹ Matrix Insight Ltd et al, Civil Liberties, Justice and Home Affairs Committee, 'What System of Burden-Sharing Between Member States for the Reception of Asylum Seekers?' (2010).

¹⁶² *New Approaches, Alternative Avenues and Means of Access Study*, above n 17.

¹⁶³ Elspeth Guild et al, Civil Liberties, Justice and Home Affairs Committee, 'Enhancing the Common European Asylum System and Alternatives to Dublin' (2015).

¹⁶⁴ Madeline Garlick, 'The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims', March 2015 <<http://www.migrationpolicy.org/news/potential-and-pitfalls-extraterritorial-processing-asylum-claims>>.

CONCLUSION

The focus on extra-regional refugees and the failure to fully grapple with fair responsibility-sharing under the CEAS is not surprising given the EU's historical focus on policing its 'external' borders. While EU states have spent considerable energy removing barriers for the internal movement of EU citizens, they have at the same time been implementing more restrictive policies for the entry of non-EU migrants at their frontiers. The development of CEAS has been driven not simply by a desire to improve protection and prevent asylum from looking like a lottery, but by the concern of the wealthier countries at the core of the EU that their economies are a pull factor for irregular migrants and that asylum is abused by economic migrants. Consequently, while the slogan for the internal market was 'Europe without frontiers', a common critique of the EU's approach to migrants and refugees is that it has served as 'Fortress Europe'. Klug writes that EU asylum policy has never discarded its connection with immigration control objectives.¹⁶⁵ As a consequence, Gibney has described the regionalism operating in the Common European Asylum System as engineered regionalism¹⁶⁶ – that is, a method of containment whereby the Global North keeps the Global South out. In mid-2015 Europe seemed torn between containment and deterrence, on the one hand, and responsibility-sharing through measures such as the adoption of quotas, more mobility and development-based means to improve protection within countries of first asylum, on the other.

¹⁶⁵ Anja Klug, 'Regional Developments: Europe' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press, 2011) 117, 128.

¹⁶⁶ Matthew J Gibney, 'Forced Migration, Engineered Regionalism and Justice between States' in Susan Kneebone and Felicity Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers: Challenges Ahead* (Berghahn Books, 2007) 57.

8. The Mexico Declaration and Plan of Action and Cartagena+

Meeting in Mexico City on 16 November 2004 to commemorate the 20th anniversary of the 1984 Cartagena Declaration, 20 Latin American governments adopted the Mexico Declaration and Plan of Action (MPA),¹ an innovative regional arrangement that focused on protecting refugees in border areas, urban centres and through resettlement programmes. The MPA reflects the strong in-principle commitment to asylum in the region. It was endorsed by the General Assembly of the Organization of American States in 2006,² and re-affirmed by 18 governments in the Brasilia Declaration in 2010.³ At the 30th anniversary of the Cartagena Declaration in 2014, more than 30 Latin American and Caribbean countries adopted a new Declaration and Plan of Action that builds on the MPA – the Brazil Declaration and Plan of Action.⁴

Like the CPA, the MPA had been a response to a particular refugee crisis – the Colombian refugee crisis.⁵ Countries of first asylum, such as Ecuador, had indicated that they were unable to bear all the costs (both

¹ *Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America* (16 November 2004) ('MPA') <http://www.oas.org/dil/mexico_declaration_plan_of_action_16nov2004.pdf>.

² *OAS General Assembly Resolution 2232: Protection of Asylum Seekers, Refugees, and Returnees in the Americas* (6 June 2006) 4th sess, OAS Doc AG/RES 2232 (XXXVI-O/06).

³ *Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas* (adopted by the countries present at the International Meeting on Refugee Protection, Statelessness and Mixed Migration Movements in the Americas) (11 November 2010).

⁴ *Brazil Declaration, A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean and Brazil Plan of Action, A Common Roadmap to Strengthen Protection and Promote Sustainable Solutions for Refugees, Displaced and Stateless Persons in Latin America and the Caribbean within a Framework of Cooperation and Solidarity* (3 December 2014) ('Brazil Declaration and Plan of Action') <<http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2014/9865>>.

⁵ MPA, above n 1, Ch I.

social and economic) of providing protection to refugees.⁶ Unlike the CPA, the MPA has prompted many Latin American governments to implement changes to their national laws with respect to the rights of refugees.⁷

The MPA was very practically oriented. It sought to advance legal research and doctrinal development, as well as improve training for refugee workers and capacity-building with respect to integration of refugees. It also asked the media to promote ‘the values of solidarity, respect, tolerance and multiculturalism’.⁸ Most importantly, the MPA established three courses of action for enhancing refugee protection and durable solutions in the region. Each of these – Cities of Solidarity, Borders of Solidarity and Resettlement in Solidarity – are described in the following paragraphs.

CITIES OF SOLIDARITY

The first course of action, the Cities of Solidarity Programme for Self-Sufficiency and Local Integration, sought to address the needs of a growing number of refugees living in Latin American cities.⁹ It aimed to promote self-reliance and local integration of refugees in urban areas by providing access to education, health services, employment and other income-generating activities.¹⁰ Under Cities of Solidarity, at least 16

⁶ See MPA, above n 1, Ch III(2); also Ministerio de Relaciones Exteriores Comercio e Integración, *Política del Ecuador en Materia de Refugio* (Gobierno Nacional de La República del Ecuador, 2008) 7, 44.

⁷ UNHCR, *The Mexico Plan of Action to Strengthen International Protection of Refugees in Latin America: Main Achievements and Challenges During the Period 2005–2010* (UNHCR, October 2010) 2. In many of these legislative changes, governments have referred either directly or indirectly to the MPA as a motivating factor for implementing reform; see, for example, Ministerio de Relaciones Exteriores Comercio e Integración, above n 6, 15; UNHCR, ‘Chile Adopta Ley de Protección de Refugiados’ (10 March 2010) <[http://www.acnur.org/t3/index.php?id=559&tx_ttnews\[tt_news\]=1184](http://www.acnur.org/t3/index.php?id=559&tx_ttnews[tt_news]=1184)>.

⁸ MPA, above n 1 (preambular paragraph 9).

⁹ According to UNHCR, two-thirds of all asylum seekers and refugees in Latin America reside in cities; see UNHCR, *The State of the World’s Refugees: In Search of Solidarity* (Oxford University Press, 2012) 193.

¹⁰ *Ibid* 160.

cities across six different countries in the region entered into agreements with UNHCR to provide protection services to refugees.¹¹

UNHCR focused strategically on integrating refugees into programmes already in place for local nationals, instead of establishing parallel programmes for refugees in urban centres.¹² When UNHCR recognized protection shortfalls in particular cities, local municipalities and UNHCR developed programmes to support refugees, as well as migrants and nationals in need. For example, in Desamparados in Costa Rica, the municipal government, UNHCR and NGOs established the Casa de Derechos (House of Rights) to provide legal assistance, psychosocial care and microcredit opportunities for refugees, migrants and Costa Ricans.¹³ The microcredit programme, which is run by UNHCR's implementing partner Asociación de Profesionales en Desarrollo para la Promoción de Personas en Condición de Pobreza (APRODE),¹⁴ became self-replenishing and does not need any further donor support to operate.¹⁵ Viewed as a model programme,¹⁶ the microcredit programme has assisted at least 500 people, particularly women, to start up small businesses in Costa Rica.¹⁷ Twelve hundred loans have been given since 2003,¹⁸ approximately 70 per cent of them to refugees.¹⁹ Asociación de Consultores y Asesores Internacionales (ACAI),²⁰ which provides services for refugees in San José and Desamparados, has helped refugees develop business plans and assesses the integration potential of applicants, by assessing, for example, the likelihood that an applicant will remain in Costa Rica for a reasonable length of time.²¹ In 2013, when field work

¹¹ See Andrea Durango and Sonia Aguilar, "'Ciudades Solidarias' Trabajan para Integración de Refugiados en las Américas' (11 November 2010) <<http://www.acnur.org/t3/noticias/noticia/ciudades-solidarias-trabajan-para-integracion-de-refugiados-en-las-americas/>>.

¹² Interview with Juan Carlos Murillo González, UNHCR Costa Rica, San José, 18 April 2013.

¹³ UNHCR, *The Mexico Plan of Action*, above n 7, 19.

¹⁴ Association of Professionals in Development for the Promotion of Persons in Poverty.

¹⁵ Interview with Juan Carlos Murillo González, above n 12.

¹⁶ *Ibid.*

¹⁷ The microcredit scheme prioritizes single women who are heads of household, women with young children and survivors of domestic violence (Interview with Juan Carlos Murillo González, above n 12).

¹⁸ Interview with Gloria Maklouf, ACAI, San José, 19 April 2013.

¹⁹ *Ibid.*

²⁰ Association of International Consultants and Advisors.

²¹ Interview with Gloria Maklouf, above n 18.

was conducted for the purposes of this book, there had been a decline in demand for the microcredit scheme, possibly because of the Global Financial Crisis.²² ACAI and UNHCR have also been working on the issue of waged employment, doing such things as approaching businesses, recruitment offices, Chambers of Commerce and others to ensure that they are aware of the legality and benefits of employing refugees and trying to establish a database of refugees' *curricula vitae*.²³ Nevertheless, refugees still faced many obstacles in gaining access to education, health and housing.

In Ecuador's capital, Quito, the municipal government developed a plan in 2009 to promote the rights of persons in situations of 'human mobility'.²⁴ Under this plan, the Casa de la Movilidad Humana (House of Human Mobility) provides legal, psychological and technological development support to refugees, internally displaced persons, migrants and Ecuadorans returning from abroad.²⁵ This plan was not specifically related to the MPA, having been designed to implement the Ecuadoran Constitution's progressive protections for migrants – provisions that originated when Ecuadorans were returning home in the late 1990s. It is, nevertheless, consistent with the MPA's focus, which is 'geographic' rather than 'population based'²⁶ and seeks to avoid establishing parallel programmes for refugees. Another important programme is the Accelerated Basic Cycle of Education in Quito under which people aged between 17 and 26 can complete three years of high-school education in one year. Established for all Quito inhabitants, refugees have benefited from this programme.

The municipal government of Quito has also implemented several education campaigns targeting discrimination and xenophobia against Colombian refugees in the city.²⁷ The campaigns are important because, as a 2012 study for the Facultad Latinoamericana de Ciencias Sociales

²² Ibid.

²³ Ibid; Interview with Juan Carlos Murillo González, above n 12.

²⁴ On 18 February 2009, the Metropolitan District of Quito adopted Municipal Ordinance 0271, which, along with the District Plan of Human Movement, regulates the promotion and protection of the rights of people living in situations of human mobility in Quito.

²⁵ Ibid.

²⁶ MPA, above n 1, Ch 1 [10].

²⁷ Durango and Aguilar, above n 11.

(FLACSO)²⁸ found, 52 per cent of the refugee population in the cities of Quito and Guayaquil feel that they are discriminated against.²⁹

The success of the Cities of Solidarity programme depends on the level of commitment and will of local governments to engage in refugee protection issues. The central Ecuadoran government has not set the agenda, having left the MPA in the hands of municipal governments, UNHCR and NGOs. It has contributed US\$60 million for health care, education and subsidies for gas and electricity. However, acquisition of citizenship, which is clearly the domain of the central government, has been difficult and costly, even though it would be an effective way of integrating refugees into Ecuadoran society.

As the MPA did not require cities to make particular commitments with respect to refugees in order to be called a City of Solidarity, cities have varied greatly in their level of commitment to the programme. In some cities, municipal governments have developed innovative programmes of action to assist refugees in urban centres, whereas in others becoming a City of Solidarity has largely been a symbolic act. The participation of NGOs in the Cities of Solidarity programme has also differed dramatically among cities, with many NGOs operating excellent programmes that seem to operate independently of the MPA.

Issues relating to institutional memory and responsibility within government and more general problems with capacity also prevail in these middle-income countries. One illustration is the problem of documentation in Ecuador, where refugees' identification documents were not coordinated with the Ecuadoran civilian register, causing difficulty for refugees who wanted to do even simple things like cash their pay cheques.³⁰ When we conducted our field work in 2013, a proposal was pending under which the Ecuadoran Civil Registration Office was to provide documentation to recognized refugees. The proposal was an initiative of the Ecuadoran Refugee Directorate in alliance with the Civil Registration Office and UNHCR.³¹

²⁸ Latin American Social Sciences Institute.

²⁹ Carlos Ortega and Oscar Ospina, *No se Puede ser Refugiado Toda la Vida ...': Refugiados Urbanos: El Caso de la Poblacion Colombiana en Quito y Guayaquil* (FLACSO, 2012) 120–1.

³⁰ Interview with Karina Sarmiento, Asylum Access Ecuador, Quito, 22 April 2013.

³¹ Ibid.

BORDERS OF SOLIDARITY

The second pillar of the MPA, the Integrated Borders of Solidarity Programme, aimed to increase the presence of state institutions, UNHCR and civil society projects in the border regions of the countries neighbouring Colombia. The Borders of Solidarity programme sought to compile data on unregistered Colombians in border regions in need of international protection and to provide solutions for these ‘invisible’, ‘vulnerable and marginalised’ people.³² It has worked to establish and reinforce refugee status determination mechanisms (RSD) in the border areas and to implement health, sanitation and education services and other income-generating activities of benefit to both refugees and the local host communities.³³ This is a significant innovation, because central governments have traditionally neglected border areas, rendering them potentially dangerous places dominated by industries such as illegal sex work and trafficking.³⁴ Nevertheless refugees are likely to remain in the border areas because of the history of cross-border migration, because they are familiar territory for refugees, close to family across the border they have crossed, and because onward movement is too expensive.³⁵

In its 2010 review of the MPA, the UNHCR found that 392 projects had been developed in 198 border communities between 2008 and 2010.³⁶ According to UNHCR, these projects assisted more than 100 000 refugees and locals.³⁷ Several of these projects received external funding, including from other Latin American governments. In September 2010, for example, Brazil agreed to financially assist Ecuador with the local integration of 15 000 refugees in the border province of Sucumbios in Ecuador.³⁸ The Brazilian government funded projects in the areas of education, sexual and gender-based violence, and water and sanitation infrastructure with the assistance of UNHCR.³⁹ The projects were

³² MPA, above n 1, Ch III(2). For more on the invisibility of Colombian refugees in the Andean region, see Martin Gottwald, ‘Protecting Colombian Refugees in the Andean Region: The Fight against Invisibility’ (2004) 16 *International Journal of Refugee Law* 517.

³³ UNHCR, *The State of the World’s Refugees*, above n 9, 193.

³⁴ Interview with Ana Guglielmelli White, US Committee for Refugees and Immigrants, Washington DC, 16 April 2013.

³⁵ *Ibid.*

³⁶ UNHCR, *The Mexico Plan of Action*, above n 7, 13.

³⁷ *Ibid.* 13.

³⁸ Sonia Aguilar, ‘Brazil Helps Ease Local Integration of Refugees in Northern Ecuador’ (17 February 2011) <<http://www.unhcr.org/4d5d4afd6.html>>.

³⁹ *Ibid.*

intended to facilitate the integration of Colombian refugees in these border communities, while simultaneously developing basic infrastructure and services that benefit Ecuadoran nationals. Colombia, the country from which the refugees had fled, also contributed some funding to assist Ecuador with the arrival of refugees in the border areas.⁴⁰

The UNHCR review also reported significant progress by governments in RSD. In Panama, three offices of the National Office for Refugee Affairs were set up in Darien and San Blas.⁴¹ Similarly, in Venezuela, the National Office for Refugees established three Regional Technical Secretariats in Maracaibo, San Cristobal and Guasdalito.⁴² Nevertheless, large numbers of refugees in Venezuela still faced problems with registration and documentation of their migratory status in the border areas near Colombia.⁴³ In Ecuador and Costa Rica, RSD centres were established in remote areas with large numbers of refugees. ACAI has visited the border areas of Costa Rica to interview asylum seekers and monitor their treatment⁴⁴ and also placed an official in southern Costa Rica to assist vulnerable people in need of international protection.⁴⁵

Ecuador implemented an Enhanced Registration Programme between March 2009 and March 2010 to deal with the large backlog of asylum seekers residing in border areas and utilized mobile RSD units to register applicants.⁴⁶ In this one-year period, Ecuador recognized 27 740 refugees, applying both the 1951 Refugee Convention definition and the wider Cartagena definition.⁴⁷ The Ecuadoran government made these RSD determinations on an individual rather than a group basis, often within a one-day timeframe. To assist decision-makers, the Ecuadoran government issued a manual explaining how to apply the broader Cartagena definition to these claimants. It was the first time that the

⁴⁰ ‘Colombia Hizo Aportes a Ecuador para sus Refugiados, Pero se Requiere de Más, Según Gobierno’ *Ecuador Inmediato* (Quito), 1 March 2013 <http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=192401&umt=colombia_hizo_aportes_a_ecuador_para_refugiados_pero_se_requiere_mas_segun_gobierno>.

⁴¹ UNHCR, *The Mexico Plan of Action*, above n 7, 12.

⁴² *Ibid.*

⁴³ *Ibid.* 14; Interview with Andrea Lari, Director of Programs, Refugees International, Washington DC, 15 April 2013.

⁴⁴ Interview with Gloria Maklouf, above n 18.

⁴⁵ *Ibid.*

⁴⁶ UNHCR, *The Mexico Plan of Action*, above n 7, 11.

⁴⁷ UNHCR, *UNHCR in Ecuador* (UNHCR, June 2012) <http://www.acnur.org/t3/fileadmin/Documentos/RefugiadosAmericas/Ecuador/2012/UNHCRs_work_in_Ecuador_June_2012.pdf?view=1>.

broader refugee definition had been applied so routinely and to such a large number of applicants.

Unfortunately, after the conclusion of the Enhanced Registration Programme, Ecuador resorted to restrictive policies for asylum seekers arriving at its borders. Under Ecuador's Executive Decree 1182 the broad Cartagena Declaration definition of a refugee was no longer to be applied⁴⁸ and stringent time and admissibility requirements for application and appeal in the RSD process were put in place.⁴⁹ Among possible reasons for this change are security concerns arising from the Colombian reorganized paramilitary groups, Fuerzas Armadas Revolucionarias de Colombia (FARC) members and Ejército por la Liberación Nacional (ELN), whose members operate on both sides of the Ecuador–Columbia border.⁵⁰ Improved political relations between Colombia and Ecuador, which the Ecuadoran government did not want to strain by recognizing Colombian migrants as refugees,⁵¹ pressure from the media and the failure of the international community to support Ecuador also influenced the implementation of more restrictive policies.

Anecdotal evidence suggests that many people who may have had valid claims for refugee status were screened out in eligibility interviews that lasted only 20 minutes. Similarly, the 15-day deadline for lodging a claim for refugee status excluded many applicants from the RSD process.⁵² Although Decree 1182 indicates that the police and army in border areas can accept applications for asylum,⁵³ the adequacy of this is

⁴⁸ *Decreto 1182: Reglamento para la aplicación en el Ecuador del Derecho de Refugio establecido en el Art. 41 de la Constitución de la República, las normas contenidas en la Convención de las Naciones Unidas de 1951 sobre el Estatuto de los Refugiados y en su Protocolo de 1967* (30 May 2012) Art 8.

⁴⁹ Article 12 of Decreto 1182 (*ibid*) provides that persons entering Ecuador must apply for refugee status within 15 days of arriving in Ecuador and Article 48 establishes that any appeal must be lodged within five days of the decision. Articles 19 and 20 of the Executive Decree also establish a pre-admissibility procedure in Ecuador's RSD process.

⁵⁰ Interview with Andrea Lari, Director of Programs, Refugees International, Washington DC, 15 April 2013. Article 1F of the Refugee Convention excludes certain people from refugee status, including those who have committed war crimes, crimes against humanity or serious non-political crimes.

⁵¹ Interview with Juan Pablo Alban and Daniela Salazar, Universidad San Francisco de Quito, 23 April 2013.

⁵² Interview with Sabrina Lustgarten, HIAS, Quito, 23 April 2013. (HIAS was an acronym for Hebrew Immigrant Aid Society, but HIAS now supports refugees in many situations.)

⁵³ Decree 1182, Art 27(2).

questionable, given that many asylum seekers may fear officialdom and need the intervention of a neutral third party and it is likely that the army and the police do not have the requisite knowledge. While we were conducting field work for this book in April 2013, UNHCR and the non-governmental organization HIAS were bussing people from the border town of San Lorenzo to Esmeraldas, to improve their chances of making a timely application for refugee status.⁵⁴ The UNHCR's evaluation of the impact of the more restrictive policies on refugees and other persons of concern to the Ecuadoran government demonstrated 'a significant drop in recognition rates and increased uncertainty among refugees whose status [was] being reviewed, revoked or cancelled.'⁵⁵

It appears that while the Ecuadoran government maintained a strong commitment to protection of recognized refugees, particularly their integration – one noteworthy and very positive element of Decree 1182 is that it allows asylum seekers to work and eliminates the need for them to be authorized to do so⁵⁶ – the government decided that the numbers of asylum seekers were too high. Its response to this perception, which is very similar to Western governments' responses to refugee flows, has been to effectively reinforce its border, making it more difficult for asylum seekers to enter the RSD process even if they remain inside Ecuador's physical borders.⁵⁷ This response undermines the concept of Borders of Solidarity.

Two constitutional challenges of Decree 1182 were mounted. Among the issues raised were questions of due process, particularly in relation to the time limits imposed on application and appeal and to the principle of legality.⁵⁸ The legal clinic of Universidad San Francisco de Quito, which

⁵⁴ Interview with Sabrina Lustgarten, above n 52.

⁵⁵ UNHCR Executive Committee, Standing Committee, 'Overview of UNHCR's Operations in the Americas' <<http://www.unhcr.org/5319cb789.html>> 2–3.

⁵⁶ Interview with Sabrina Lustgarten, above n 52.

⁵⁷ The most vivid illustration of border manipulation in which the technologies of border control are played out through refugee status or lack of it is the current Australian policy. It relies on the excision of the entire country from its migration zone, which means that entry of 'boat people' or unauthorized maritime arrivals into the RSD system is theoretically discretionary and may result either in the release of asylum seekers into the community on visas that do not give them the right to work and may endure for an indefinite period of time or incarceration on Nauru (although Nauru has now announced that it will maintain open centres) or in Papua New Guinea.

⁵⁸ Interview with Juan Pablo Alban and Daniela Salazar, above n 51; interview with Karina Sarmiento, above n 30.

mounted one of the constitutional challenges, alleged, *inter alia*, that Ecuador's new decree was invalid because any measure that regulates the rights of refugees must be enacted through law and not by executive decree.⁵⁹ On 12 September 2014 the Constitutional Court of Ecuador declared that the short deadlines for applications for refugee status and appeals were unconstitutional, and reinstated the Cartagena Declaration definition of a refugee.⁶⁰

RESETTLEMENT IN SOLIDARITY

The third and final pillar of the MPA was the Regional Solidarity Resettlement Programme,⁶¹ which invited countries to resettle refugees 'at an opportune time' in an attempt to alleviate some of the pressure on host countries receiving large influxes of refugees.⁶² Since its introduction in 2004, five countries in Latin America have participated in the MPA's Regional Solidarity Resettlement Programme. Chile and Brazil, which had been resettling small numbers of refugees since 1999 and 2002 respectively, began resettling refugees in 2004 under the MPA framework.⁶³ In January 2005 Argentina agreed to resettle small numbers of refugees in accordance with the MPA.⁶⁴ Both Paraguay and Uruguay signed Memoranda of Understanding (MOUs) with UNHCR in June

⁵⁹ Interview with Juan Pablo Alban and Daniela Salazar, above n 51.

⁶⁰ Case No 0056-12-IN & 0003-12-IA Acumulados, Ecuador Constitutional Court, Judgment No 002-14-SIN-CC, 14 August 2014. See Asylum Access, 'Ecuador Advances the Protection of Refugees' (Press release, 15 September 2014) <http://asylumaccess.org/AsylumAccess/wp-content/uploads/2014/09/AEE-Constitutional-Challenge-Approved_September-2014_Press-Release.pdf>, Daniela Ubidia Vasquez, 'Inconstitucionalidad parcial del Decreto 1182 sobre el derecho a solicitador refugio en el Ecuador: Analysis y efectos' (2015) 2 *Universidad San Francisco de Quito Law Review* 145.

⁶¹ MPA, above n 1, Ch III(3).

⁶² *Ibid.*

⁶³ UNHCR Division of International Protection, *UNHCR Resettlement Handbook* (UNHCR, Rev. ed, 2011) <<http://www.unhcr.org/46f7c0ee2.pdf>> 66.

⁶⁴ *Sesión Especial Sobre Temas de Actualidad del Derecho Internacional de los Refugiados: Protección a los Refugiados y Programa de Reasentamiento* (Documento presentado por la Delegación de Argentina) (29 January 2008) OEA/Ser.G CP/CAJP/INF.79.08 corr. 1, 1–3.

2007 to participate in the MPA resettlement programme.⁶⁵ The government of Uruguay actually passed this MOU as a national law.⁶⁶

All of the resettlement agreements establish conditions for resettlement and require each state to resettle an annual quota of refugees, which is determined by each government in consultation with UNHCR and is based upon the state's financial resources and absorption capacity. The broad Cartagena refugee definition applies in resettlement cases. In addition, five areas of vulnerability have been prioritized: legal and physical protection needs (including threats of *refoulement* and arbitrary detention); survivors of violence and torture (particularly in situations that could lead to further traumatization); at-risk women (i.e. women for whom gender poses particular protection problems); unaccompanied children and adolescents (where the best interests of the child are considered to determine resettlement need); and refugees who have no prospect of local integration within their country of first asylum.⁶⁷ The Argentinian and Brazilian agreements included a further criterion which excludes refugees with a past criminal history.⁶⁸

According to UNHCR data from January 2013, more than 1200 people were resettled in Argentina, Brazil, Chile, Paraguay and Uruguay under

⁶⁵ UNHCR, *Memorandum de Entendimiento para el Reasentamiento de Refugiados en el Paraguay entre el Gobierno de la República del Paraguay y el Alto Comisionado de las Naciones Unidas para los Refugiados* (28 June 2007) <<http://www.unhcr.org/refworld/docid/47fdfadc0.html>>.

⁶⁶ *Ley No 18.382: Apruébase el Acuerdo Marco para Reasentamiento de Refugiados con el Alto Comisionado de las Naciones Unidas para los Refugiados* (Uruguay) (15 June 2007) <<http://www.unhcr.org/refworld/docid/4b0d4b5c2.html>>.

⁶⁷ Each agreement differs slightly in content and form with regards to these criteria. For more, see *Sesión Especial Sobre Temas de Actualidad del Derecho Internacional de los Refugiados*, above n 64; UNHCR, *Memorandum de Entendimiento para el Reasentamiento de Refugiados en el Paraguay*, above n 65; *El Acuerdo Marco para Reasentamiento de Refugiados en Chile entre el Gobierno de la República de Chile y el Alto Comisionado de las Naciones Unidas para los Refugiados* (5 Enero 1999); *Ley No 18.382*, above n 66; UNHCR Division of Internal Protection, above n 63, 243–96.

⁶⁸ UNHCR, *UNHCR Resettlement Handbook: Country Chapter, Argentina* (UNHCR, 2011) <<http://www.refworld.org/docid/4ecb9bfb0.html>> 6; see also *Sesión Especial Sobre Temas de Actualidad del Derecho Internacional de los Refugiados*, above n 64; UNHCR, *UNHCR Resettlement Handbook: Country Chapter, Brazil* (UNHCR, 2011) <<http://www.refworld.org/docid/52a077620.html>> 3.

the MPA programme.⁶⁹ Almost all of the refugees who have benefited from the programme are Colombians, but it is worth noting that a small group of Palestinian refugees from Iraq were resettled in Brazil and Chile in 2007.⁷⁰ Brazil and Uruguay have also been resettling Syrian refugees.⁷¹ As with UNHCR's resettlement programme more generally, there have been problems meeting the resettlement quotas. Nevertheless, the process is generally quicker and less cumbersome than resettlement programmes run by governments of the Global North, which usually insist on re-interviewing applicants for refugee status and do not apply the Cartagena Declaration's definition of a refugee.

Integration of resettled refugees has been hampered by the lack of resources devoted to integration and by the short period of time that resettlement countries have had to pilot local integration programmes for refugees in the region.⁷² This suggests a need for the greater engagement of countries such as the USA and Australia and Canada which have long-standing and reasonably successful resettlement programmes.

While the resettlement numbers are smaller in Latin America than in some other regions such as North America,⁷³ they represent a significant development in the responses from Latin American nations to refugee protection and resettlement and contrast favourably with the containment measures adopted in the developed world to keep asylum seekers out. The resettlement programmes have also expanded the protection space for asylum seekers arriving in the resettlement countries of Latin America. For example, in the countries of the Southern Cone, refugee issues have become more visible and participating governments have received more funds from UNHCR to develop programmes to assist refugees. The participation of Argentina and Uruguay in the resettlement programme has been coupled with new national laws establishing safeguards and protections for refugees.⁷⁴

⁶⁹ These statistics were obtained from the UNHCR Regional Legal Unit in Costa Rica on 7 March 2013.

⁷⁰ UNHCR, Chile and Brazil to receive Palestinian Refugees (2007) <<http://www.unhcr.org/46e66ea43.html>>.

⁷¹ UNHCR, *Resettlement and Other Forms of Legal Admission for Syrian Refugees* (24 November 2015) <<http://www.unhcr.org/52b2febafc5.pdf>>.

⁷² Interview with Ana Guglielmelli White, above n 34.

⁷³ The United States of America alone received 66 300 UNHCR resettlement admissions in 2012 (UNHCR, *Global Trends 2012: Displacement: The New 21st Century Challenge* (UNHCR, 2013) 3).

⁷⁴ Argentina enacted legislation on refugee protection in 2006 and Uruguay in 2007. See *Ley 26.165: Ley General de Reconocimiento y Protección al Refugiado* (Argentina) (28 November 2006); *Ley No 18.382*, above n 66.

THE BRAZIL DECLARATION AND PLAN OF ACTION

The Brazil Declaration and Plan of Action reinforces some of the programmes of the MPA, changing some elements and adding new ones. It is the work of a larger group of states as it included Caribbean states and involved states from outside the region in the preparatory work.

In preparation for the ministerial meeting at which the Brazil Declaration and Plan of Action was adopted, four sub-regional meetings were held. The Mercado Común del Sur (MERCOSUR) meeting was held in Buenos Aires on 18–19 March 2014, attended by observers from the governments of the USA, Norway and Sweden, as well as a delegation from the EU.⁷⁵ The Andean countries met in Quito on 9–10 June 2014 and their meeting was also attended by observer delegations from Canada, Sweden and the EU.⁷⁶ The Mesoamerican countries met in Managua on 10–11 July 2014, with observers from the USA, the EU, Cuba, Spain and Brazil in attendance.⁷⁷ The Grand Cayman Island was the location of the Caribbean nations' meeting on 10–11 September 2014, at which observers from the United Kingdom, the USA, the EU, Mexico and Brazil were in attendance.⁷⁸ Representatives from various international organizations also attended these sub-regional meetings, as did civil society organizations which were involved in the final ministerial meeting as well.⁷⁹ The Norwegian Refugee Council was charged with facilitating civil society participation.⁸⁰ The Ambassadors of GRULAC (the UN group of Latin American and Caribbean countries) also held meetings in Geneva.

The Brazil Declaration and Plan of Action responds to concerns beyond the continuing flow of Colombians. With respect to people

⁷⁵ UNHCR, 'Cartagena+30: Newsletter, no. 2' (September 2014) <http://www.acnur.org/t3/fileadmin/Documentos/Proteccion/Cartagena30/Cartagena30_Newsletter_Sep_2014.pdf> 2.

⁷⁶ Ibid 2–3.

⁷⁷ Ibid 3–4.

⁷⁸ Ibid 4.

⁷⁹ See, for example, 'Presentation of Civil Society's Main Recommendations in the Framework of Cartagena+30, Brasilia, 2nd–3rd December 2014' <<http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2015/9896>>. Summary conclusions of the subregional meetings and other preparatory material can be found at <<http://www.acnur.org/t3/que-hace/proteccion/declaracion-de-cartagena-sobre-los-refugiados/>>.

⁸⁰ UNHCR, 'Cartagena+30: Newsletter, no. 1' (February 2014) <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/Proteccion/Cartagena30/Cartagena30_Newsletter_Feb_2014>.

fleeing the countries of the Northern Triangle (Guatemala, Honduras and El Salvador), described as vulnerable to the activities of transnational crime,⁸¹ there is a focus on prevention, responding to both protection needs and the underlying causes of displacement. Among other things, the international community is invited to support and finance the Plan Alliance for the Prosperity of the Northern Triangle.⁸² The Brazil Declaration also devotes a chapter to 'Regional Solidarity with the Caribbean for a Comprehensive Response on International Protection and Durable Solutions'⁸³ and another that announces a programme on 'eradicating statelessness'.⁸⁴

Several elements of the MPA are retained and reinforced. The Borders of Solidarity Programme has become the Borders of Solidarity and Safety Programme, which appears to try to balance state security with improved refugee protection.⁸⁵ The Cities of Solidarity Programme has become the new Local Integration Programme, which highlights 'the central role of the State' along with the role of other actors such as local municipalities,⁸⁶ thus implying a recognition that the state cannot leave local integration to municipal governments or non-governmental organizations. Many of the best aspects of the Cities of Solidarity Programme, such as the effort to generate employment through corporate social responsibility and microcredit, are retained.⁸⁷

The Regional Solidarity Resettlement Programme is also retained and strengthened. Notably, there is specific reference to the need to support Ecuador through the Resettlement in Solidarity programme because it hosts the largest number of refugees and asylum seekers in Latin America and the Caribbean.⁸⁸ Other interesting elements are the reference to a possible transit mechanism (presumably similar to emergency transit mechanisms in place elsewhere) and to the possibility of establishing a voluntary Cooperation Fund to which both international and regional donors could contribute.⁸⁹ A new element is a proposed Labour Mobility

⁸¹ Brazil Declaration and Plan of Action, above n 4, 13.

⁸² *Ibid* 15.

⁸³ *Ibid* Chapter 5.

⁸⁴ *Ibid* 17.

⁸⁵ *Ibid* 11.

⁸⁶ *Ibid* 12.

⁸⁷ *Ibid*.

⁸⁸ *Ibid* 13.

⁸⁹ *Ibid*.

Programme,⁹⁰ rounding out the suite of ‘comprehensive, complementary and sustainable solutions’ contained in Chapter 3 of the document.

In addition to the Borders of Solidarity and Safety Programme, refugee protection is to be lifted through the UNHCR’s facilitation of a Quality Asylum Programme,⁹¹ which is voluntary on the part of states. It aims to improve RSD and protection and effectively sets out minimum standards of quality asylum processes, which include legal representation, written decisions, administrative appeal and judicial review, differentiated approaches to age, gender and diversity in RSD and standards for family reunification applications and for prioritizing the cases of unaccompanied and separated children.⁹²

The Brazil Declaration and Plan of Action is designed to be the regional response to refugees, displaced and stateless persons in Latin America and the Caribbean for ten years from its adoption in 2014.⁹³ Governments are to define their own priorities with respect to the programmes set out in the Plan of Action and to ‘explore the possibility of creating evaluation and follow-up mechanisms’.⁹⁴ UNHCR is to disseminate the Brazil Declaration and Plan of Action and produce triennial progress reports and a final report.⁹⁵

The protection of refugees, displaced and stateless persons in the Americas is described in the Plan of Action as part of a project of regional integration.⁹⁶ South–South cooperation through exchanges between national RSD commissions is noted.⁹⁷ However, the Plan of Action is clearly not solely concerned with regional responses to regionally displaced and stateless persons, as it also identifies the importance of cooperation with relevant actors ‘outside the region’⁹⁸ and acknowledges the presence in Latin America and the Caribbean of asylum seekers from other continents and the role of trafficking and smuggling.⁹⁹

A number of strategies for responsibility-sharing are mentioned in the Plan of Action. Exchanges between national RSD authorities, contributions to the proposed Cooperation Fund, and increased participation in

⁹⁰ Ibid 13–14.

⁹¹ Ibid 9.

⁹² Ibid 10.

⁹³ Ibid 4.

⁹⁴ Ibid 19.

⁹⁵ Ibid.

⁹⁶ Ibid Chapter 7.

⁹⁷ Ibid 18.

⁹⁸ Ibid.

⁹⁹ Ibid 8.

the Resettlement in Solidarity programme are all mooted, but the Brazil Declaration and Plan of Action is not a binding document. Interestingly, although the notion of 'shared but differentiated responsibility among the States of origin, transit and destination' is referred to,¹⁰⁰ it is not developed further.

CONCLUSION

Regional cooperation efforts in Latin America and the Caribbean might be expected to have a greater chance of success than in other regions because of common experiences and common language. However, a charge of 'engineered regionalism'¹⁰¹ (creating a region by exclusion of others) cannot be levelled at this region, where the concept of Borders of Solidarity is very different to Fortress Europe. The Americas seem, rather, to offer a regional take on problems and norms that are global in scope and to demonstrate a healthy willingness, at least in principle, to take responsibility for protecting the displaced and affording them full rights protection. A tradition of innovation in responding to refugee flows has also grown in the Americas. The geographical, as opposed to population-based, approach that first emerged with the application of Refugee Aid and Development and Targeted Development and Assistance in ICARA and CIREFCA has found new expression in the Cities and Borders of Solidarity.

The implementation of the new Plan of Action will undoubtedly continue to pose great challenges for this region, and this may, in part, reflect the fact that, while countries of asylum and origin have been involved, there has so far been only a limited contribution from outside the region, even from the nearby superpower, the USA. However, Brazil, a leading economic power in the region, is playing a proactive role and South–South cooperation may prove very fruitful. It is clear that the participating states are proud of their regional tradition of human rights and asylum and that UNHCR is able to build on this commitment to trial innovative programmes that are visionary and inspiring. The 'spirit of

¹⁰⁰ Ibid 2.

¹⁰¹ Matthew J Gibney, 'Forced Migration, Engineered Regionalism and Justice between States' in Susan Kneebone and Felicity Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers: Challenges Ahead* (Berghahn Books, 2007) 57.

Cartagena'¹⁰² apparent in their willing cooperation is a welcome change from the tactics of deterrence, containment and cruelty deliberately adopted in other corners of the world.

¹⁰² Liliana Lyra Jubilut and Wellington Pereira Carneiro, 'Resettlement in Solidarity: A New Regional Approach Towards a More Humane Durable Solution' (2011) 30(3) *Refugee Survey Quarterly* 63, 68.

9. Lessons learned

Regional arrangements are often proposed as the answer to refugee flows. The examination of the regional arrangements in this book shows that not all regional arrangements have provided refugee protection and solutions equally well. In some cases, part of the problem has been the lack of responsibility-sharing among states and between regions.

As the Syrian crisis highlights, the lack of a firm commitment to share responsibility for the protection of, and durable solutions for refugees is a gaping hole in the international refugee regime. This lacuna threatens the protection of refugees, because some states into which the lion's share of the refugees flow, thereby having disproportionate responsibility thrust upon them, will stay outside the international refugee regime. Two regions – the Middle East and Asia and the Pacific are notable for the number of states which are not party to the Refugee Convention and its Protocol. The propensity of states that are parties to the Refugee Convention and Protocol, particularly those states in the Global North, to openly flout or covertly avoid their legal obligations does nothing to encourage those states to become party. A wheel of non-cooperation is set spinning that unravels the rights of refugees.

Some of the more successful regional arrangements explored in this book have benefited from participation by extra-regional states. The CPA is particularly notable because countries like Canada, the US and Australia contributed to the arrangement in the largest resettlement operation since the Second World War. Indeed, perhaps the only respect in which the CPA can be called a 'regional solution' is that it assisted in bringing to a close a refugee flow that emanated from and was impacting on the Southeast Asian region.

Despite some reservations concerning the role of, and even the label 'regional' arrangements, it is clear to us that regional arrangements have played much the same role as the constituent elements of a federation with respect to innovation and experimentation.¹ They have often been sites where greater agreement on norms of refugee protection has been

¹ Geoffrey de Q Walker, 'Ten Advantages of a Federal Constitution and how to make the most of them' (1999) 73 *Australian Law Journal* 634, 638.

secured than the global level – witness the expanded definitions of refugee status in the Americas and Africa – and they have also served as sites where new concepts, such as refugee aid and development have been trialled. Below, we make a summative assessment of the regional arrangements examined in the book, paying attention to whether they have served to protect refugees and provide durable solutions for them; the ways they have (or have not) shared responsibility for refugees; and the different kinds of ‘regionalism’ at play in these regional arrangements and whether these are helpful or harmful to refugee protection and responsibility-sharing.

THE COMMON EUROPEAN ASYLUM SYSTEM AND ENGINEERED REGIONALISM

Under the Common European Asylum System (CEAS), the true purpose of the Dublin Regulation seems not to share responsibility on the basis of capacity to respond, but rather to protect stronger European economies from the influx of refugees and migrants who may be drawn to these states by their economic strength, although its justification has usually been couched in terms of ensuring that one state takes responsibility for a refugee’s application, thus avoiding multiple applications or the phenomenon of ‘refugees in orbit’.² The allocation of responsibility on the basis of point of entry into the EU, which still operates under the latest reiteration of the Dublin Regulation, largely overlooks the pressure placed on Europe’s gateway states to protect refugees (although, granted, they are not the only states within Europe facing high numbers of asylum claims), thus providing perverse incentives for *refoulement*.³

The regionalism reflected in the EU’s treatment of refugees over past decades has been described aptly as ‘engineered’.⁴ On the one hand, as the EU’s internal borders were dismantled, the external border was fortified and it has become more difficult for refugees to reach Europe lawfully. On the other hand, once refugees arrive in Europe, they are

² This refers to the phenomenon of refugees being shunted between states and never finding protection.

³ Lillian M Langford, ‘The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of EU Solidarity’ (2013) 26 *Harvard Human Rights Journal* 217.

⁴ Matthew J Gibney, ‘Forced Migration, Engineered Regionalism and Justice between States’ in Susan Kneebone and Felicity Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers: Challenges Ahead* (Berghahn Books, 2007) 57.

protected by the ‘imagined’⁵ European community and its commitment to freedom, security and justice. Whatever criticisms may be levelled at CEAS, human rights standards are front and centre in the harmonization aspect of this arrangement.

Despite some departures from the international standards, CEAS is generally to be criticized not for what it says about human rights protection, but for failing to realize these standards in practice. The strong mechanisms that are in place in Europe to protect human rights are helpful in overcoming this problem and ensuring that refugees are protected. In particular, both the European Court of Human Rights and the Court of Justice of the European Union have developed jurisprudence that has remedied human rights violations and forced the EU to amend law and policy, including the Dublin Regulation. The EU is also working on proactive measures for the implementation of human rights standards through the European Asylum Support Office (EASO).

At its inception, the CEAS also failed to address the responsibilities for refugees borne by states beyond EU borders, which is a potential shortcoming of regional approaches in general, suggesting a need for interregional cooperation. Indeed, it could be argued that the Dublin system systematically institutionalized the concept of the safe third country, both within the EU, and outside as it permitted EU states to utilize the concept with respect to states outside the EU⁶ and set a precedent which stimulated the migration of this concept to other parts of the globe.

The EU has taken some steps to address imbalances in responsibilities for refugees both within the EU and beyond, through, for example, EASO; the EUREMA programme for relocation of refugees from Malta and the more recent efforts to relocate asylum seekers presently in Italy, Greece and Hungary; the Asylum Migration and Integration Fund and the regional trust fund for Syria; the Joint European Resettlement Programme and proposals for a more structured resettlement scheme; and the Regional Protection Programmes. The acceptance of mandatory quotas in relation to the relocation of 120 000 asylum seekers within the

⁵ This borrows from Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1983).

⁶ Twenty years ago, Achermann and Gattiker argued that the effect of the Dublin Convention and Schengen agreement was in fact that ‘[t]he principle of the responsible State has ... been turned upside down: expulsion to a third State is no longer the exception but the rule.’ Alberto Achermann and Mario Gattiker, ‘Safe Third Countries: European Developments’ (1995) 7 *International Journal of Refugee Law* 19, 23.

EU is significant. If a quota system were also to be adopted with respect to resettlement efforts, this might act as a catalyst for a global system of resettlement quotas. However, the debates over quotas for relocation and resettlement and rescue at sea and the construction or planned construction in 2015 of fences by states such as Austria, Hungary and Slovenia in order to exclude migrants and refugees demonstrate the reluctance of some EU members to do more to share responsibility for refugees and asylum seekers.

ARRANGEMENTS IN LATIN AMERICA – THE SPIRIT OF CARTAGENA

The Americas have a grand vision for a peaceful and democratic region with a strong commitment to human rights. There is a particularly strong regional commitment to asylum and a tradition of innovation within Latin America. This vision is apparent in many landmark declarations and agreements, such as the Cartagena Declaration, the International Conference on Central American Refugees (CIREFCA), the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (MPA) and the Brazil Declaration and Plan of Action.

The contribution of the relatively strong supranational human rights framework is now becoming more evident in the region. The Quality Asylum Programme of the Brazil Declaration and Plan of Action draws on the due process standards set out by the Inter-American Court of Human Rights in the *Pacheco* case.⁷ Implementation of those standards is, however, an ongoing problem, which may, in part, indicate a lack of equitable responsibility-sharing both within the region and the international community.

In the case of CIREFCA, adherence to human rights standards in theory and in practice was reasonably strong. Unlike the African states under the International Conferences on Assistance to Refugees in Africa (ICARA) or the Southeast Asian states participating in the Comprehensive Plan of Action for Indochinese Refugees (CPA), the Central American states participating in CIREFCA were amenable to offering local integration. CIREFCA was innovative in that it used the broader Cartagena Declaration definition of a refugee and addressed new categories of persons of concern, including internally displaced persons, returnees and

⁷ *Pacheco Tineo Family v Bolivia* [InterAmerican Court of Human Rights] (2013) Series C No 272 (25 November 2013).

'externally displaced persons'.⁸ It is also an early example of an arrangement that incorporated gender issues into its implementation.

The root causes of refugee flight were able to be tackled through the Esquipulas II peace agreement. This agreement led to active promotion of voluntary repatriation programmes but not of resettlement, as it was envisaged that returnees could contribute to the development of their countries of origin. Nevertheless, refugees and other persons of concern were empowered to make choices about durable solutions for their future, and local integration was also available. Extra-regional financial assistance, particularly from Italy and the EU, meant that development projects could be implemented that offered significant support to the local communities hosting refugees. These projects contributed to peace and stability across the region and ensured a fairer distribution of responsibility among states from both within and outside the region.

The MPA is also highly protective of human rights, although its lofty aims have not always been fully realized. The commitment of municipal governments to the Cities of Solidarity Programme has been variable and refugees have faced difficulties securing education, health and housing. However, there have been outstanding examples of good programmes in the implementation of the MPA that assist both vulnerable citizens and refugees. The Borders of Solidarity Programme has encouraged impressive efforts to improve access to protection, particularly in Ecuador. The very idea of Borders of Solidarity stands in stark contrast with the closure of borders in other parts of the world, and suggests that legalizing mobility is the answer to forced migration.

Nevertheless, Ecuador subsequently attempted to scale back access to protection, which may, in part, be attributable to the fact that, although solidarity has played an important role in bringing states together to protect refugees under the MPA, responsibility still falls largely on those states geographically close to the paths of displacement. Countries far from these paths, such as Brazil, Argentina and Chile, have agreed to resettle some refugees and countries such as Ecuador have received some financial contributions to protection initiatives, but these contributions have been relatively small. It remains to be seen whether the new commitment to solidarity under the Brazil Declaration and Plan of Action will result in more responsibility-sharing.

⁸ See Michael Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America' (Legal and Protection Policy Research Series No 32, UNHCR Division of International Protection, June 2013) <<http://www.refworld.org/docid/51c801934.html>> 15 and the discussion in Chapter 6.

One can only speculate on how well the regional commitment to asylum might serve refugees if refugee flows from outside the region continue to increase. The regionalism evident in the Americas has both elements in common with and quite different from the EU. Similarities include the stated commitment to refugee protection and human rights more generally. Differences include the fact that the EU appears to regard itself as a non-refugee-producing region, while the Americas have developed responses to refugees and asylum seekers as a result of refugee movements within the Americas. If patterns of displacement change and more refugees emanate from outside the region, will the Americas embrace 'engineered regionalism' and deterrence?

ICARA – THE LIMITS OF PAN-AFRICANISM MEET DONOR FATIGUE

A bottom line of commitment to *non-refoulement* was evident in the regional refugee arrangement of ICARA, but commitment to refugee protection beyond *non-refoulement* was weak. There were limits to pan-African hospitality, which can be explained, in part, by the shift in refugee-producing factors from the impacts of colonial oppression and apartheid to the economic and political insecurity of newly independent states, and also the effects of structural adjustment programmes. ICARA relied on the international community, through UNHCR, to assist with providing refugees' material needs and failed to fully realize the concept of Refugee Aid and Development (RAD) as the African states did not activate local integration as a durable solution.

In part, the failure of RAD in ICARA was due to lack of funding – that is, the failure of the responsibility-sharing aspect of the exercise. There was some acceptance on the part of developed states that the countries of first asylum did not have the financial capacity to protect refugees properly and that it was necessary to support these states financially with the associated costs. However, the financial assistance was neither sufficient overall nor distributed to the areas most in need. Western donors gave financial assistance primarily to those African states with which they had shared interests in the context of the Cold War. Donors made limited contributions to countries that did not support their political interests, even if those states were significantly more affected by the arrival of large numbers of refugees. RAD further failed because African states failed to view refugees as agents of development. Refugees were not offered local integration, but 'local settlement' which was not viewed

as permanent and restricted refugees' interactions with local communities. African states expected that the refugees would eventually return home. The failure to offer local integration, combined with the impossibility of repatriation, contributed to many protracted refugee situations.

There was a lack of clarity in the aims of ICARA and no real meeting of minds among donor and host states. Host states viewed the funding they sought as compensation for hosting refugees. Donors became disengaged because they were wary that some of the projects put forward by host states were projects that had previously failed to secure overseas development assistance, and they could not see an end to their financial responsibilities, given the lack of durable solutions for refugees. Famine and the distraction of other refugee crises compounded their disengagement. Regionalism effectively acted as a mechanism of containment.

One might question whether there could have been more leverage for local integration if the international community had been inclined not just to pay for protection but also to offer protection through strategic resettlement. It is plausible that as long as refugees were framed as a burden for which African states were to be compensated, they could never be viewed as anything other than temporary guests.

However, the refugee aid and development concept has led to much further work and is a best practice that can and should be used going forward. Furthermore, other, subregional arrangements in Africa have yielded positive developments. For example, the mobility of refugees under the Economic Community of West African States (ECOWAS) offers another example of a best practice.

THE COMPREHENSIVE PLAN OF ACTION – PASSING THE BUCK

The 1979 arrangement adopted as a result of the Meeting on Refugees and Displaced Persons in South-East Asia and the Comprehensive Plan of Action (CPA) in 1989 led to a more balanced distribution of responsibilities for refugees, as states from outside the Southeast Asian region were prepared to resettle refugees and thus reduce the pressures that countries of first asylum were facing. For refugees, this ensured that they would not be turned back if they arrived in a neighbouring country and provided durable solutions. The participation of a country of origin, Vietnam, enabled hundreds of thousands to migrate under the auspices of the Orderly Departure Programme, some of whom may have qualified as refugees and who might otherwise have embarked on a dangerous

journey in search of protection. It also ensured extensive monitoring of returnees under the auspices of UNHCR.

The main problems with the CPA relate to the standards of protection in countries of first asylum and the longer-term failure of Southeast Asian countries to make a stronger, ongoing commitment to refugee protection. The CPA reflected a grudging commitment to *non-refoulement* that depended on the guarantee of resettlement places. It has been described as entrenching a mentality of ‘passing the buck’ for refugee protection.⁹ While the cardinal obligation of *non-refoulement* was generally respected by states of first asylum, refugee status determination was variable across the countries participating in the CPA, meaning that some genuine refugees may have failed in their attempt to secure protection. In addition, some of the returns of persons incorrectly determined not to be refugees could be viewed as cases of constructive *refoulement* when conditions in the camps were deliberately worsened. Some of the forced returns also raised questions about whether they were conducted safely and with dignity. It has also been argued that the Orderly Departure Programme negated the right of some Vietnamese to leave and to seek asylum given the involvement of government.¹⁰

Local integration was not an option under the CPA – rather, temporary protection was offered in exchange for resettlement or return to the country of origin. The conditions in which refugees were held have been described as ‘temporary confined transit’.¹¹ In Hong Kong, refugees were subjected to mandatory detention. The unwillingness of Southeast Asian countries of first asylum to offer protection that fully respected human rights, particularly the right to liberty, helped to create further problems such as overcrowding in detention centres. The regionalism evinced by the CPA is one in which refugee protection is ultimately viewed as a foreign responsibility. The Cold War context enabled the Southeast Asian region to shift responsibility to the West. Any regional arrangement today should seek to stimulate rather than avoid local integration through

⁹ W C Robinson, ‘The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck’ (2004) 17 *Journal of Refugee Studies* 319.

¹⁰ Judith Kumin, ‘Orderly Departure from Vietnam: Cold War Anomaly or Humanitarian Innovation?’ (2008) 27(1) *Refugee Survey Quarterly* 104, 114–16.

¹¹ W C Robinson, *Terms of Refuge: The Indochinese Exodus & the International Response* (Zed Books, 1998) 281.

strategic resettlement,¹² or at least enable lawful status and self-sufficiency.

While the CPA was successful in bringing the Indo-Chinese refugee crisis to a close, the experience of open-door resettlement that prevailed from 1979 until the CPA was adopted in 1989 may have assisted in diminishing commitment to resettlement in general, although the end of the Cold War also played a role. During the CPA, new language developed to describe refugee and migration flows. The CPA was adopted because states perceived that unlimited resettlement had served as a pull factor, and the concept of an orderly 'queue' emerged. With the demise of the Soviet Union and declining global economic conditions, a discourse about refugees that labelled all asylum seekers as economic migrants and queue jumpers developed.

THE INTERSECTIONS BETWEEN REGIONALISM AND RESPONSIBILITY-SHARING

Each of the regional arrangements tells us something about the importance of responsibility-sharing. Responsibility-sharing was at the heart of the success of the CPA, and in some measure its relative absence was the reason for the failure of ICARA. Responsibility-sharing in the form of funding for CIREFCA helped to underwrite its success, and lack of it may in part explain the relatively modest success of the MPA and the attempt by Ecuador to retreat from the concept of the Borders of Solidarity.

The initial focus on allocation rather than sharing of responsibility within the EU has provided perverse incentives for non-compliance with, and a distraction from, the harmonization aspects of the CEAS. The inequities in the distribution of asylum seekers within the EU, and the much greater inequities in responsibilities for refugee protection and solutions that exist beyond Europe, and which have been exacerbated by deterrence policies adopted within the EU and elsewhere in the Global North lead us to conclude responsibility-sharing is indeed a *sine qua non* for the proper functioning of the international refugee regime.¹³

¹² Keane Shum, 'A New Comprehensive Plan of Action: Addressing the Refugee Protection Gap in Southeast Asia through Local and Regional Integration' (2011) 1(1) *Oxford Monitor of Forced Migration* 60, 66.

¹³ J P L Fonteyne, 'Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees' (1978–1980) 8 *Australian Year Book of International Law* 162, 175.

We have suggested that it is fair to distribute the responsibility among states based on their capacity to respond, i.e., the capacity of states to protect and/or provide durable solutions for refugees (for hosting) and the capacity to pay (in relation to funding protection elsewhere).¹⁴ This requires states and regional actors to consider factors relevant to absorption of refugees, such as GDP, population size and density and the quality of a state's environmental infrastructure. In addition, we have argued that attention ought to be paid also to factors such as refugee status determination, reception facilities, integration programmes and programmes promoting multiculturalism and social inclusion. A 'protection capacity assessment', rather than the lottery of geographical location, should determine which states bear responsibilities to host and/or fund refugee protection. Similarly, wealth should not simply be treated as a proxy for protection capacity as it may be a necessary, but not sufficient element for effective refugee protection. It is also important, however, that 'those who can, do'; that wealthy countries do not avoid responsibility-sharing by failing to implement programmes that will assist in the integration of refugees.

This focus on states' capacity to respond has consequences for the idea that regionalism offers all the answers for refugee flows. As the regions from which refugees are primarily generated are located in the Global South, this suggests that an element of inter-regional cooperation is required for most regional arrangements to adequately protect refugees and share responsibility and in particular, that countries from the Global North need to participate or support these arrangements. We also suggest that if the notion of 'common but differentiated' responsibility developed in the context of international environmental law is to be applied to international refugee law, the result should not be that those with capacity to pay ensure that those with least capacity to host are simply paid to go on hosting as compensation, or even in order to assist in offering a better standard of protection. Such a result implies that refugees have little to contribute.

Funding shortfalls need to be addressed. However, even if financial assistance is used in a way that promotes the development of both host communities and refugees, the likelihood that refugees will be viewed as agents of development instead of a 'burden' is diminished if the Global North is granted an exemption from the responsibility to host refugees.

The comparison of the regional arrangements and the discussion of various responsibility-sharing proposals in this book highlight some

¹⁴ See discussion in Chapter 3.

valuable tools aside from funding that can assist in sharing responsibility for refugees equitably. Among these are the creation of lawful pathways for refugee movement through resettlement and other migration schemes, whether humanitarian or labour-based; funding that supports local integration of refugees and development of local communities simultaneously; and methods of pooling or loaning technical expertise such as regional asylum support offices.

While we have not sought to develop a ‘blue print’ for a global responsibility-sharing plan, believing that this is simply too ambitious and beyond the scope of a book that examines the intersections between regionalism and responsibility, we comment in the ensuing paragraphs on several useful proposals and practices that would assist in better management of refugee flows. They are: more use of resettlement, particularly strategic resettlement and adoption of quotas for resettlement; increased funding for UNHCR and a focus on effectively linking humanitarian aid and development assistance; more sharing of ‘in kind’ resources; and alternative migration paths. As the former Assistant High Commissioner for Refugees, Erika Feller, has commented, ‘[m]ost of these ideas are not new. What will be new, if it happens, is how they are pieced together and then acted upon in a coherent and coordinated manner, to determine, who, how and where to protect.’¹⁵ Some of these tools could be utilized in the near future on a case-by-case basis and by relatively small groups of states if they so choose. Others such as quotas for resettlement will require concerted agreement on the part of the Global North, and may be unlikely to be implemented in the near future. However, they will never be adopted if no one advocates for them.

More Resettlement, Quotas and Strategic Resettlement

Resettlement has had a chequered history, but it has a valuable role to play as a protection tool and a durable solution. It is unacceptable that resettlement places are not offered for each of the relatively few urgent cases for resettlement identified by UNHCR every year. The recent acceptance of mandatory quotas for relocation of asylum seekers within the EU based on GDP, population size, previous contribution regarding asylum and employment rates, while hard won and still contested, suggests that it could be possible for all states in the Global North to agree on mandatory resettlement quotas based on similar measurements

¹⁵ Erika Feller, ‘Protection Somewhere – but where’, Speech delivered at the Kaldor Centre for International Refugee Law Annual Conference, 20 November 2015.

of absorption capacity. We would also wish to see an emphasis on protection capacity built into the assessment. Consequently, it would be important to pay attention to states' programmes for integration, social inclusion and multiculturalism, to ensure that refugee rights are fulfilled.

There should also be a focus on strategic resettlement. The use of resettlement during the CPA could be viewed as one of the first instances of what is now referred to as the strategic use of resettlement. Under the CPA, the resettlement of Vietnamese refugees to countries outside the region not only provided obvious protection gains for the refugees involved, but also secured the commitment of countries within the region, such as Thailand and Malaysia, to continue allowing persons to seek asylum in their country in the first instance. This agreement, commonly known at the time as 'an open shore for an open door',¹⁶ effectively ensured that the protection benefits that arose from resettlement of refugees flowed on to other asylum seekers still wanting to leave Vietnam and Laos and seek protection elsewhere.

However, in the longer term, a more strategic use of resettlement would be to link resettlement with local integration, for example, by offering one resettlement place for every refugee locally integrated.¹⁷ Putting this into practice, hypothetically, during the 2015 Rohingya boat crisis the Australian government could have offered resettlement places in exchange for local integration, or at the very least some lawful status and self-sufficiency after Malaysia and Indonesia agreed not to push back boats and to shelter affected asylum seekers for a year.¹⁸ Such an offer could have served as a pilot programme with potential to engender more confidence in these countries of first asylum to offer meaningful refugee protection. Even if these governments proved unresponsive to such an offer, it might have improved Australia's relationships with these countries, which the flat refusal to even consider resettlement as an option failed to do. Offering some resettlement places would be consistent with

¹⁶ W C Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck' above n 9, 320.

¹⁷ Keane Shum, 'A New Comprehensive Plan of Action: Addressing the Refugee Protection Gap in Southeast Asia through Local and Regional Integration' above n 12, 66, citing Robinson, 'Terms of Refuge: The Indochinese Exodus & the International Response' above n 11, 277.

¹⁸ Joe Cochrane, 'Indonesia and Malaysia Agree to Care for Stranded Migrants' *New York Times*, 20 May 2015 <http://www.nytimes.com/2015/05/21/world/asia/indonesia-malaysia-rohingya-bangladeshi-migrants-agreement.html?_r=0>.

the practices developed during the CPA through Disembarkation Resettlement Offers and Rescue at Sea Resettlement Offers¹⁹ and could help reinforce commitment to rescuing refugees at sea.

Secure Funding for UNHCR and Effective Linkage of Humanitarian Aid and Development Assistance

In addition to the global imbalance in responsibilities for hosting refugees, it is clear that the shortfall in state funding for refugee protection has a significant, adverse impact. The relative success of some of the regional arrangements examined in this book has often been underpinned by external funding.

We have proposed that the responsibility of financing refugee protection should be distributed equitably based on the principle of states' 'capacity to pay'. Of course, states have other priorities that compete with refugee protection. However, there needs to be a shift in thinking among many states in the Global North which currently spend significantly more on deterring refugees from reaching their territory than on providing protection to them. Such an approach only displaces the needs of refugees onto others, leaving refugees in desperate circumstances, while also wasting resources and foregoing the contributions that refugees can make. For states without the natural advantage of the splendid isolation that Australia enjoys, deterrence measures may eventually fail, as illustrated, arguably, by the present influx of refugees and migrants to the EU.

As shortfalls in the funding provided to UNHCR have become the norm rather than the exception, it may be necessary to consider whether UNHCR funding should still be obtained by voluntary contributions from states, intergovernmental institutions and private donors, or whether there should be a transition to a compulsory funding model, or a hybrid model that incorporates elements of both. A compulsory model for UNHCR funding could be based on meeting 100 per cent of the financial needs documented in UNHCR's annual Global Needs Assessment, as well as incorporating provisions for emergency refugee situations.²⁰

The United Nations High Commissioner for Refugees has argued that the exodus of refugees to Europe in 2015 was caused in part by the lack

¹⁹ See discussion in Chapter 4.

²⁰ For a description of previous efforts to change UNHCR's funding model, see Chapter 3.

of funding for UNHCR's operations.²¹ While the report of the International Human Rights Clinic at Boston University School of Law referred to in the introduction to this book identified a risk that responsibility-sharing arrangements focused *solely* on sharing financial resources could serve as a containment device,²² it is apparent that inadequate sharing of finances combined with barriers to lawful movement may achieve the opposite result, fuelling disorderly and dangerous journeys. This should argue in favour of a commitment to meet UNHCR's funding needs.

Beyond funding the basic survival needs of refugees, the strategic linkage between refugee protection and development has been an important component of several past and present regional arrangements for refugees, leading to further work and new initiatives such as the Transitional Solutions Initiative.²³ In past arrangements, such as CIREFCA, RAD greatly facilitated the integration of refugees in host communities and the return of persons to their country of origin. In modern arrangements, such as the MPA, it has been used as a strategic tool to promote social cohesion between refugees and local communities and to bring greater prosperity both to communities hosting refugees and the refugees themselves.

Certain conditions must be in place before such efforts can be effective. For example, there must be good coordination between agencies responsible for refugee protection and those responsible for development, whether they are the international agencies (UNHCR and UNDP or the World Bank, for example) or departments within host or donor governments. The UN High Commissioner for Refugees has recently

²¹ The High Commissioner identified two long-term trends, namely that Syrians have lost hope in a political solution to the war in the near future and the impoverished state of the millions of Syrian refugees sheltered in the countries neighbouring Syria, and said that in this context, the shortfall in humanitarian funding served as a trigger for the exodus to Europe: UN High Commissioner for Refugees, 'Statement on questions relating to refugees, returnees and displaced persons' (Statement delivered at the Third Committee of the General Assembly, 70th Session, New York, 3 November 2015) <<http://www.unhcr.org/563a17566.html>>.

²² Sarah Bidinger et al, *Protecting Syrian Refugees: Law, Policies, and Global Responsibility Sharing* (2014) Boston University School of Law International Human Rights Clinic <<https://www.bu.edu/law/central/jd/programs/clinics/international-human-rights/documents/FINALFullReport.pdf>> 1–2.

²³ See discussion in Chapter 3.

called for a 'fundamental review of the strategies and policies of bilateral and multilateral development cooperation'.²⁴

In principle, however, this approach has the advantage of 'issue-linkage',²⁵ which should appeal to enlightened self-interest. Developing countries should receive additional aid which may, if protection levels are raised, assist in diminishing the market for people smuggling and serve as an investment that may assist in tackling the root causes of forced migration.²⁶ An investment of this nature may not have the populist appeal of expensive maritime interception or mandatory detention exercises, but could have long-term benefits, including better regional relationships that could be linked to other issues of importance in the future.

More Sharing of 'In Kind' Protection Resources

One of the more promising developments in the implementation of the CEAS has been the sharing of expertise through EASO. States should be sharing more protection resources such as mobile refugee status determination teams to assist with mass influx or rescue-at-sea situations as well as to improve and maintain consistently high standards of refugee status determination, asylum seeker reception and refugee protection. States from the Global North could share expertise of this nature more regularly with states in the Global South. States with strong resettlement programmes could also offer assistance to other states in the development of resettlement services, and indeed, some states already do this through 'twinning arrangements'. The CPA demonstrated the benefit of having skilled personnel monitoring returns to ensure confidence in the system among refugees and to promote reintegration of returnees. Although monitoring in this case was carried out by UNHCR, perhaps it would be possible for other credible entities, such as regional asylum support offices, to conduct monitoring. Given the attractions of RAD/TDA (targeted development assistance), in kind support in areas of development, such as expertise in micro-financing, is also important.

²⁴ UN High Commissioner for Refugees, 'Statement on questions relating to refugees, returnees and displaced persons', above n 21.

²⁵ Alexander Betts, 'North-South Cooperation in the Refugee Regime: the Role of Linkages' (2008) 14 *Global Governance* 157.

²⁶ UN High Commissioner for Refugees, 'Statement on questions relating to refugees, returnees and displaced persons', above n 21.

Alternative Migration Paths

Scholars have begun to talk of migration not as a problem to be solved, but as part of the solution, and labour migration in particular as a fourth solution for refugees in addition to the existing durable solutions of resettlement, local integration and voluntary repatriation.²⁷ Alternative migration paths have been used or proposed in some regions. Examples include the use of freedom of movement for refugees under the ECOWAS protocols²⁸ and the encouragement of labour mobility through MERCOSUR (Mercado Común del Sur) under the Brazil Declaration and Plan of Action.²⁹ Many proposals for reform of the CEAS have also suggested using resettlement, humanitarian admission programmes and other migration programmes (where the relevant criteria are met) to enable asylum seekers to access refugee protection.³⁰

Offering more lawful means of movement could serve many interests well. The absence of lawful means for migration feeds the market for people smugglers. Frequently, too, there is unacknowledged demand for labour, and it makes sense to use this demand to open doors for refugees, so long as their protection needs are also guaranteed.³¹ The recognition that refugees can contribute to their host societies through the labour market acknowledges refugees as something other than a burden on host societies' hospitality and resources.³² If labour mobility schemes could be combined with permanent status for refugees, this would deal with the concerns about the precarious nature of labour migration as a protection tool for refugees. It could also enable refugees to contribute more fulsomely to their host societies, while keeping open refugees' options to

²⁷ Katy Long, 'Rethinking Durable Solutions' in Elena Fiddian-Qasmiyeh et al (eds), *The Oxford Handbook of Refugees and Forced Migration* (Oxford University Press, 2014) 475.

²⁸ See discussion in Chapter 3.

²⁹ *Brazil Declaration, A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean and Brazil Plan of Action, A Common Roadmap to Strengthen Protection and Promote Sustainable Solutions for Refugees, Displaced and Stateless Persons in Latin America and the Caribbean within a Framework of Cooperation and Solidarity* (3 December 2014) ('Brazil Declaration and Plan of Action') <<http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2014/9865>> 13.

³⁰ See the discussion in Chapter 7.

³¹ See discussion in Chapter 3.

³² See discussion in Chapter 2.

return to their countries of origin at a time of their choosing. Choice for refugees can work to governments' advantage.

CONCLUSION

Regionalism may have some advantages over universalism. It may provide a more promising basis for agreement on higher standards than the low standards so often found in inclusive multilateral arrangements. On the other hand, in a context in which there is a North-South imbalance in refugee generation and protection, interregional cooperation is required to offer maximum benefits in terms of refugee protection and durable solutions. Moreover, a correlation between regionalism and solidarity, whether with refugees or other states within a particular region, cannot be assumed. Sovereignty, or at least the appearance of sovereign control, has a remarkable hold on governments wherever they may be. This can work to unravel political bargains struck within regional arrangements or to ensure that the bargains incorporate elements of deterrence.

The refugee is an anomalous figure in a world of nation states seeking competitive advantage for their citizens. In this context, it seems that sharing responsibility for refugees is the exception, rather than the norm. It is, however, a norm worth attempting to establish, as it could help secure refugee protection and uphold the values upon which refugee protection is based – the sanctity of human life, a commitment to equality, and traditions of hospitality towards the stranger that have a longer history and a richer cultural heritage than the concept of the sovereign state.³³

Some of the tools explored in this book could be used by governments to leverage better protection for refugees and, at the same time, to bring advantages in terms of more traditional state interests. While states have legitimate interests in managing their borders, governments have all too often reacted to the flow of refugees by applying techniques of rigid control rather than by looking for solutions that could offer options both to their own citizens and to refugees. In doing so, they neglect values and traditions that they claim to hold dear and they forget that in the longer term refugees have made, and will always make, significant contributions to their host societies.

³³ Ibid.

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Index

- Abass, Ademola 27, 44
Abbott, Tony 8
Abi-Aad, Naji 53
Abrams, Abigail 88
absorption capacity of states 112–13,
127–9, 130, 131, 191–3, 245
Achermann, Alberto 236
Adepoju, Aderanti 45, 117
Africa
 Addis Ababa Symposium on
 Refugees and Forced Population
 Displacements 174
 African (Banjul) Charter on Human
 and Peoples' Rights 43–4
 Asian-African Legal Consultative
 Organization, Bangkok
 Principles on Status and
 Treatment of Refugees 34–5, 48
 Economic Community of West
 African States (ECOWAS) 117,
 240, 249
 ICARA *see* International
 Conferences on Assistance to
 Refugees in Africa (ICARA I
 and II)
 regionalism and refugee protection
 43–6
 structural adjustment policies 86
 see also individual countries
African Union
 external factors and asylum policy
 45–6
 as Organization of African Unity
 (OAU) 43, 44, 60, 95, 163
 refugee definition 33, 44–5, 63
Aguilar, Sonia 219, 220, 222
Al-Tikriti, Nabil 54
Alden, Edward 80
Alleweldt, Ralf 36
alternative migration paths 249–50
Americas, regionalism and refugee
protection 39–42
 American Convention on Human
 Rights 40
 American Declaration on the Rights
 and Duties of Man 40
 see also individual countries
Amman Summary Conclusions on
 International Cooperation 94–5,
 136–7
 see also UNHCR
Anderson, Benedict 24, 236
Anghie, Anthony 29
Anker, Deborah 106, 107, 114, 115,
133
Arab Charter on Human Rights 54,
70–71
Arab Convention on Regulating Status
of Refugees in the Arab Countries
35, 56–7, 70–71
Arab League 52, 53
 see also Middle East
Arana, Marie 39
ASEAN
 Human Rights Declaration 35, 46–7
 asylum seekers and 'clawback' clause
 32
 Vietnamese asylum seekers 148
Asia and Pacific, regionalism and
refugee protection 46–52
 anti-refoulement protection 48
 informal arrangements and lack of
 status for refugees 49–51
 intra-regional refugee flows 47
 Pacific island states 47
 and Refugee Convention
 participation 47–9, 51
 see also individual countries

- Asia, Southeast
 Comprehensive Plan of Action for Indochinese Refugees (CPA) *see* Comprehensive Plan of Action for Indochinese Refugees (CPA)
 labour mobility and resettlement programmes 118
 UN General Assembly, Comprehensive Plan of Action for Indochinese refugees 32
- Asian-African Legal Consultative Organization, Bangkok Principles on Status and Treatment of Refugees 34–5, 48
- Asylum, Migration and Integration Fund (AMIF), EU 200, 202–3, 206, 209, 236
- asylum provisions
 Arab Convention on Regulating Status of Refugees in the Arab Countries 57, 70–71
 asylum seekers and ‘clawback’ clause, ASEAN Human Rights Declaration 32
 and Buddhist principle of *silā* (virtue) 72–3
 and Christian protection of the stranger 72, 73
 EU *see* EU, Common European Asylum System (CEAS)
 first asylum states *see* states of first asylum
 and French Revolution 73
 ‘Welcoming the Stranger’ initiative 70
 ‘asylum shopping’ concerns, EU 189–90, 192, 194
- Aust, Helmut 74
- Australia
 labour migration programmes, post-WW2 117
M70/2011 v Minister for Immigration and Citizenship 8, 120
M106/2011 v Minister for Immigration and Citizenship 8, 120
 ‘Malaysia swap’ and resettlement exchange 8, 9, 15, 119–20
 Migration Act 8–9
 offshore detention centre conditions 13–15
 offshore detention centres and ‘Pacific solution’ 7–8, 9, 10, 12, 13–15, 47, 48–9, 120, 215
 offshore detention centres and ‘Pacific solution’, Republic of Nauru MOU 14–15, 225
 Operation Sovereign Borders 80–81
 Refugee Convention accession 36
 Refugee Council of Australia, on asylum seekers and fair treatment 150
 Refugee Council of Australia, review of economic, civic and social contributions of refugees and humanitarian entrants 84
 refugee protection 75
 regional resettlement arrangement with Cambodia, Nauru and Papua New Guinea 9–10, 12, 14, 15
 relocation of refugees 119–20
 resettlement places for Indochinese refugees 145
 selective cooperation with Indonesia 12–13
 unauthorized boat arrivals 6–9, 80–81, 87, 104, 133–4, 160, 225
- Babarinde, Olufemi 26
 Babon, Andrea 14
 Bach, Daniel 43
 Bali Process on People Smuggling, Trafficking and Related Transnational Crime 10–14, 51–2
 Bangkok Principles on Status and Treatment of Refugees 34–5, 48
- Barbour, Brian 76
 Barker, Cat 81
 Barrett, Scott 99
 Bau, Ignatius 70
 Bedlington, Jenny 136
 Bergin, Anthony 68
 Bethlehem, Daniel 31

- Betts, Alexander 64, 74, 95, 98–9, 123, 137, 138, 151, 164, 171, 172, 173, 178, 187, 248
 Beyani, Chaloka 33, 44
 Bidinger, Sarah 4, 6, 16, 247
 Blavo, E 45
 boat arrivals
 ‘boat people’ terminology origins 157
 EU, Common European Asylum System (CEAS) 212–14
 Frontex, Operation Triton, EU 213
 Global Initiative on Protection at Sea 105
 Inter-Governmental Maritime Consultative Organization 146
 International Convention on Maritime Search and Rescue (SAR Convention) 103
 International Convention for the Safety of Life at Sea (SOLAS Convention) 103, 104
 International Maritime Organization (IMO) on persons in distress at sea 103–4, 105
 refugees in distress at sea 102–4
 refugees and other displaced persons in distress in South China Sea 146
 Rescue at Sea Resettlement Offers, Comprehensive Plan of Action for Indochinese Refugees (CPA) 146, 246
 unauthorized, Australia 6–9, 80–81, 87, 104, 133–4, 160, 225
 Bonfanti, Sarah 132
 border control role 76–7
 Borders of Solidarity Programme, Mexico Declaration and Plan of Action 123–4, 222–6, 238
 Borders of Solidarity and Safety Programme, Mexico Declaration and Plan of Action 230, 232
 Boswell, Christina 75, 76, 77, 84
 Bradley, Megan 177, 182, 183
 Brazil, Ecuador funding assistance 222–3
 Brazil Declaration and Plan of Action 229–32, 237, 238
 see also Mexico Declaration and Plan of Action and Cartagena+
 Brookings Process 124
 Brown, Lucy 53
 Buddhism, asylum and principle of *sila* (virtue) 72–3
 Cahn, Claude 38
 Cambodia
 emergency refugee relief 147, 149
 regional resettlement arrangement with Australia 15
 camps
 Kenya, Dadaab refugee camps, effects and benefits to local population 90–92
 militarization of refugees in camps, causes of 82–3
 self-settling and avoidance of camp dependency, Africa 170
 Canada
 Americas, regionalism and refugee protection 39–42
 labour migration programmes, post-WW2 117
 resettlement places for Indochinese refugees 145
 Carens, Joseph 76
 Carneiro, Wellington 233
 Cartagena Declaration on Refugees
 funding principles 180
 and Mexico Declaration and Plan of Action *see* Mexico Declaration and Plan of Action and Cartagena+
 see also International Conference on Central American Refugees (CIREFCA)
 Cass, Moss 157
 Castles, Stephen 79
 Chalmers, Max 14
 Chatelard, Geraldine 58
 Chatty, Dawn 55
 Chimni, B 45, 66, 79, 101, 110, 127, 133, 157
 China, Refugee Convention
 participation 48
 Chiu, Hungdah 153

- Christensen, Asger 77, 85, 86, 90
- Christianity, asylum and protection of the stranger 72, 73
- CIREFCA *see* International Conference on Central American Refugees (CIREFCA)
- Cities of Solidarity Programme for Self-Sufficiency and Local Integration 218–21, 230, 238
see also Mexico Declaration and Plan of Action and Cartagena+
- clandestine departures, dealing with, Comprehensive Plan of Action for Indochinese Refugees (CPA) 150, 152–3
- Claude, Inis 60–61
- Cochrane, Joe 245
- Cold War impacts 25–6, 45, 53–4, 62, 88, 153, 165, 239
- collective expulsion prohibition, EU, Common European Asylum System (CEAS) 197
- Colombian refugee crisis 41
Mexico Declaration and Plan of Action 217–18, 223, 224, 228
- Common European Asylum System (CEAS) *see* EU, Common European Asylum System (CEAS)
- Comprehensive Plan of Action for Indochinese Refugees (CPA) 23, 51, 139, 140, 143–61, 240–42, 245
1979 arrangement 143–8, 153, 157
1989 international conference 148–51, 153–4
balance of responsibilities 150–51
'boat people' terminology origins 157
Cambodian refugees, emergency relief 147, 149
clandestine departures, dealing with 150, 152–3
detention centre conditions 154
Disembarkation Resettlement Offers 146, 246
donor states 145
economic migrants 147–8, 150–51, 159
ethnic Chinese minority, Vietnamese expelling of 153
forcible return of refugees to Vietnam 155–6
and international legal definition of a refugee, varied application 154
mass media campaign 150
Memorandum of Understanding (MOU) with UNHCR 145–6
non-refoulement obligation 145, 241
Orderly Departure Programme (ODP) 145–6, 150, 152–3, 240–41
public attitudes towards refugees in Asia Pacific region, effects on 158–60
'queue jumper' terminology origins 157–8
refugee status-determination (RSD) process 149–50, 153–4
refugees and other displaced persons in distress in South China Sea 146
Rescue at Sea Resettlement Offers 146, 246
responsibility-sharing 144–5, 148–9, 151, 158–9, 242
'safe third countries' concept 159–60
states of final settlement 145, 147, 149, 151, 158–9
states of first asylum 145, 148, 149, 152, 153–4, 156, 158–9, 241–2
Vietnam, repatriation programme to 149, 151–2, 154–6, 245, 248
Vietnamese refugees 143–6, 147–8, 240–41, 245
- containment measures and consequences 80–83, 101, 107
- Cook, Benjamin 114
cooperation benefits 60–63
see also regionalism and refugee protection
- Cornall, Robert 14
- Costa Rica
Casa de Derechos (House of Rights), and Mexico Declaration and Plan of Action 219
Esquipulas II peace process 175–6, 187–8, 238
credit programmes 123, 183, 219–20

- Crisp, Jeff 4, 5, 6, 82, 84, 101, 117, 167, 169, 170, 171, 172, 174
- culpability of states for causing displacement of people 127, 134–6
- Czaika, Mathias 76, 96
- Dauvergne, Catherine 87
- Davies, Sara 35, 51
- Davis, John 54
- De Vattel, Emmerich 74
- Deffenbaugh, Ralston 72
- definition *see* refugee definition
- detention centres
- Australia *see* Australia
 - Cambodia 15
 - Comprehensive Plan of Action for Indochinese Refugees (CPA) 154
 - costs, and responsibility of states to protect refugees 84
 - and European Court of Human Rights *see* European Court of Human Rights (ECtHR)
- developed countries, containment measures and consequences 80–83, 101, 107
- see also* individual countries
- developing countries
- disproportionate share and local integration problems 101–2, 107
 - economic impact of refugees 84–5, 93, 248
 - global number of refugees in developing world 9–10, 63
 - minilateralism and divide between developed and developing countries 63–5
 - see also* individual countries
- Development Program for Displaced Persons, Refugees and Returnees in Central America (PRODERE) 124, 178–9, 183, 185, 186
- see also* International Conference on Central American Refugees (CIREFCA)
- Dewan, Torun 126
- Di Pascale, Alessia 204
- distress at sea situations *see* boat arrivals
- Djibouti repatriation agreement 170–71
- see also* International Conferences on Assistance to Refugees in Africa (ICARA I and II)
- donor states
- Comprehensive Plan of Action for Indochinese Refugees (CPA) 145
 - International Conference on Central American Refugees (CIREFCA) 186–7
 - International Conferences on Assistance to Refugees in Africa (ICARA I and II) 167–8
 - scepticism on project funding 165, 170, 171–2, 240
 - see also* funding
- D’Orsi, Christiano 43
- Dratel, Joshua 31
- drought and famine effects on funding 172–3
- see also* funding
- Drüke, Luise 146, 147, 148
- Dryden-Peterson, Sarah 85
- Dublin Convention and allocation of responsibility 189–93, 196, 197, 203, 205, 215, 235, 236, 242
- see also* EU, Common European Asylum System (CEAS)
- Dupont, Alan 49, 50
- Durango, Andrea 219, 220
- Eckersley, Robyn 59, 63–4
- Economic Community of West African States (ECOWAS) 117, 240, 249
- see also* Africa
- economic efficiency, and responsibility sharing among states as 106–7, 113–15
- economic impacts of refugee protection 74, 84–6, 91, 92
- economic migrants 147–8, 150–51, 159
- see also* Comprehensive Plan of Action for Indochinese Refugees (CPA)

- Ecuador
 Brazil's funding assistance 222–3
 Casa de la Movilidad Humana (House of Human Mobility), and Mexico Declaration and Plan of Action 220
 documentation issues 221
 due process and time limit concerns 225–6
 Enhanced Registration Programme, and Mexico Declaration and Plan of Action 223–4
 Quito, Accelerated Basic Cycle of Education 220–21
 education concerns 4–5, 91, 102, 167, 204, 218, 220–21, 222
 Egypt, No Lost Generation strategy 4–5
 Einarsen, Terje 33, 69
 El Salvador, Esquipulas II peace process 175–6, 187–8, 238
 Elmadmad, Khadija 70
 emergency transit centres in Romania and Slovakia 210
see also detention centres
 employment
 labour migration programmes 116–19, 132–3, 220, 230–31
 opportunities for refugees and national workers, Central America 182–3
 and UNHCR 116, 117–18, 120–21
 Enghoff, Martin 90
 environmental impacts 90, 91, 92
 Esquipulas II peace process 175–6, 187–8, 238
see also International Conference on Central American Refugees (CIREFCA)
 ethnic nationalist focus and pan-Arabism problems 53
 EU
 Asylum and Migration and Integration Fund (AMIF) 121
 Council of Europe and European Convention on Human Rights (ECHR) 37
 donor support, International Conference on Central American Refugees (CIREFCA) 178
 European Asylum Support Office 124
 extra-regional refugees 38–9, 196–7
 intra-regional refugee crises 37–8
non-entrée measures 80
 population size and absorptive capacity 128–9
 refugee quotas 112–13, 115–16
 refugee resettlement 111
 Regional Protection Programmes (RPP) 27, 124–5
 responsibility-sharing for refugees fleeing from non-EU member states 38, 95–6
 Roma persecution and rights 38
 subsidiary status 34
 UNHCR and EU review, International Conference on Central American Refugees (CIREFCA) 180, 185, 186, 187
 EU, CJEU
N. S. v Secretary of State for the Home Department and M. E. v Refugee Applications Commissioner 38, 119–20, 197
 EU, Common European Asylum System (CEAS) 23–4, 37–9, 61, 139, 189–216, 235–7, 242, 249
 Asylum, Migration and Integration Fund (AMIF) 200, 202–3, 206, 209, 236
 asylum seeker numbers 209
 'asylum shopping' concerns 189–90, 192, 194
 boat arrivals 212–14
 capacity of states to absorb or protect refugees 112–13, 191–3
 collective expulsion prohibition 197
 demographic changes, awareness of 214
 Dublin Convention and allocation of responsibility 189–93, 196, 197, 203, 205, 215, 235, 236, 242
 emergency transit centres in Romania and Slovakia 210

- EU Fundamental Rights Agency (FRA) 212–13, 214
- EU Naval Force – Mediterranean (EUNAVFOR Med) 213–14
- EU Regional Trust Fund in Response to the Syrian Crisis 201
- European Asylum Support Office (EASO) 195, 197–200, 205, 207–8, 236, 248
- European Asylum Support Office (EASO), ‘joint’ processing arrangements 198–9
- European Council on Refugees and Exiles (ECRE) 203, 211
- European Fund for the Integration of Third-Country Nationals 202
- European Refugee Fund (ERF) 200, 201–2, 209
- European Return Fund 202
- finance sharing 200–203
- financial compensation mechanism proposals 215
- first instance interviews, quality concerns 195–6
- Frontex, Operation Triton and boat arrivals 213
- funding distribution, disproportionate 201–2
- funding incentive for relocation 206
- harmonization instruments 193–8
- interception and return of asylum seekers to countries outside EU 196
- intra-EU relocation project from Malta (EUREMA) 205, 207, 236
- Italy, Operation Mare Nostrum 213
- Joint EU Resettlement Programme 209, 236
- legal representation access 195
- mandatory quotas 210, 236–7, 244–5
- mass influx of displaced persons and Temporary Protection Directive 203–4, 248
- migrant smuggling or human trafficking from Libya 214
- multiple processing concerns 193
- point of first entry focus 191, 235
- Procedures Directive 193, 195–6
- Procedures Directive and asylum seekers sent to third country 190–91
- Qualification Directive 193
- Rapid Border Intervention (RABIT) Teams 200
- Reception Directive 193, 194
- refugee accommodation concerns 191–2, 196
- and Refugee Convention standards 194, 200
- refugee status determination (RSD) 192, 215
- refugees from priority areas using distribution factors 209–10
- Regional Development and Protection Programmes (RDPPs) 211
- Regional Protection Programmes (RPPs) 210–12
- relocation of refugees and asylum seekers within EU 204–7
- resettlement quotas 205, 206–10, 215, 236–7, 244–5
- responsibility-sharing models 214–15, 236, 249
- Syrian crisis effects 200, 201, 207–8, 211, 236
- TFEU and principle of solidarity and fair sharing of responsibility 191
- UN Security Council resolution on boat arrivals 213–14
- voluntary relocation 205–6, 207
- EUREMA (intra-EU relocation project from Malta) 205, 207, 236
- European Court of Human Rights (ECtHR)
 - Hirsi Jamaa v Italy* 29, 197
 - M.S.S. v Belgium and Greece* 29, 38, 119, 191–2, 196
 - on relocation of refugees and *non-refoulement* obligations 119
 - Tarakhel v Switzerland* 197
- European perspectives, universalization from 29, 35–9, 51

- Evans, Gareth 158
- Executive Committee of the High Commissioner's Programme (ExCom) 32, 58, 94
see also UNHCR (United Nations High Commissioner for Refugees)
- extra-regional refugees
 EU 38–9
 International Conference on Central American Refugees (CIREFCA) 185
 International Conferences on Assistance to Refugees in Africa (ICARA I and II) 163–4
- Fawcett, Louise 18, 24, 25, 52
- Feller, Erika 244
- Feneley, Rick 88
- Ferris, Elizabeth 39, 41, 72
- financial compensation mechanism
 proposals, EU, Common European Asylum System (CEAS) 215
- financial cost sharing 121–4, 125–6, 129, 200–203
- financial donors *see* donor states
- first asylum states *see* states of first asylum
- first entry, EU point of first entry focus 191, 235
- first instance interviews, quality concerns, EU 195–6
- Fontaine, Pierre-Michel 152, 155
- Fonteyne, J 102, 242
- Foster, Michelle 69
- France
 asylum and French Revolution 73
 resettlement places for Indochinese refugees 145
- Fratzke, Susan 192
- free-riding concerns 98–9, 116
- freedom of movement rights 38, 116, 144, 160, 170, 177–8, 249
see also human rights
- Frenzen, Niels 213
- Frontex, Operation Triton and boat arrivals, EU 213
- funding
 Brazil, Ecuador funding assistance 222–3
 distribution, disproportionate, EU 201–2
 donor states *see* donor states
 drought and famine effects 172–3
 European Fund for the Integration of Third-Country Nationals 202
 European Return Fund 202
 principles and Cartagena Declaration on Refugees 180
 refugee hosting, International Conferences on Assistance to Refugees in Africa (ICARA I and II) 162–3, 164–5, 167
 relocation incentive, EU 206
 shortages and inequalities, International Conferences on Assistance to Refugees in Africa (ICARA I and II) 165, 166, 171, 172, 239–40
 shortfalls 96, 121, 122–3, 243, 246–8
 UNHCR donations, voluntary 121–3, 125–6, 129
- future emergencies, insurance against 105–6
- Gallagher, Michael 72
- Gariup, Monica 52
- Garlick, Madeline 7, 27, 190, 192, 198, 199, 200, 202, 205, 215
- Gattiker, Mario 236
- GDP consideration in reallocation of responsibility 112–13, 127–8
- gender issues and refugee women vulnerability 181–2
- Germany
 asylum applications 38, 200
 resettlement places refugees 6, 145
- Gibney, Matthew 38, 64–5, 77–8, 79, 101, 114, 216, 242
- Gillard, Julia 6–7, 8
- Gleditsch, Kristian 89
- Global Initiative on Protection at Sea 105
see also UNHCR
- Goddard, Brenda 55, 56

- Gomez, Margarita 85, 86, 90
 Goodwin-Gill, Guy 101, 125
 Gordenker, Leon 100
 Gorlick, Brian 76
 Gorman, Robert 165
 Gottwald, Martin 41, 62
 Grahl-Madsen, Atle 70, 112–13, 116, 127
 Grant, J Andrew 26
 Greece
 asylum seekers 39, 115–16, 191–2, 196, 206–7
 European Asylum Support Office (EASO) Support Teams 124, 199–200
 Greenberg, Karen 31
 Grenon, Michel 53
 Guatemala
 Esquipulas II peace process 175–6, 187–8, 238
 state-sponsored violence problems 184
 Guild, Elspeth 38, 192, 196, 207, 215
 Hale, Thomas 59
 Hammerstad, Anne 82
 Hanson, Gordon 51, 77
 Harild, Niels 77
 Harley, Tristan 87
 harmonization instruments, EU 193–8
 Hathaway, James 64, 67, 69, 80, 105, 106, 107, 114, 125, 126, 127, 130–34
 Hatton, Timothy 77, 85
 Hawley, Samantha 15
 health concerns 5, 15, 91, 102, 133, 167, 177, 204, 218, 220–21, 222
 Helton, Arthur 143–4, 147, 148, 152, 154
 Hetfield, Mark 72
 Hieronymi, Otto 56
 Honduras, Esquipulas II peace process 175–6, 187–8, 238
 Hong Kong, and Vietnamese refugee repatriation 156
 Hooper, John 70
 hospitality principles 69, 70–78
 see also responsibility of states to protect refugees
 hosting *see* refugee hosting
 housing assistance 76, 102, 121, 204, 220, 238
 Hovil, Lucy 85
 Howard, John 7, 8
 Hugo, Graeme 84
 human rights
 European Court of Human Rights (ECtHR) *see* European Court of Human Rights (ECtHR)
 family reunification and cultural rights 120
 freedom of movement rights 38, 116, 144, 160, 170, 177–8, 249
 International Covenant on Economic, Social and Cultural Rights 26
 principles 69, 70–78
 promotion, grassroots involvement and NGO participation 179, 180, 186–7
 Universal Declaration of Human Rights and right to seek asylum 97
 Human Rights Watch 15, 156, 184
 human trafficking from Libya 214
 Hungary, asylum seekers 39, 116, 207
 Hurrell, Andrew 25–6
 ICARA *see* International Conferences on Assistance to Refugees in Africa (ICARA I and II)
 ICJ (International Court of Justice)
 Asylum Case (Colombia v Peru) 30
 Fisheries Case (United Kingdom v Norway) 32
 Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) 30
 North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) 31
 Idler, Annette 41
 Iheduru, Okechukwu 26

- immunity from prosecution and lawful presence to stay 97–8
- Inder, Claire 94
- Indochinese refugees *see*
 - Comprehensive Plan of Action for Indochinese Refugees (CPA)
- Indonesia
 - Australia's selective cooperation with 12–13
 - opposition to protection of refugees 32
 - refusal to accept refugees rescued at sea 104–5
- insurance against future refugee emergencies 105–6
- Inter-American Commission on Human Rights 40
 - Haitian Center for Human Rights v United States of America* 29
- Inter-American Court of Human Rights
 - CIREFCA Legal Document 180–81
 - Pacheco Tineo Family v Bolivia* 40, 237
- Inter-Governmental Maritime Consultative Organization 146
- internally displaced persons (IDPs) 176, 178, 180, 184–5
- International Committee of the Red Cross (ICRC), Cambodian emergency relief programme 147
- International Conference on Central American Refugees (CIREFCA) 123–4, 139, 140, 175–88, 237–8
 - credit programmes for farmers and entrepreneurs 183
 - Development Program for Displaced Persons, Refugees and Returnees in Central America (PRODERE) 124, 178–9, 183, 185, 186
 - employment opportunities for refugees and national workers 182–3
- Esquipulas II peace process 175–6, 187–8, 238
- EU donor support 178
- externally displaced persons 185
 - financial support from international donors 186–7
 - funding principles and Cartagena Declaration on Refugees 180
 - gender issues and refugee women vulnerability 181–2
 - human rights promotion, grassroots involvement and NGO participation 179, 180, 186–7
 - internally displaced persons (IDPs) 176, 178, 180, 184–5
 - international organizations, lack of clarity in responsibility distribution 185–6
 - land recovery problems 183–4
 - Legal Document 180–81
 - local integration of refugees 176, 177, 182
 - monitoring programme 179
 - Plan of Action and social and economic development in returnee communities 177–8, 183–4
 - quick impact projects (QiPs) 182, 183–4, 185
 - and Refugee Convention ratification 181
 - refugee numbers 175
 - resettlement in states outside region 182
 - return of refugees to country of origin 183
 - state-sponsored violence problems in Guatemala 184
 - UNHCR and EU review 180, 185, 186, 187
 - voluntary repatriation programmes 176–7, 183–4
 - see also* Mexico Declaration and Plan of Action and Cartagena+
- International Conferences on Assistance to Refugees in Africa (ICARA I and II) 123, 139, 140, 162–74, 239–40
- Declaration and Programme of Action 167–8
- Djibouti repatriation agreement 170–71

- donor scepticism on project funding 165, 170, 171–2, 240
- drought and famine effects on funding 172–3
- extra-regional support 163–4
- funding shortages and inequalities 165, 166, 171, 172, 239–40
- local settlement or integration failures 169–70
- local settlement or integration focus 164, 167
- political instability concerns 169, 239–40
- refugee aid and development (RAD) focus 166–72, 174, 239–40
- refugee hosting, funding for 162–3, 164–5, 167
- refugee numbers 162
- self-settling and avoidance of camp dependency 170
- UNHCR coordination responsibility 168, 170–71
- UNHCR on need for ICARA II 166
- US donor support 164, 172
- voluntary repatriation considerations 168, 170–71
- see also* Africa
- International Convention on Maritime Search and Rescue (SAR Convention) 103
- International Convention for the Safety of Life at Sea (SOLAS Convention) 103, 104
- international cooperation, UNHCR on 94–5, 103, 247–8
- International Court of Justice *see* ICJ
- International Covenant on Civil and Political Rights 26
- International Covenant on Economic, Social and Cultural Rights 26
- international legal definition of a refugee, variation in application 154
- International Maritime Organization (IMO), on persons in distress at sea 103–4, 105
- international organizations, lack of clarity in responsibility distribution 185–6
- international politics, regionalism and refugee protection 24–7
- interviews, first instance interviews, quality concerns, EU 195–6
- Ippolito, Francesca 27, 34
- Ireland, *D (a minor) v Refugee Appeals Tribunal* 38
- Isbister, John 76
- Italy
 - asylum seekers 39, 115–16, 206–7
 - European Asylum Support Office (EASO) Support Teams 199
 - Operation Mare Nostrum 213
- Jacks, Timna 15
- Jacobs, Dov 1
- Japan, refugee protection and UNHCR resettlement programme 49
- Jasson, Chiara 56
- Johnson, Kevin 77
- Jubilut, Liliana 233
- Judaism, asylum and protection of the stranger 72
- Juss, Satvinder 131
- Kälin, Walter 32
- Kant, Immanuel 73
- Kenya
 - ‘abdication and containment’ policy and Somali refugees 89–91
 - Dadaab refugee camps, effects and benefits to local population 90–92
- Kibreab, Gaim 168, 169, 172, 173
- Klug, Anja 94, 105, 118, 146, 216
- Kneebone, Susan 27, 28
- Kraler, Albert 215
- Kritzman-Amir, Tally 127, 134
- Kumin, Judith 144, 146, 152, 153, 241
- Kuosmanen, Jaakko 120
- labour *see* employment
- Lake, Marilyn 75

- land recovery problems, International Conference on Central American Refugees (CIREFCA) 183–4
- Langford, Lillian 192, 200
- Latin America
- Americas, regionalism and refugee protection 39–42
 - Cartagena Declaration on Refugees *see* Cartagena Declaration on Refugees
 - Colombian refugee crisis 41
 - MERCOSUR labour mobility programme 117, 249
 - political asylum history 40–41
 - responsibility-sharing 96, 123–4
 - see also* individual countries
- Lauterpacht, Elihu 31
- Lazarte, Alfredo 179, 183
- Lebanon, economic concerns and refugee numbers 5
- Lebson, Mike 83
- legal protection
- Asian–African Legal Consultative Organization, Bangkok Principles on Status and Treatment of Refugees 34–5, 48
 - court cases *see under* individual countries and courts
 - international legal definition of a refugee, varied application 154
 - lack of, and pan-Arab hospitality 57–8, 70–71
 - Legal Document, International Conference on Central American Refugees (CIREFCA) 180–81
 - legal representation access, EU, Common European Asylum System (CEAS) 195
- liberal political structures and philosophical principles 73–7
- Libya, migrant smuggling or human trafficking 214
- Lindholm-Schulz, Helena 52, 56
- Lischer, Sarah 83
- local integration of refugees 109–21, 125–6
- International Conference on Central American Refugees (CIREFCA) 176, 177, 182
- International Conferences on Assistance to Refugees in Africa (ICARA I and II) 164, 167, 169–70
- UNHCR on 109
- see also* refugee hosting; resettlement
- Loescher, Gil 86, 88, 110, 165
- Long, Katy 82, 117, 119, 170, 249
- McAdam, Jane 101
- McKay, Fiona 158
- McKeown, Adam 74–5
- Malaysia
- ‘Malaysia swap’ and resettlement exchange, Australia 8, 9, 15, 119–20
 - opposition to protection of refugees 32
 - refusal to accept refugees rescued at sea 104–5
- Malta, EUREMA (intra-EU relocation project from Malta) 205, 207, 236
- Mares, Peter 75
- market-based model for refugee protection 113–15, 125–6
- Mason, Victoria 58
- mass influx of displaced persons 78–9, 203–4, 248
- mass media campaign, Comprehensive Plan of Action for Indochinese Refugees (CPA) 150
- Mathew, Penelope 87, 88
- Mattli, Walter 25, 27
- Maystadt, Jean-François 86
- MERCOSUR labour mobility programme 117, 249
- see also* Latin America
- Mexico Declaration and Plan of Action and Cartagena+ 42, 217–33, 237
- anti-discrimination and xenophobia campaigns 220–21
 - Asociación de Consultores y Asesores Internacionales (ACAI) 219, 220, 223

- Borders of Solidarity Programme 123–4, 222–6, 238
- Borders of Solidarity and Safety Programme 230, 232
- Brazil Declaration and Plan of Action 229–32, 237, 238
- Brazil, Ecuador funding assistance 222–3
- Cities of Solidarity Programme for Self-Sufficiency and Local Integration 218–21, 230, 238
- Colombian refugee crisis 217–18, 223, 224, 228
- Costa Rica, Casa de Derechos (House of Rights) 219
- Ecuador, Casa de la Movilidad Humana (House of Human Mobility) 220
- Ecuador, due process and time limit concerns 225–6
- Ecuador, Enhanced Registration Programme 223–4
- Ecuador, Executive Decree 1182 and security concerns 224–6, 238
- Ecuadoran Civil Registration Office and documentation issues 221
- education campaigns 220–21
- employment programmes 220, 230–31
- external funding for projects 222
- Labour Mobility Programme suggestion 230–31
- microcredit programme 219–20
- NGO involvement 221
- Northern Triangle (Guatemala, Honduras and El Salvador) refugees 230
- Palestinian refugees 228
- Quito, Accelerated Basic Cycle of Education 220–21
- refugee definition 223–4, 227, 237–8
- refugee status determination mechanisms (RSD) 222, 223–6, 231
- Regional Solidarity Resettlement Programme 226–8, 230
- responsibility-sharing strategies 231–2
- states of first asylum 217–18
- UNHCR, Quality Asylum Programme 231, 237
- UNHCR refugee protection agreements 219, 220
- UNHCR review 222–3, 225, 227–8, 231
- Venezuela, registration and documentation problems 223
- voluntary Cooperation Fund suggestion 230, 231
- vulnerability areas 227
- see also* International Conference on Central American Refugees (CIREFCA)
- microcredit programmes 123, 183, 219–20
- Middle East
- Arab League *see* Arab League
- Arab Spring effects 54
- Casablanca Protocol and Palestinian refugees 56
- Cold War effects 53–4
- conflict and instability effects 53–4
- foreign intervention history 54–5
- Iraq wars 54
- legal protection, lack of, and pan-Arab hospitality 57–8, 70–71
- Palestinian refugee protection 55–6, 58
- refugee flows 54
- regionalism and refugee protection 52–8
- see also* individual countries
- migrant smuggling or human trafficking from Libya 214
- militarization of refugees in camps, causes of 82–3
- Miller, Mark 79
- Milner, James 44, 45, 46, 86, 87, 89, 165
- minilateralism and divide between developed and developing countries 63–5
- Missbach, Antje 160
- monitoring programmes 62, 151–2, 154, 155, 173, 179, 197–8, 223, 241, 248

- Moraga, Jesus 215
 moral and philosophical underpinnings
 of refugee protection 69, 70–80
 Morrison, Scott 12, 80–81
 Mouzourakis, Minos 192, 193
 Muntarbhorn, Vitit 50
 Murphy, Kevin 156
 Mutua, Makau wa 45
 Mystris, Dominique 44
- Nafziger, James 74
 Naím, Moisés 63
 Naldi, Gino 43
 Nascimbene, Bruno 204
 Nathwani, Niraj 73
 nation state emphasis, concerns over
 74–6
 sovereignty protection 97–8
 Neff, Stephen 73, 74
 Nesadurai, Helen 46
 Neumann, Klaus 117, 157
 Neve, R Alexander 64, 105, 106, 107,
 114, 126, 127, 130–34
 NGO involvement
 International Conference on Central
 American Refugees (CIREFCA)
 179, 180, 186–7
 Mexico Declaration and Plan of
 Action 221
 Nicaragua, Esquipulas II peace process
 175–6, 187–8, 238
 Nigeria, labour migration programme
 117
 Noll, Gregor 73, 108
 Nollkaemper, Andre 1
 non-financial (in-kind) resource sharing
 124–5
non-refoulement obligation
 ASEAN Human Rights Declaration
 48
 Comprehensive Plan of Action for
 Indochinese Refugees (CPA)
 145, 241
 European Court of Human Rights
 (ECtHR) on 119
 Inter-American Court of Human
 Rights 40
 International Conferences on
 Assistance to Refugees in Africa
 (ICARA I and II) 239
 and refugee security 131, 135
 regionalism and refugee protection
 62
 responsibility of states to protect
 refugees 67, 73–4, 102
 see also security
- Okoth-Obbo, George 33, 174
 Orderly Departure Programme (ODP),
 Comprehensive Plan of Action for
 Indochinese Refugees (CPA)
 145–6, 150, 152–3, 240–41
 Organization of African Unity *see under*
 African Union
 Organization of American States (OAS)
 39–40
 Refugee Convention participation 42
 Organization of the Islamic Conference
 (OIC) 71–2
 Ortega, Carlos 221
 Ospina, Oscar 221
- Pacific island states, ASEAN Human
 Rights Declaration 47
 Pahuja, Sundhya 29
 Palestinian refugees 55, 228
 Palmgren, Pei 47, 49
 Papadopoulou, Aspasia 125, 211
 Parlapiano, Alicia 88
 Peers, Steve 24, 194, 198
 Peretz, Don 55, 56
 Phillips, Janet 81
 Pickering, Sharon 82, 158
 Pitterman, Shelly 164, 170
 Pobjoy, Jason 83
 political and security impacts 82–3,
 87–90, 92–3, 169, 239–40
 population size and absorptive capacity
 128–9, 130, 131
 see also absorption capacity of states
 Prakash Sinha, S 70, 73
 Procedures Directive, EU, Common
 European Asylum System (CEAS)
 190–91, 193, 195–6

- PRODERE *see* Development Program for Displaced Persons, Refugees and Returnees in Central America
 prosecution, immunity from, and lawful presence to stay 97–8
 protection capacity *see* responsibility of states to protect refugees
 public attitudes towards refugees 87, 158–60, 220–21
- Qualification Directive, EU 193
 ‘queue jumper’ terminology origins 157–8
 quick impact projects (QiPs), International Conference on Central American Refugees (CIREFCA) 182, 183–4, 185
 quotas *see* refugee quotas
- racism and xenophobia concerns 87, 220–21
 Rapid Border Intervention (RABIT) Teams, EU, Common European Asylum System (CEAS) 200
 Rapoport, Hillel 215
 Ravenhill, John 24, 25
 Rawlings-Sanaei, Felicity 27, 28
 Reception Directive, EU 193, 194
 Redmond, Ron 178, 187
 Reed-Hurtado, Michael 180–81, 238
 Reformulation Project and common but differentiated responsibility 126, 130–34
refoulement see non-refoulement
 obligation
- refugee accommodation *see* detention centres *and* refugee camps
 refugee aid and development (RAD) focus 166–72, 174, 239–40, 247–8
 Refugee Convention 28
 bill of rights for refugees 29
 denouncement arguments 68
 and EU Charter of Fundamental Rights of the European Union 37
 immunity from prosecution and lawful presence to stay 97–8
 on international cooperation 94
ius cogens (non-derogable norms) 31
 Middle East states’ involvement, lack of 56, 57, 70–71
non-refoulement obligation 28–9, 30, 32, 35, 37, 75, 99
opinio juris (belief that practice required by law) 30–31
 Palestinian refugee protection exclusions 55–6
 participation, and ASEAN Human Rights Declaration 47–9, 51
 ratification, and International Conference on Central American Refugees (CIREFCA) 181
 and Refugee Convention and Protocol 37
 refugee definition 17, 28, 34, 35, 63, 75
 refugee status determination 149–50, 153
 regional reactions and refinements 33–5
 standards, and EU, Common European Asylum System (CEAS) 194, 200
 temporary protection and voluntary repatriation 130–32
 and universalism 30–33, 59–60
- refugee definition
 African Union 33, 44–5, 63
 international legal definition of a refugee, varied application 154
 Mexico Declaration and Plan of Action and Cartagena+ 223–4, 227, 237–8
 Refugee Convention 17, 28, 34, 35, 63, 75
- refugee hosting
 funding for, International Conferences on Assistance to Refugees in Africa (ICARA I and II) 162–3, 164–5, 167
 host societies, contributions of refugees to 69, 76–7, 83–4
 and local integration *see* local integration
 refugees as burden or benefit 83–93

- refugee protection, and regionalism *see*
 - regionalism and refugee protection
- refugee quotas
 - EU 112–13, 115–16
 - resettlement quotas, EU 205, 206–10, 215, 236–7, 244–5
 - responsibility sharing among states 107, 112–16, 125–6
 - UNHCR on 112, 113, 115
- refugee status determination (RSD)
 - Comprehensive Plan of Action for Indochinese Refugees (CPA) 149–50, 153–4
 - EU, Common European Asylum System (CEAS) 192, 215
 - Mexico Declaration and Plan of Action 222, 223–6, 231
 - UNHCR 42
- ‘refugee warriors’ prosecuting wars at home 88–9
- Regional Development and Protection Programmes (RDPPs), EU 211
- Regional Protection Programmes (RPP), EU 27, 124–5, 210–12
- Regional Refugee and Resilience Plan (3RP), UNHCR 2, 3
- Regional Solidarity Resettlement Programme, Mexico Declaration and Plan of Action 226–8, 230
- regionalism and refugee protection 23–66
 - ad hoc initiatives and *non-refoulement* 62
 - Africa 43–6, *see also* Africa
 - Americas 39–42, *see also* individual countries
 - Asia and Pacific 46–52, *see also* individual countries
 - best interests for refugees, occasional lack of 62–3
 - cooperation benefits 60–63
 - European perspectives, universalization from 29, 35–9, 51
 - historical perspective 28–35
 - inter-regionalism 27
 - interdependence and shared identity 25
 - international politics 24–7
 - merits of 58–63
 - Middle East 52–8, *see also* Middle East
 - minilateralism and divide between developed and developing countries 63–5
 - Refugee Convention *see* Refugee Convention
 - regionalism as concept 23–4, 25, 139–41
 - regionalism purposes 25
 - temporary refuge agreements 31
 - UN and Cold War impacts 25–6
 - universalism 59–60
- regionalism as response and responsibility-shifting 6–15
 - Australia *see* Australia
 - Bali Process on People Smuggling, Trafficking and Related Transnational Crime (Bali Process), Regional Cooperation Framework (RCF) 10–14
 - global number of refugees in developing world 9–10, 63
- religious beliefs, state protection responsibility 70–73
- Renshaw, Catherine 47
- resettlement
 - local integration *see* local integration
 - Mexico Declaration and Plan of Action 228
 - quotas, EU 205, 206–10, 215, 236–7, 244–5
 - relocation funding incentive, EU 206
 - relocation limits 119–21
 - repatriation programme to Vietnam 149, 154–6, 245
 - Rescue at Sea Resettlement Offers, Comprehensive Plan of Action for Indochinese Refugees (CPA) 146, 246
 - in states outside region, International Conference on Central American Refugees (CIREFCA) 182
 - strategic 245–6

- temporary protection in exchange for 130–34, 241–2
- to a third country, and responsibility sharing among states 110–12
- UNHCR programme 49, 110, 111, 125–6, 155
- responsibility sharing among states 94–138, 243–4, 246
- Amman Summary Conclusions on International Cooperation 94–5, 136–7
- comparative advantage considerations 126–7
- Comprehensive Plan of Action for Indochinese Refugees (CPA) 144–5, 148–9, 151, 158–9, 242
- containment measures by developed countries 101, 107
- and culpability of states for causing displacement of people 127, 134–6
- developing countries, disproportionate share and local integration problems 101–2, 107
- distribution suggestions 125–36
- Dublin Convention and allocation of responsibility, EU 189–93, 196, 197, 203, 205, 215, 235, 236, 242
- as economic efficiency 106–7, 113–15
- equitable distribution of responsibility considerations 120–21
- EU, Common European Asylum System (CEAS) 214–15, 236, 249
- EU, refugees fleeing from non-EU member states 38, 95–6
- family reunification and cultural rights 120
- financial cost sharing 121–4, 125–6
- financial responsibility and capacity to pay 129
- free-riding concerns 98–9, 116
- functional necessity 102–5
- GDP consideration in reallocation 112–13, 127–8
- immunity from prosecution and lawful presence to stay 97–8
- inequitable nature of current system 100–102
- insurance against future refugee emergencies 105–6
- International Conference on Central American Refugees (CIREFCA) 242
- international level 94–5, 97–100
- justification for 100–108
- labour migration programmes 116–19, 132–3
- local integration *see* local integration
- market-based model for refugee protection 113–15, 125–6
- microcredit programmes 123, 183, 219–20
- non-financial (in-kind) resources, sharing 124–5
- physical distribution and capacity to absorb refugees 127–9
- population size and absorptive capacity 128–9, 130, 131
- Reformulation Project and common but differentiated responsibility 126, 130–34
- refugee protection as global public good 99
- refugee quota systems 107, 112–16, 125–6
- refugee relocation and adequate protection 119–20
- refugee relocation limits 119–21
- refugee security and *non-refoulement* 131, 135
- refugees in distress at sea *see* boat arrivals
- regionalism as response and responsibility-shifting 6–15
- resettlement to a third country 110–12
- self-sufficiency of refugees, encouraging 123
- sovereignty protection 97–8
- state sharing methods 108–25
- targeted development assistance (TDA) 123–4, 248

- temporary protection and voluntary repatriation 130–34
- unilateral deterrence mechanisms 99–100
- voluntary repatriation 110–11, 130–34
- responsibility of states to protect refugees 67–93, 243
 - asylum and ‘Welcoming the Stranger’ initiative 70
 - border control role 76–7
 - containment consequences 80–83
 - contributions of refugees to host societies 69, 76–7, 83–4
 - detention centre costs 84
 - economic impacts 74, 84–6, 91, 92
 - environmental impacts 90, 91, 92
 - feasibility issues 77
 - humanity and hospitality principles 69, 70–78
 - liberal political structures and philosophical principles 73–7
 - mass influx, understanding of 78–9
 - migration as threat to security 82–3
 - militarization of refugees in camps, causes of 82–3
 - and moral and philosophical underpinnings 69, 70–80
 - nation state emphasis, concerns over 74–6
 - non-refoulement* obligation 67, 73–4, 102
 - political and security impacts 87–90, 92–3
 - racism and xenophobia concerns 87
 - ‘refugee warriors’ prosecuting wars at home 88–9
 - refugees as burden or benefit 83–93
 - religious beliefs 70–73
 - social impacts 86–7, 91
 - targeted development assistance 86
- Reynolds, Henry 75
- Riess, Steffanie 184
- Rishmawi, Mervat 54
- Roberts, Anthea 31
- Robinson, W 23, 112, 144, 151, 152, 154, 156, 160, 241, 245
- Rodriguez, Roberto 187
- Romano, David 53
- Roniger, Luis 40
- Rwandan refugees, UNHCR on 89
- Sacerdoti, Guy 153
- ‘safe third countries’ concept 159–60
- Salehyan, Idean 89
- Sánchez, Rafael 175
- Schuck, Peter 105–6, 107, 113–14, 125–6
- Schultz, Christina 178–9, 185
- Schulz, Michael 52, 56
- sea distress situations *see* boat arrivals
- security
 - migration as threat to 82–3, 87–90, 92–3, 169, 239–40
 - see also non-refoulement* obligation
- Seglow, Jonathan 127–8, 131
- self-settling and avoidance of camp dependency, Africa 170
- self-sufficiency of refugees, encouraging 123
- Sesay, Fatmata 100
- Sharpe, Marina 163
- Shaw, Timothy 26, 43
- Sheridan, Greg 68, 75
- Showler, Peter 67
- Shum, Keane 112, 118, 123, 242, 245
- Skran, Claudena 75
- Slaughter, Amy 169, 172, 174
- Smit, Jack 157
- Snyder, Susanna 72
- Söderbaum, Fredrik 26, 27
- Sollis, Peter 178–9, 185
- South Africa, as asylum state 44
- Southeast Asia *see* Asia, Southeast
- sovereignty protection 97–8
 - nation state emphasis, concerns over 74–6
- Spain, Aznar Protocol and Basque separatists 196
- Sri Lanka, opposition to protection of refugees 31–2
- state-sponsored violence problems in Guatemala 184

- states
- responsibility sharing *see* responsibility sharing among states
 - responsibility to protect refugees *see* responsibility of states to protect refugees
- states of final settlement, Comprehensive Plan of Action for Indochinese Refugees (CPA) 145, 147, 149, 151, 158–9
- states of first asylum
- Comprehensive Plan of Action for Indochinese Refugees (CPA) 145, 148, 149, 152, 153–4, 156, 158–9, 241–2
 - Mexico Declaration and Plan of Action and Cartagena+ 217–18 *see also* asylum provisions
- Stein, Barry 61, 62–3, 167, 171
- Steketee, Mike 134
- Stevens, Yvette 171
- Suhrke, Astri 98–9
- Syria
- refugee crisis 3, 5–6, 54, 85, 102
 - refugee crisis effects, EU 200, 201, 207–8, 211, 236
- Syria Regional Response Plan*, UNHCR 2–4, 6
- Sznajder, Mario 40
- Tanzania
- refugees, labour benefits 85–6
 - restrictive policies on refugees 46
- Tapinos, Georges 51
- targeted development assistance (TDA) 86, 123–4, 248
- Taylor, Savitri 52, 75
- Temporary Protection Directive, EU 203–4, 207
- temporary protection of refugees 31, 109, 130–34, 241–2
- Thailand
- opposition to protection of refugees 32
 - refusal to accept refugees rescued at sea 104–5
- Thibos, Cameron 132
- Thielemann, Eiko 126, 201–2
- Towle, Richard 50, 51, 151, 154
- Tran, Yen 148, 160
- Transitional Solutions Initiative, UNHCR 124, 247
- Trenholme, Norman 70
- Troeller, Gary 68, 82
- Tündern-Smith, Ann 117
- Turkmen, Ilter 55
- UK, resettlement places for Indochinese refugees 145
- UN Children's Fund (UNICEF), Cambodian emergency relief programme 147
- UN General Assembly, Comprehensive Plan of Action for Indochinese refugees 32
- UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) 55
- UN Security Council
- burden-sharing principles and culpability issues 135
 - resolution on boat arrivals 213–14
- UN World Food Programme (WFP), Cambodian emergency relief programme 147
- UNHCR (United Nations High Commissioner for Refugees)
- 'Agenda for Protection' 95
 - Amman Summary Conclusions on International Cooperation 94–5, 136–7
 - and Australian refugee relocations 7, 8, 9
 - and Bali Process on People Smuggling, Trafficking and Related Transnational Crime (Bali Process) 10–12, 51–2
 - 'Convention Plus' initiative and burden-sharing 98
 - coordination responsibility, International Conferences on Assistance to Refugees in Africa (ICARA I and II) 168, 170–71
 - Executive Committee (ExCom) recommendations 32, 58, 94

- Framework for Durable Solutions for Refugees and Persons of Concern 124
 fund donations, voluntary 121–3, 125–6, 129
 funding targets' shortfall 96, 121, 122–3, 243, 246–8
 Global Initiative on Protection at Sea 105
 Handbook on Procedures and Criteria for Determining Refugee Status 149
 on international cooperation 94–5, 103, 247–8
 labour migration programmes 116, 117–18, 120–21
 on local integration 109
 mass influx, understanding of 78–9
 Memorandum of Understanding (MOU), Comprehensive Plan of Action for Indochinese Refugees (CPA) 145–6
 monitoring programmes 62, 151–2, 154, 155, 173, 241, 248
 on need for ICARA II 166
 non-financial (in-kind) resources 124–5
 Note on Protection (2000) 58–9
 Palestinian refugee protection 55
 Quality Asylum Programme, Mexico Declaration and Plan of Action 231, 237
 Refugee Aid and Development agenda 123
 refugee protection agreements, Mexico Declaration and Plan of Action 219, 220
 on refugee quota systems 112, 113, 115
 refugee status determination 42
 Regional Cooperation and Irregular Migration proposal 10–11
 Regional Refugee and Resilience Plan (3RP) 2, 3
 resettlement programme 49, 110, 111, 125–6, 155
 review, International Conference on Central American Refugees (CIREFCA) 180, 185, 186, 187
 review, Mexico Declaration and Plan of Action 222–3, 225, 227–8, 231
 on Rwandan refugees 89
Syria Regional Response Plan 2–4, 6
 temporary protection of refugees 109
 Transitional Solutions Initiative 124, 247
 'Welcoming the Stranger' initiative 70
 UNIFEM (United Nations Development Fund for Women) 182
 unilateral deterrence mechanisms 99–100
 Universal Declaration of Human Rights and right to seek asylum 97
see also human rights
 US
 Americas, regionalism and refugee protection 39–42
 donor support, International Conferences on Assistance to Refugees in Africa (ICARA I and II) 164, 172
 refugee resettlement 111
 resettlement places for Indochinese refugees 145
 'torture memos' and interrogation methods 31
 Van Langenhove, Luk 27
 Van Selm, Joanne 111–12
 Veney, Cassandra 45, 46, 86
 Venezuela, registration and documentation problems 223
 Verdirame, Guglielmo 82–3
 Verwimp, Philip 86
 Vietnamese refugees
 ASEAN 148

- Comprehensive Plan of Action for
Indochinese Refugees (CPA)
143–6, 147–8, 240–41, 245
repatriation programme,
 Comprehensive Plan of Action
 for Indochinese Refugees (CPA)
 149, 154–6, 245
- Viviani, Nancy 150
- voluntary Cooperation Fund
 suggestion, Mexico Declaration
 and Plan of Action and Cartagena+
 230, 231
- voluntary relocation
 EU, Common European Asylum
 System (CEAS) 205–6, 207
- voluntary repatriation
 International Conference on Central
 American Refugees (CIREFCA)
 176–7, 183–4
- International Conferences on
 Assistance to Refugees in Africa
 (ICARA I and II) 168, 170–71
- Wagner, Martin 215
- Walker, Geoffrey 234
- Weber, Leanne 82
- Weijers, Dan 129
- ‘Welcoming the Stranger’ initiative,
 UNHCR 70
- Whyte, Sarah 13
- Williams, Richard 192, 193, 200
- Williamson, Jeffrey 77, 85
- World Meteorological Organization 146
- Zieck, Marjoleine 98
- Zitnanova, Kristina 11
- Zolberg, Aristide 45, 82, 88