

INTRODUCTION: REGIONALISM AS A RESPONSE TO A GLOBAL CHALLENGE

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The current challenge for the international refugee protection system is to meet the protection needs of asylum seekers whilst engaging the cooperation of the global community. In this context, regional approaches are often advocated to achieve durable solutions for asylum seekers and refugees. For example, in its 2000 *Note on International Protection*, the UNHCR suggested that:

Harmonized regional protection approaches are an important means of strengthening the international refugee 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. (UNHCR 2000: paragraph 39)

In this statement it is implicit that regional responses shore up the international protection regime by cutting across and perhaps weakening the power of the

Nation state.¹ The reasons for this approach are not hard to find. The responses of nation states to refugees and asylum seekers in the last two decades, in the form of non-entry and other restrictive policies, are well known. Another suggested reason for promoting regional responses lies in their ability to provide practical solutions more suited to regional situations for what are global problems (De Andrade 1998). Frequently, regionalised responses to refugee issues are promoted in the form of 'harmonization' and burden-sharing by states within a region. The question that this collection of essays tackles is whether regional or collective responses, generally involving some degree of regional cooperation or 'regionalism', can satisfy the protection needs of asylum

seekers and refugees. In this book, the authors discuss the significance of regionalism and describe different models of regionalism and approaches to this problem.

For example, in Chapter 1 Castles explains the significance of the differences between extra-, intra- and inter-regional patterns of migration for policy responses to forced migrants. In Chapter 2 Koser discusses the nature of inter-regional asylum movements. Gibney in Chapter 3 contrasts the period of 1945 to 1965 which he describes as one of 'unregulated regionalism', with the later period of 'engineered regionalism'. In Chapters 4 and 5 by contrast the 'superimposed' model of the European Union (EU), which seeks 'harmonization' of policy on asylum seekers for the protection of EU interests is discussed. This latter supra-national model of regionalism has implications for the sovereignty of member states within the EU and the direction of their national asylum policies (see Chapter 5). This EU policy also contains an external element involving engagement with countries bordering the region and assistance to regions outside the EU. Conversely, the recent post-9/11 cooperative response of the U.S.A. and Canada to refugees and asylum seekers illustrates a new model of spontaneous intra-regional response (see Chapter 6). Similarly, in Chapter 7 Australia's 'Pacific Solution' or 'Strategy' which involves offshore or extra-territorial processing of asylum seekers, is described. This in turn is based upon the U.S.A. interdiction programme, and is itself considered as a possible model by the EU for the Mediterranean. This demonstrates another sense of 'regionalism' – the borrowing of models between regions.

This brief summary of some of the essays illustrates that the term 'regionalism', like 'globalism' (with which it is often linked), defies precise definition. When we talk about 'globalization' we refer to a world of interconnected societies and activities which both work through and across nation states (Mason 2001). 'Regionalism' by contrast suggests a collective or communal response within a region to a global issue where the parties share a common purpose or destiny. Depending upon the context, the response may be based upon shared cultural, social, political, or economic interests or a combination of these. One issue which this book addresses is how to promote a shared common purpose or destiny between regional and global interests in this context.

The discussion in this book parallels the attention that is being given to this concept in other contexts. In the literature, there is a broad affirmation of the need for regional arrangements to seek enduring solutions that address problems on a large scale, such as forced migration, environmental degradation, governance, poverty, security, disease and drug trafficking, to name but a few (Hettne 1996; Wilding 1997; Wheeler

2002; Chandra 2004). In this literature the view held is that a more coordinated approach will facilitate collective action problem solving within the region for a global problem. In this context 'new regionalism' is contrasted with 'old regionalism'. As Björn Hettne explains:

Whereas the old regionalism was created 'from above' (often through superpower intervention), the new is a more spontaneous process from within the regions, where the constituent states now experience the need for cooperation in order to tackle new global challenges. Regionalism is thus one way of coping with global transformation, since most states lack the capacity and the means to manage such a task on the 'national' level. (Hettne 1996: 5)

In the context of refugees and asylum seekers, regionalism is a more complex notion. Whilst we can speak of an 'old' and a 'new' regionalism in similar terms to those used above (see for example, the U.S.A.-Canada agreement discussed in Chapter 6 and the Australian model discussed in Chapter 7), the terms are also used in this book to refer to historical approaches. For example, in its 2004 *General Conclusion on International Protection*, (UNHCR 2004a: paragraph (b) and paragraph (t)) the UNHCR discusses both the need for cooperation at the national and regional level and the value of the older 'comprehensive' approaches which are described in this chapter. This recognizes that there are limits to what can be achieved by regional approaches alone. On the one hand, in the industrialized North regionalism is often symptomatic of 'protectionism' and restrictive approaches as states within a region combine to erect barriers to entry (such as the EU). Moreover, the policies of such states since the 1980s have been directed at 'containing' the problem in the regions of origin in the developing South (see Castles, Chapter 1 and Gibney, Chapter 3). Today, the reality is that the bulk of the world's refugees live in 'protracted' situations in developing countries close to the borders of their country of origin (Crisp 2003). On the other hand, in contrast to Björn Hettne's concept of 'new regionalism', it is clear that the poorer regions of origin cannot solve the problem without assistance from the industrialized North and the international community (see Shaw, Chapter 8 on the African situation). Thus, as described later in this chapter, considerable effort is being made by the EU and the UNHCR to aid development in such regions. In addition, there is the problem of 'secondary movements', of refugees who move from places of asylum in a region of origin to a third country. The position of such transit countries is another factor to be considered in assessing the role of regional or collective responses.

In this chapter we describe the 'old' approaches to refugee protection which to a large extent were created 'from above', but which also arose as 'spontaneous processes from within the regions'. We then analyse the elements of these approaches and describe recent efforts by the UNHCR to revive these models of regionalism through the Convention Plus and the Agenda for Protection. We describe some recent 'new' regional programmes and foreshadow the discussion in this book.

Old regionalism: development of the international refugee protection system

A glance at the history of the international refugee protection system illustrates that the first accords were regional in the sense that they were directed at a perceived 'European' problem. They also coincided with the creation of the League of Nations and the appointment of the first High Commissioner for Refugees in 1921 and thus were the work of the 'international' community. At this time there was a recognized interdependence of the regional and the international. However from the 1960s onwards, refugee crises in other parts of the world led to the development of other regional models.

The first European accords dealt with the influx of (mostly) Russian and Armenian refugees in the period 1920–1935, and were intended to facilitate the international movement and resettlement of these groups.² Importantly these accords referred to specific groups or categories of people and 'were formulated in response to the international legal dilemma caused by the denial of State protection' (Hathaway 1984: 358). For the first time, it was acknowledged that refugee movements and migration were interconnected, thus challenging the tradition of asylum for political and religious refugees which had largely prevailed in the previous centuries (Barnett 2002).

The next phase in the development of refugee protection also stressed the lack of state protection but additionally emphasized the personal reasons for flight. They were largely directed at the plight of groups such as Jewish people fleeing from Germany between the two world wars. Like the measures in the period between 1920 and 1935, they were intended to facilitate freedom of movement (Hathaway 1984: 379). They also foreshadowed the individual concept of a refugee which the 1951 refugees convention perfected.

The 1951 Convention Relating to the Status of Refugees³ (Refugees Convention) which was negotiated in the aftermath of the Second World War was intended to deal with the European problem of 1.25 million

refugees arising out of the postwar chaos. In particular it was directed at the victims of Nazi and other fascist regimes. This is recognised by the refugee definition which describes a refugee as a person with a 'well-founded fear of being persecuted' as a result of 'events occurring before 1 January 1951' (Article 1A(2)). Signatories to the convention could choose to interpret this as referring to events in Europe 'or elsewhere' (Article 1B(1)). As a result of the 1967 Protocol Relating to the Status of Refugees⁴ the temporal and geographical limits were removed.

In the postwar Cold War period, crises such as the Hungarian one of 1956 and the Czech uprising in 1968 emphasized the ideological basis of the European refugee problem. But from the 1970s onwards refugee crises in other parts of the world, largely in developing countries affected by decolonisation and independence movements in the period Gibney labels 'incipient globalism' (see Chapter 3), suggested that the problem was more complex and required different approaches. The importance of the 1967 Protocol was to recognize the global nature of the problem, (Barnett 2002: 248) the universality of the rights of refugees, and the possibility of global solutions.

Although the Refugees Convention arose from European events, and was brokered (largely) by European nations, it was also a manifestation of the development of a system of international law and institutions intended to provide responses and solutions to a global problem. The importance of the establishment of the United Nations High Commissioner for Refugees (UNHCR) in 1951 under the United Nations General Assembly cannot be underestimated. This development was part of a package of far-reaching human rights instruments and measures which were intended to recognize the universality of human rights. The Refugees Convention is an instrument of human rights protection which implements the basic right to flee persecution and to seek and enjoy asylum, and which enshrines the right against *refoulement* (Article 33(2)).

In the remaining discussion in this chapter we describe specific regional approaches which developed in Africa, Latin America and South-east Asia, and analyse the protection outcomes of these approaches for asylum seekers and refugees. This discussion highlights the increasingly important role of the UNHCR in these processes.

The 1969 Organisation of African Unity Convention

The 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)^v arose in the context of independence movements and massive displacements in

the postwar decolonisation of Africa. Between 1963 and 1966 the number of refugees in Africa rose from 300,000 to 700,000 (Rankin 2005: 2). It was a specific response to the massive displacements in Africa in this period and was intended to fill the gaps in the refugees convention definition, with its temporal and geographical limits. The importance of the OAU Convention is its attempt to tailor protection to the particular issues raised in the region, and to provide for regional solutions.

The drafting of the OAU Convention was a cooperative effort between the OAU collective and the UNHCR (Arboleda 1991: 193). All forty-one states which were independent in 1969 when the OAU Convention was adopted became signatories to it. The OAU Convention is expressed to be complementary to the 1951 refugees convention and the international regime of human rights. These facts are reflected in the preamble and Articles I(1) and VIII of the OAU Convention.

There were three broad objectives for the OAU Convention (Rankin 2005: 2). The first was to balance Africa's traditional hospitality and responsibility to strangers with the need to ensure security and peaceful relationships in the region. The preamble to the OAU Convention refers to the fact that the problems and unrest caused by increasing number of refugees and displaced persons on the African continent is creating discord amongst states and encouraging the activities of 'subversive elements'.⁶ Its aim is to provide solutions 'in the spirit of the Charter of the Organisation of African Unity and in the African spirit'. The second objective was to complement the 1951 Refugees Convention, as stated above. The third was to meet the specific needs of African refugees. Importantly, the OAU Convention attempts to link the refugee definition with the actual root causes of displacement (Turner 1994: 285). Its underlying goal is to solve the African refugee problem.

This third objective is reflected in the additional refugee definition in Article I(2) of the OAU Convention which complements the 1951 Refugees Convention definition which is set out in Article I(1); Article I(2) of the OAU Convention states:

The term 'refugee' shall also apply to every person, who owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. (OAU Convention 1951: Article 1(2))

These events, namely, 'external aggression, occupation, foreign domination or events seriously disturbing public order' reflect the struggles for independence from former colonial powers at the time that

the OAU Convention was entered into. More than half of the refugees were from former colonies, although a substantial proportion were refugees affected by ethnic and boundary disputes (Arboleda 1991: 190) – a fact which was perhaps not sufficiently reflected in the complementary refugee definition at that time, and even less so today as the root causes for displacement now are largely massive abuses of human rights and civil wars (Okoth-Obbo 2001: 112). However the importance of this complementary definition was that it brought in a communitarian concept of a refugee which focuses upon the nature and quality of the community, that is, upon economic, social and cultural rights rather than upon individual rights (Rankin 2005: 7).⁷

Article II of the OAU Convention which is headed ‘Asylum’ deals specifically with asylum, *non-refoulement* and durable solutions:

Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality. (OAU Convention 1951: Article II (1))

Unlike the 1951 Refugees Convention, the right of asylum is specifically mentioned, although it is qualified by the requirement that the right be ‘consistent with their [domestic] legislations’. To take the political ‘sting’ out of asylum, Article II(2) states that the grant of asylum is ‘a peaceful and humanitarian act’. The *non-refoulement* obligation is contained in Art II(3) and is applicable to persons whose ‘life, physical integrity or liberty’ would be threatened for the reasons set out in both refugee definitions.

Article II contains provisions which deal with solutions – asylum in the form of re-settlement (Article II(1)), temporary protection pending re-settlement (Article II(5)) but away from the ‘frontier of their country of origin’ (Article II(6)). Article V deals at some length with voluntary repatriation. Article II(4) brings in the concept of burden-sharing:

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 cooperation take appropriate measures to lighten the burden of the Member State granting asylum. (OAU Convention 1951: Article II(4))

The discussion by Shaw in Chapter 8 of this book suggests that in practice the OAU Convention has not provided solutions to root causes, or lived up to its burden-sharing intentions and ‘sovereign shattering possibility’

(Tuepker 2002: 411). It has been suggested (Rutinwa 1999) that from about the mid-1980s onwards the African nations moved away from the spirit of the OAU Convention. This was in part due to the policy of 'containment' of refugees which prevailed at that time and the effect that it had on host countries. Increasingly the host countries disregarded the basic rights of refugees and the implementation of durable solutions other than repatriation. This in turn had a negative effect on inter-state relations in the region.

In 1999 the UNHCR estimated that there were over 4 million refugees in Africa, and several times that number of internally displaced persons (Okoth-Obbo 2001: 82). In 2004 the number of refugees and internally displaced persons was not changed substantially as new refugee crises replaced the old (UNHCR 2004b). Many of these people live in protracted refugee situations and face continuing security risks, and social and economic hardships. The UNHCR rather than the OAU has taken a lead role in refugee protection in Africa. The prevailing view is that it is time to revisit the OAU Convention and its implementation.

The Cartagena Declaration

The 1969 OAU Convention was a direct inspiration for the 1984 Cartagena Declaration on Refugees adopted at a Colloquium held at Cartagena, Colombia in November 1984,⁸ (the Cartagena Declaration) which relates to the 'refugee situation' in Central America. The Cartagena Declaration differs from the OAU Convention as it did not emerge from within a regional organization but out of an ad hoc group of experts (Goodwin-Gill 1996: 21) and ten Latin American governments. However, this 'aspirational' statement remains the foundation for refugee protection in the region. Its content and importance has been confirmed in numerous subsequent colloquiums,⁹ including most recently on its twentieth anniversary in Mexico City in 2004.

The Cartagena Declaration was approved by the 1985 General Assembly of the Organization of American States and is the basis of the process arising from the International Conference on Central American Refugees (CIREFCA), Guatemala City, 29–31 May 1989 which produced a *Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons*. A special feature of this regional approach is a high level of cooperation with the UNHCR (discussed below). It is also regional in the sense that the Cartagena Declaration states that the problem must be 'tackled in the light of the necessary co-ordination and harmonization of universal and regional systems and national efforts' (Cartagena Declaration, paragraph I).

Like the OAU Convention, the Cartagena Declaration was a response to mass refugee influxes, in this case arising from political and military instability in Central America in the 1970s and 1980s. As with the OAU Convention, it is intended to ensure peace processes and the reintegration of refugees in their home countries. It is also claimed that the Cartagena Declaration confirms 'regional norms' regarding the granting of asylum (Arboleda 1991: 189). Until the making of the Cartagena Declaration, the history and tradition of asylum (dating from the 1889 Montevideo Treaty on International Penal Law) was one of political asylum for high-profile or well-known individuals. But in the 1970s and 1980s the refugees were 'displaced masses of peasants' (Arboleda 1991: 201). Almost 2 million people from El Salvador, Guatemala, and Nicaragua were displaced during this period. Some 200,000 Central Americans were formally recognized and registered as refugees.¹⁰ Thus the Cartagena Declaration like the OAU Convention reflects the changing nature of refugee populations and the causes of displacement.

The prime purpose of the Cartagena Declaration was to promote the adoption of national laws to implement the 1951 Refugees Convention and 1967 Protocol, 'thus fostering the necessary process of systematic harmonization of national legislation on refugees' (Cartagena Declaration, paragraph III(1)). For that purpose it was recommended that the definition of a refugee for 'use in the region' should complement the 1951 Refugees Convention. It was stated that in addition to the 1951 Refugees Convention definition, legislation should include:

[P]ersons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order (Cartagena Declaration, paragraph III(3)).

Under this definition, refugees are primarily persons whose life, security or liberty is threatened. The inclusion of generalized violence, internal conflicts, and massive violations of human rights expands the refugee definition beyond that of the OAU Convention, and picks up the gaps in that definition.

Like the OAU Convention, the Cartagena Declaration links the refugee definition to root causes. The declaration also confirms that the granting of asylum is 'humanitarian' in nature, and reiterates the importance and meaning of the principle of *non-refoulement*. The declaration reflects the current experiences of refugees by expressing its 'concern' at the problem raised by military attacks on refugee camps and settlements in different parts of the world (Cartagena Declaration, paragraph III(7)). Additionally,

going beyond the refugee issue, it expresses its 'concern' at the 'situation of displaced persons within their own countries' (Cartagena Declaration, paragraph III(9)).

As with the OAU Convention, the UNHCR had an important and 'highly visible' role (Arboleda 1991: 201) which is recognised in paragraph I of the Cartagena Declaration. The UNHCR had established regional offices in Central America in the late 1960s in response to the serious refugee problems. An express purpose of the declaration (paragraphs II(e), (f), (g), (j), (k), (l), (n) and (o)) is to support the work of the UNHCR and to coordinate with it.

On the twentieth anniversary of the Cartagena Declaration, the UNHCR began regional consultations to discuss new refugee challenges and to commemorate the declaration. According to the high commissioner in a statement dated 15 November 2004, the declaration's expanded definition is included in the legislation of ten countries and applied by another thirty, and used as a standard of interpretation by another. It was described as an 'historical and exemplary commitment of an entire region to refugee rights'. The UNHCR took the opportunity of this occasion to link the declaration to the Convention Plus process by launching a Plan of Action to Enhance Refugee Protection in Latin America. In particular this plan is directed at the problem of refugees concentrated in urban areas, and Columbian refugees in neighbouring countries. The plan is aimed at encouraging the self-sufficiency of 'urban' refugees and providing 'durable' solutions for Columbian refugees in the region in the form of resettlement.

Whilst the UNHCR extols the declaration as an icon of regional efforts, the claimed success may be somewhat exaggerated (Gottwald 2004). Throughout the period the UNHCR has continued to play a prominent role in determining refugee status under its mandate (UNHCR 2005). Whilst both the 1969 OAU Convention and the 1984 Cartagena Declaration were above all an expression of the political will of actors within the regions, they each show the limits of regional initiatives which lack international support. In 1999 for example, the late refugee advocate Arthur Helton (Helton 1999) was calling for a regional arrangement involving international cooperation. As examples of 'new regionalism' the OAU Convention and the Cartagena Declaration show both the strengths and weaknesses of such approaches.

The prominent role of the UNHCR is one feature which is common to both the OAU Convention and the Cartagena Declaration. The events which led to the 1969 OAU Convention and the 1984 Cartagena Declaration involving large-scale refugee movements resulted in a broadening of the UNHCR's mandate to 'persons of concern to the

international community' (Goodwin-Gill 1996: 8–18). From the mid-1970s, events in South-east Asia also brought out the limitation of the refugees convention definition, which provides that a refugee must be outside their country of origin. In the 1970s as the superpowers fought out the Cold War in South-east Asia, the UNHCR extended its 'good offices' mandate to internally displaced persons 'of concern' in Vietnam and Laos so as to avoid the limitation on the refugee definition requiring a person to be beyond the border of their country of origin. At this time the UNHCR also extended the range of activities to provide direct humanitarian aid (UNHCR 2000: 81).

The decade from the mid-1970s to mid-1980s saw a substantial rise in the number of refugees worldwide. In 1974 the UNHCR estimated that there were 2.4 million refugees, but by 1984 the figure was 10.5 million (Barnett 2002: 249). In 1996 this figure had risen to 27 million although the figure now included internally displaced persons under the UNHCR's expanded mandate. This was the year in which the 1989 Comprehensive Plan of Action (CPA) for Indo-Chinese Refugees^{xi} officially came to an end. We turn now to see what lessons are to be learnt from it as an experiment in 'regionalization'.

The Comprehensive Plan of Action

The Comprehensive Plan of Action (CPA) for Indo-Chinese Refugees came about to cope with the human fall-out from an ideologically based war. The CPA involved an unprecedented approach to situations of large-scale influx by asylum seekers. Up to 3 million people fled from Indo-China in the two decades after 1975. The CPA was unique for involving the coincidence of three factors: being instigated by countries within the region, and involving the cooperation of the country of origin, as well as the international community. The last two features set it apart from the other two models we have examined. As an experiment it is arguable that it has left a lasting legacy of negative attitudes and approaches to asylum seekers and refugees, including a preference for 'unilateral' (Tran 1995) rather than cooperative solutions, and a perception that asylum seekers should seek legal means to 'migrate'. Yet paradoxically it is a model of a regional and a comprehensive approach.

The CPA developed in two stages. The first stage was brokered by the UN Secretary General in 1979, resulting from pressure by the Association of Southeast Asian Nations (ASEAN), and involved the granting of temporary asylum to be followed by resettlement in a third country. In an attempt to deter clandestine departures it was accompanied by an Orderly

Departure Programme (ODP). However when the problem continued to escalate, it was followed by the formal CPA in 1989 which had an emphasis on voluntary returns and reintegration in the country of origin. The background to these developments was as follows.

The exodus of the Vietnamese boat people began following the communist victories in the former French colonies of Indo-China, with the collapse of the South Vietnamese government in April 1975. This was to be the largest mass departure of asylum seekers by sea in modern history. Yet, although these asylum seekers fitted the classic definition of ideological refugees, the Indo-Chinese crisis coincided with the beginning of a restrictive approach to refugee intakes in Western states. By this time international economic growth had declined and unemployment had grown (Barnett 2002: 248). It was in this context that the terms 'economic refugees' and 'illegal immigrants' became common usage for asylum seekers and refugees.¹² The global economic climate, plus other pressures in the region shaped the response.

Initially those fleeing Vietnam, Cambodia and Laos, sought refuge in the neighbouring countries of Hong Kong, Thailand, Malaysia, Indonesia, Singapore and the Philippines, none of which were signatories to the 1951 Refugee Convention at that point. The asylum seekers were granted prima facie refugee status. The countries of first asylum were initially willing and able to respond generously to the crisis because resettlement of refugees to countries outside the immediate region provided a permanent solution. However, despite the resettlement arrangements, the sheer number of refugees tested both the capacity for countries in the region to provide them asylum and the will of Western states to resettle them (UNHCR 2000: 79).

In the late 1970s the number of refugees fleeing to ports of first asylum began to outweigh resettlement quotas. Between 1975 and 1979 over 600,000 Indo-Chinese refugees had fled their homeland. In the spring of 1979 the departure rate of Vietnamese escalated dramatically, to 40,000 per month (Tran 1995: 469). As a result, boat 'push backs' by countries that had offered temporary safe haven in the past became routine and boatloads of Vietnamese were left to the mercilessness of pirates and the high seas. Thousands of asylum seekers may have perished at sea as a result (UNHCR 2000: 83). In June 1979, the member states of the Association of Southeast Asian Nations (ASEAN) – Indonesia, Malaysia, the Philippines, Singapore and Thailand – issued a statement declaring that they had 'reached the limit of their endurance and [had] decided that they would not accept any new arrivals' (UNHCR 2000: 83). In immediate response to this crisis, sixty-five countries at the International Conference on Refugees and Displaced Persons in Southeast Asia, held in Geneva

20–21 July 1979, reached an agreement including the countries of origin in which:

- ASEAN countries agreed to provide temporary asylum;
- Vietnam undertook to promote orderly departures (the ODP), in an effort to stem the illegal emigration of Vietnamese to resettlement countries;
- Third countries agreed to accelerate the rate of resettlement of asylum seekers.

It is generally accepted that this 1979 agreement endorsed the general principles of asylum and *non-refoulement* (Robinson 2004: 319) and codified the presumption that the Vietnamese boat people were genuine refugees (Hathaway 1993: 686). It did not call for an assessment of the origins of exodus, but encouraged a burden sharing approach (Bronée 1993: 535–6). The involvement of the Vietnamese government was a deliberate attempt to engage it in addressing the crisis in its totality (Bronée 1993: 539).

However, by the late 1980s both the countries of first asylum and the countries of resettlement began to review their policies. By 1984 annual departures under the ODP had risen to 29,100 in excess of the spontaneous regional boat arrivals of 24,865 (UNHCR 2000: 86). There was a renewed surge in Vietnamese departures in 1987–88. Western governments became increasingly concerned about the number of refugees arriving in their countries and expressed their suspicion that policies of open ended resettlement were drawing economic opportunists to their shores. The Malaysian government requested the UNHCR to convene a second international conference, in which ASEAN again participated. As a result, the Comprehensive Plan of Action for Indo-Chinese refugees (CPA), was agreed upon, at a Geneva Conference held from 13–14 June 1989, by the UNHCR, the countries of first asylum and fifty resettlement countries in the West. The new features of the agreement were the introduction of:

- A system of individual screening of asylum seekers to determine their status as refugees;
- A programme of return for those who failed the test.

As a result of this agreement, the countries of first asylum began to respond generously once again.

Was the CPA a success? Certainly the CPA finally brought an end to the flow of Vietnamese asylum seekers. Over the two decades from 1975, of the 3 million who fled from Indo-China, 2.5 million found new homes and 0.5 million persons returned home (UNHCR 2000: 102). The CPA's five main objectives were:

- To reduce clandestine departures through prevention, information campaigns and the ODP;
- To provide temporary asylum to all asylum seekers until their status is established;
- To determine the refugee status of all asylum seekers in accordance with international standards;
- To resettle all those recognized as refugees;
- To return and to repatriate all those not recognized as refugees.

Through the ODP, the CPA arguably pre-empted the right to seek asylum and created a 'norm' of 'orderly departures' or 'queues' which persists in the policies of some Western countries today. The CPA has however been held up as a successful cooperative regional approach to refugee flows that reinstated the principle of asylum in the countries of first asylum (UNHCR 2000: 84). In general the principle of asylum was honoured throughout the region, in exchange for the promise of resettlement. By the end of the CPA, most ASEAN countries had become signatories of the Refugees Convention (Robinson 2004: 323–4).

Resettlement was the 'engine that powered the many moving parts of the CPA' (Robinson 2004: 326). It has been claimed that without the option of resettlement, the countries of first asylum would not have agreed to cooperate in regional status determinations (Robinson 2004: 326). During the eight years of the CPA, more than 530,000 Vietnamese and Laotians were resettled in (mainly) Western countries. Governments in the resettlement countries entered into agreements with the government of Vietnam under the ODP. But arguably the motives of governments in signing up to the CPA were more to do with security and economic issues rather than burden-sharing or protection. There are indications that it involved selective burden-sharing, which favoured the interests of the Western states, rather than any sense of genuine sharing.

The predominant features of the CPA were the emphasis on orderly departures and resettlement. But additionally in this period the UNHCR took on a humanitarian role which involved monitoring the situation in the country of origin. Importantly the government of Vietnam was cooperative in the whole process.

The introduction of refugee status determinations on a large scale was another important feature of the CPA. This was significant for two reasons. First, it introduced the idea that asylum did not automatically follow from flight. Secondly, it had an educative role. Under the CPA the principal countries of first asylum, Hong Kong, Indonesia, Malaysia, the Philippines and Thailand, were provided the new role of undertaking individual refugee status determination. Thus each country adopted procedures providing for asylum seeker access to the UNHCR, a refugee status determination interview, services of an interpreter, and the possibility of review by an additional authority (UNHCR 2000: 85). Hong Kong also provided access to the courts for judicial review. Apart from the Philippines, none of the countries that agreed to implement refugee status determination procedures under the CPA were parties to the refugee convention and thus had no previous experience in determining refugee status.

Unlike the other examples of regional agreements we have examined, there was no attempt to formulate a complementary refugee definition. These were after all 'ideological' refugees. Moreover, to underline the proper nature of refugee protection, the CPA expressly required the Refugees Convention definition to be interpreted in light of fundamental principles of human rights. The UNHCR Handbook, which 'equates persecution with serious violations of human rights' was to 'serve as an authoritative and interpretive guide in developing and applying the criteria'.¹³ Unfortunately, the CPA did not prevent individual countries from applying their own standards when deciding who to repatriate (Schloenhardt 2000: 35). The UNHCR produced guidelines to encourage uniformity of practice in the region. But, as the UNHCR's role in this respect under the CPA was to 'observe and advise', individual states retained control over the selection process. Many critiques emerged of the processes. Of all the countries of first asylum, Hong Kong had the most advanced legal system, however even her procedures were said to be flawed and 'not to accord fully with the basic requirements for a fair and effective determination system'.¹⁴ Moreover, in some countries, the military who were involved in receiving the boats, were also given the task of screening (Nichols and White 1993: 25).

Further, resettlement states had the right to reject the decisions made by the country of first asylum and some resettlement states even raised their

entry bars by using extra criteria (Nichols and White 1993: 25). The presence of a 'double screening process' under the CPA, highlights how resettlement states maintained a national interest agenda over finding durable solutions to a humanitarian crisis.

In 1992 the Lawyers Committee for Human Rights reported that 'at least hundreds, perhaps thousands of Vietnamese are being wrongfully denied refugee protection because of decision making deficiencies' (Mushkat 1993: 563). This meant in some cases that asylum seekers were involuntarily repatriated, and were subject to *refoulement*.

Another controversial aspect of the CPA was the implementation of the repatriation objective. Although the return programme under the CPA was intended to be voluntary, the CPA did acknowledge the possibility of its evolution into mass involuntary deportations. Under the CPA parties had agreed that:

In the first instance, every effort will be made to encourage the voluntary return of [those whose applications are rejected] [...] If, after the passage of reasonable time, it becomes clear that voluntary repatriation is not making sufficient progress toward the desired objective, alternatives recognized as being acceptable under international practices would be examined.¹⁵

The first involuntary deportation exercise was undertaken by Hong Kong in December 1979. The consequent international criticism caused Hong Kong to suspend unilateral involuntary returns but this led to the disguising of identical objectives in an agreement, reached between Hong Kong, the United Kingdom and Vietnam in October 1991, to implement an 'Orderly Return Programme' (UNHCR 2000: 85). Eventually all the countries of first asylum signed Orderly Return Programme agreements under which the UNHCR granted transportation costs and logistical support on the condition that returns did not involve force. However the distinction between voluntary and involuntary returns became blurred. Approximately 13 per cent of Vietnamese 'boat people' were returned under the Orderly Repatriation Programme, while the remainder returned under the UNHCR voluntary repatriation programme.¹⁶ The CPA was concluded in 1996 by the camps in countries of first asylum being almost cleared. By March 1999, 110,000 boat people had been returned to Vietnam, some of whom were judged to have valid refugee claims.¹⁷

The legacies and lessons of the CPA

The CPA heralded many of the current issues of refugee protection, such as the problem of protecting refugees within 'mixed' flows, the problem of distinguishing genuine and 'economic' refugees and the tendency of wealthier states to act in self-interest. More importantly, it dealt with the problem of refugees in flight, and with 'irregular' secondary movements. It delivered 'durable' solutions in the form of resettlement and repatriation.

Opinion is divided as to whether or not the CPA was a 'success'. For example, Hathaway believes that the CPA 'failed' because it originated from a 'tripartite collusion among Asian governments with little commitment to human rights law, superficially interested developed states, and a largely impotent international agency [the UNHCR]' (cited by Nichols and White 1993: 32). However Robinson hails it as a 'qualified success' (Robinson 2004). It was the first burden-sharing arrangement among countries of origin, first asylum and resettlement, and attempted to address the whole problem with concrete solutions. It also considered the position of transit countries and moved swiftly to protect the interests of both those countries, and the human rights of the asylum seekers. Arguably it bolstered the waning principle of asylum in the region. Further, in this period the agents, including the UNHCR, NGOs and countries of first asylum all gained enormous experience at dealing with refugee issues.

There were however problems in its implementation, and conception. For example, the emphasis on resettlement and forced returns possibly undermined the right to seek asylum elsewhere and the principle of *non-refoulement*, as well as the quest for solutions that address root causes and which involve genuine burden sharing. The CPA arguably led to 'resettlement-fatigue' and disenchantment with collective solutions. It also brought the role of the UNHCR under the spotlight.

During the period of the Indo-China crisis, the UNHCR faced new challenges and increasing attention as it coped with the immediacy of the situation and an increasingly unsympathetic international donor community as its role became redefined as one of humanitarian rather than legal protection. For unlike the more 'contained' regional situations and approaches which applied to the OAU Convention and the Cartagena Declaration, the CPA was a collective global international effort. It attempted to provide a comprehensive global solution. Whereas in Africa and Latin America the UNHCR continued to play a lead and respected role, in South-east Asia its role was more controversial. This is shown by

the controversy surrounding its role in refugee status determination procedures and the repatriation programme.

The main differences between the arrangements for the OAU Convention and the Cartagena Declaration and the CPA were in the scale and scope of the operations. Whereas the former were concerned with peace processes and reintegration of refugees within a region, the CPA involved a mass exodus following conflict and required balancing the interests of many parties: the refugees, host countries, and the resettlement countries. There were also favourable institutional factors in the case of the CPA, such as the strong role taken by ASEAN and the cooperation of the resettlement states. The political and ideological factors cannot be ignored. By contrast the African and South American situations did not achieve the same profile, until recently perhaps.

In relation to Africa, the current crisis of refugees in transit in Mediterranean countries to the south of the EU is drawing attention to the plight of the sub-Saharan countries. However, it is arguable that the situations in these sub-Saharan countries, many of which involve protracted refugee situations, stem at least in part from the fiscal policies of the industrialized nations (Rutinwa 1999; Castles Chapter 1). Until recently, this plight has been largely ignored. Currently a number of initiatives which can be described as 'new' regional approaches are under way attempting to alleviate the plight of refugees living in protracted refugee situations in Africa and to define the role of transit countries. These are consistent with the UNHCR's Convention Plus and Agenda for Protection to which we now turn.

New regionalism: UNHCR's Convention Plus and Agenda for Protection

In late 2000 the UNHCR launched the Global Consultations on International Protection to engage states and others in a dialogue in support of the fifty year-old Refugees Convention. The Convention Plus and the Agenda for Protection which arose out of this process reassert the importance of the international regime of refugee protection. These instruments refer to 'old' regional agreements and purport to offer new insights based on the traditions established by them. For example, the Declaration of State Parties accompanying the Agenda for Protection (UNHCR 2002) specifically refers in paragraph 3 of the preamble to the importance of the OAU and the Cartagena Declaration. The high commissioner introduced the concept of Convention Plus in his forward

to the Agenda. Whilst not referring to the CPA as such, he referred to its recognisable elements and expanded upon them. He explained:

The 'plus' concerns the development of special agreements or multilateral arrangements to ensure improved burden sharing, with countries in the North and South working together to find durable solutions for refugees. This includes comprehensive plans of action to deal with mass outflows, and agreements on 'secondary movements', whereby the roles and responsibilities of countries of origin, transit, and potential destination are better defined. It also includes agreements aimed at better targeting development assistance in refugees' regions of origin, and multilateral commitments for resettlement of refugees. (UNHCR 2002)

The main differences between the CPA and Convention Plus are the references to cooperation between northern and southern countries and 'targeting development assistance in refugees' regions of origin'. Convention Plus and the Agenda for Protection clearly place refugee issues within the paradigm of development. Convention Plus also has a strong emphasis on formulating plans, such as the 2004 Plan of Action to Enhance Refugee Protection in Latin America referred to above. These are examples of 'new' regional approaches.

The Agenda for Protection has six inter-related goals of which the following five are the most relevant to our discussion:

- Strengthening implementation of the 1951 convention and 1967 protocol;
- Protecting refugees within broader migration movements;
- Sharing burdens and responsibilities more equitably and building capacities to receive and protect refugees;
- Addressing security-related concerns more effectively;
- Redoubling the search for durable solutions for refugees.

The theme of burden-sharing runs throughout the entire Agenda.

These goals reflect lessons learnt from the experience of the OAU Convention, the Cartagena Declaration, and above all the CPA. The first goal recognizes that complementary refugee definitions and agreements as provided by the OAU Convention and the Cartagena Declaration are not a panacea for refugee protection. The second reflects the experience of the CPA with its 'mixed flows'. The third which is perhaps the most

important for our purpose, reflects the collective experiences of the three regional agreements. It recognises the need for a responsible approach to burden-sharing and, like Convention Plus, encourages states to enter into specific agreements. However the UNHCR has independently clarified that states should not refuse to grant asylum in the absence of such agreements (UNHCR 2004c). Additionally the third goal includes the objectives of incorporating refugee issues within national, regional and multilateral development agendas and using resettlement more effectively as a tool of burden-sharing. The fourth (security concerns) is particularly a problem in Africa (see Shaw, Chapter 8) and Latin America. The CPA demonstrates the importance of the fifth goal (the search for durable solutions for refugees); international collective agreements to resolve regional crises do not automatically lead to better solutions.

These instruments demonstrate that the UNHCR has broadened its thinking about 'regionalism' since the 2000 *Note on International Protection*, quoted at the beginning of this chapter. In its 2003 *Note on International Protection*, (UNHCR 2003: paragraph 3) it critiqued 'a strong tendency towards harmonization at the lowest common denominator in the development of regional asylum systems'. As the 2004 *General Conclusion* (also quoted above) and Convention Plus illustrate, it recognizes the value of both responses at the national and regional levels as well comprehensive approaches.

Recently a number of initiatives both of the EU as an aspect of its external programme (see van Selm Chapter 4) and of the UNHCR have been introduced to build upon the Agenda for Protection. For example, the UNHCR is engaged in a 'gaps analysis' to identify specific development assistance needs in specific regions and has urged states to target particular regions for this purpose. It has initiated a project named 'Institution-Building in North Africa' which is intended to gather evidence about the nature of the migration movements into that region. Under the Strengthening Protection Capacity Project (SPCP), the UNHCR is involved in a development project in Tanzania. It has also developed a Comprehensive Plan of Action for Somalia. The EU is assisting the UNHCR to finance some of these projects, such as the SPCP. In line with the new emphasis on development, the UNHCR has joined the United Nations Development Group (UNDG) and drafted a Guidance Note on Durable Solutions for Displaced Persons (October 2004).

These projects relate to specific regions rather than involving comprehensive plans on the CPA analogy. The Mediterranean crisis (see Chapter 4), which involves multi-parties along the lines of the Indo-Chinese crisis of the 1980s is the most likely candidate for a comprehensive solution. But for the time being, it is being addressed by a

number of separate strategies. For example, the UNHCR is giving priority to formulating agreements with Mediterranean states on protocols for rescue at sea, interdiction and exclusion. The EU has entered into bilateral relations with transit border countries who are affected by the Mediterranean crisis (see Chapter 4). There have also been discussions arising from the Hague Programme on establishing joint processing of asylum seekers either within the EU or in countries in North Africa outside the EU. Although there are no concrete proposals at present, this idea is very much on the EU agenda.

Moreover, as part of its new external focus, the European Parliament proposes the establishment of Regional Protection Programmes¹⁸ (RPPs). RPPs aim to 'enhance the capacity of areas close to regions of origin to protect refugees'. RPPs are intended to comprise two main elements: measures to enhance the protection capacity of areas close to refugees' regions of origin; and a joint EU resettlement programme.

This summary of recent EU and UNHCR initiatives demonstrates the contemporary significance of 'regionalism' in the context of asylum seekers and refugees. One of the challenges of 'new regionalism' is to formulate 'joined up' proposals which provide comprehensive solutions. It will also be necessary to avoid the mistakes of the past, in which regionalism has often coincided with national or state self-interest, and protectionism. The Convention Plus and the Agenda for Protection proposals attempt to build upon the past by providing 'new' impetus for both regional and global cooperation. We turn now to examining specific regional experiences to assess the challenges that lie ahead.

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Treaties and Conventions

Cartagena Declaration on Refugees 1984

Convention Governing the Specific Aspects of Refugee Problems in Africa 1969

Notes

- 1 The point is made explicitly in J. Hathaway, 1990. 'A Reconsideration of the Underlying Premise of Refugee Law', *Harvard International Law Journal*, 31: 129.
- 2 At this time the refugees were largely settled within other 'European' countries although some went to other Western countries such as Canada, Australia and the U.S.A. Within Europe, the movement was predominantly from eastern to western Europe (Barnett 2002: 243).
- 3 Entered into force on 22 April 1954.
- 4 Entered into force on 4 October 1967.
- 5 Entered into force on 20 June 1974.

- 6 The expanded definition of 'refugee' in Article I(2) underscores this point.
- 7 Rankin challenges the interpretive 'myths' surrounding the OAU Convention, namely that it does not involve a 'subjective' assessment of the individual's 'compulsion', and that it is intended to cover group displacements.
- 8 OAS/Ser.L/V/II.66,doc.10, rev.1, pp. 190–3.
- 9 E.g., the 1994 San Jose Declaration, 5–6 December 1994, ACNUR/IIDH, 1995.
- 10 Statement by Gerald Walzer, UN Deputy High Commissioner for Refugees in San Jose, Costa Rica, 5 December 1994 to mark the tenth anniversary of the Cartagena Declaration, UNHCR Refugee Magazine Issue 99 (Regional solutions) – the Cartagena Declaration Retrieved on 6 November 2005 from <http://www.unhcr.ch/>.
- 11 International Conference on Indo-Chinese Refugees, Geneva, 13–14 June 1989: Declaration and Comprehensive Plan of Action, UN Doc A/CONF. 148/2, 13 June 1989.
- 12 *Miniser for Immigration v Mok* (1995) 55 FCR 375 concerned statements made by the then Prime Minister and the Minister for Immigration that Cambodian boat people were 'economic refugees'.
- 13 Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, p. 27.
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- 15 Draft Declaration and Comprehensive Plan of Action, approved by preparatory meeting for the International Conference on Indochinese Refugees, 8 March 1989.
- 16 UNHCR, Geneva Briefing Book 2000–2001.
- 17 UNHCR, Geneva Briefing Book 2000–2001.
- 18 COM (2005) 388 final, 1 September 2005.