



POLICY BRIEF 2

Regional refugee protection in comparative perspective

Lessons learned from the Asia-Pacific, the Americas, Africa, and Europe

Never Stand Still

Law

Andrew & Renata Kaldor Centre for International Refugee Law

Kate Jastram
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Executive summary

Refugee movements in South-East Asia, the Middle East and Europe during 2015, along with the fact that more people are displaced now than at any time since the Second World War, provide an opportune moment to revisit some of the key regional cooperation arrangements for refugee protection. There are lessons to be learned, in particular from the 1989 Comprehensive Plan of Action for Indochinese Refugees, and its precursor agreement in 1979 (CPA), as well as from the 1989 International Conference on Central American Refugees (CIREFCA). These two programs were widely seen as successful when they were implemented, and they have stood the test of time.

Regional refugee protection cooperation arrangements can provide practical, principled responses by several States working together to meet the protection needs and humanitarian challenges posed by the movement of asylum seekers, whether fleeing in large or small numbers. There is no single definition of a regional cooperation arrangement, but the most important and useful examples are those that are protection-oriented. The need for States to work cooperatively is found in the Preamble to the 1951 Refugee Convention, and UNHCR's Executive Committee, comprised of 98 States, has provided a great deal of guidance on regional approaches to protection.

States participate in regional arrangements because they can be an effective means of providing protection in a manner beyond the reach of a single State. Regional arrangements can be flexible and responsive to the particular circumstances presented, within a basic framework of protection principles.

The legal issues relevant to regional refugee cooperation arrangements can be organised in three categories: *non-refoulement* (non-return) and other substantive standards; procedural standards; and standards of treatment.

There are a number of examples of State practice that provide lessons relevant to today's circumstances. The best known is the CPA, which from 1979 allowed millions of refugees from Vietnam, Cambodia and Laos to find a durable solution by way of resettlement in Australia, Canada, the US and other countries. The commitment by western States to resettle them enabled South-East Asian countries to provide asylum seekers with continued access to first countries of asylum. Vietnam also played a critical role in allowing safe and legal departures so that people would not have to flee by boat, and in accepting voluntary returns of rejected asylum seekers (with monitoring by UNHCR). Today, there are growing calls for a similar large-scale resettlement program, for example for Syrian refugees, given the large number of displaced people in the world and the obvious struggles faced by frontline States hosting millions of refugees.

Another positive example of regional cooperation was the CIREFCA process in Central America in the 1990s, which employed a development-oriented approach to integrate Guatemalans, Nicaraguans and Salvadorans in their countries of asylum, or to reintegrate them in their home countries. This was achieved through the provision of significant development assistance to implement projects that addressed a wide range of needs, including immediate assistance, rehabilitation, economic development and institution-building. A less successful example was the ICARA I and II Conferences in Africa in the early 1980s, which revealed divisions between donor States and asylum States on what durable solutions should be prioritised, as well as on more equitable sharing of responsibility (in the form of additional funding).

Regional protection arrangements reveal a fascinating diversity of approaches. Central and South American and Caribbean States have continued to build on the region's 1984 Cartagena Declaration and the experience of CIREFCA with a series of conferences specifically intended to address emerging protection issues and to expand the protection space in the region.

Europe has a complex constellation of asylum laws and regional bodies, which, together with the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights, form part of the Common European Asylum System. The number of Syrian and other refugees who have arrived in Europe in 2015, most since May, has put strains on the system and introduced tensions between Member States who disagree on how to respond. It is a test not only of European solidarity, but also of European asylum law and institutions.

Meanwhile, in the Asia-Pacific region, there are small steps being taken within the Bali Process and ASEAN to counter the dominant narrative of the refugee as an 'irregular migrant'. Nevertheless, Australia continues to interdict boats and transfer asylum seekers to remote offshore processing centres – a unilateral approach based on deterrence that is astonishingly expensive and does little to protect refugees or to promote regional cooperation.

Elements of successful regional cooperation for refugee protection

A review of State practice reveals that the fundamental elements of regional cooperation are protection, participation, leadership and political will.

Protection

Regional cooperation arrangements must be premised on protection. Depending on the circumstances, appropriate measures may include:

- ratification of relevant international refugee and human rights treaties;
- inclusion of protection principles in any regional plan;
- establishing fair and efficient refugee status determination processes;
- providing solutions, which may be strengthened through a balanced mix of the traditional durable solutions of voluntary repatriation, local integration and resettlement. Additional responses, such as enhanced labour mobility and sustainable development, may also provide helpful solutions.

Participation

Participation refers to the demonstrated desirability of State cooperation within a broad multilateral framework. This should include:

- engaging countries of asylum to support their resources and capacity to host refugees, enhance their ability to provide protection and reduce the need for refugees to move on in search of protection elsewhere;
- engaging countries of origin to facilitate the conditions for voluntary repatriation in safety and dignity, and to ensure that the needs and perspectives of refugees are factored into peace negotiations or other relevant developments.

Leadership by UNHCR

Leadership by UNHCR can help to provide independent oversight and facilitation of the many elements of a regional arrangement.

Implementation and political will

Regional cooperation arrangements must deal comprehensively with the interests of key participants within the framework of a single integrated strategy. This should include specific commitments and roles for each, and measures for implementation and supervision. Policies should be based on evidence and tailored to the specific context.

Protection works best when it is congruent with other policy goals of major State actors, such as bolstering national security, encouraging a peace process, addressing mixed groups of refugees and migrants, promoting development and/or expressing national values. At this historical juncture, the unprecedented number of displaced people and their evident suffering may well serve to shift public opinion, in particular by showing that protecting refugees actually strengthens efforts to attain these other important goals. It may allow a more creative discourse on regional refugee cooperation to emerge.

1 Introduction

Regional cooperation, in some form or another, has been a prominent feature of asylum policy in Australia.¹ Nevertheless, little comparative work on regional refugee cooperation frameworks has been undertaken. This research report analyses past, present, and potential regional models for responding to asylum seekers with a view to informing on-going discussions about regional cooperation in the Asia-Pacific context.

The report focuses on multilateral arrangements (involving several States) rather than bilateral agreements (between two States). It examines the legal viability of such schemes and possible policy outcomes, taking into account practical limitations. Relevant aspects include questions of State responsibility, the role of the Office of the United Nations High Commissioner for Refugees (UNHCR), and the concurrent application of other policies and practices dealing with asylum and/or migration.

Section One outlines the structure of this report. Section Two examines the meaning of regional cooperation for refugee protection, looks at State rationales for participation in such arrangements, and asks how regional schemes work. Section Three turns to the legal issues raised by regional cooperation arrangements, including the principle of *non-refoulement* and other substantive standards, procedural standards and standards of treatment. Section Four delves into selected examples of State practice in the Asia-Pacific, the Americas, Africa and Europe. Section Five offers analysis and assessment based on the models of State practice identified.

2 What is meant by regional cooperation for refugee protection?

In order to frame the discussion, the report begins with three basic issues: the meaning of regional protection, the rationales for State participation, and the mechanisms of implementation.

2.1 The meaning of refugee protection

Regional cooperation arrangements for refugee protection can be practical, principled responses by several States working together to meet the protection needs and humanitarian challenges posed by the movement of asylum seekers, whether fleeing in large or small numbers. There are many examples of such arrangements, several of which are presented in this report.

There is no single term used to describe the general category of regional refugee protection cooperation arrangements. In this report, specific arrangements will be referred to by their name or acronym, such as the Comprehensive Plan of Action, or CPA. When discussing regional arrangements in general, the report will use assorted terms such as regional approaches, regional protection arrangements and regional cooperation frameworks, simply to vary the text. If a particular word or phrase is of special significance in context, it will be flagged for the reader.

As the variation in terminology might suggest, there is no agreed legal definition of a regional cooperation arrangement for refugee protection. Indeed, critics in the Asia-Pacific region have noted that different States have different understandings of the concept, some of which seem to be premised on the notion that 'regional' means that refugees should be accommodated anywhere in the region except in the speaker's own State.² However, this report focuses on examples of *protection-oriented* regional plans, as foreseen by the architects of refugee law and as undertaken in good faith by many States all over the world.

The founding document of contemporary refugee law, the 1951 Convention relating to the Status of Refugees (1951 Convention) reflects awareness of the inequality of effort required to protect refugees and the corresponding need for State solidarity. The 1951 Convention's Preamble notes the international scope and nature of the refugee problem, acknowledges that 'unduly heavy burdens' may fall on 'certain countries' of asylum, and points out the obvious necessity of international cooperation in order to achieve solutions. The 1951 Convention and/or its companion 1967 Protocol relating to the Status of Refugees (1967 Protocol) have been ratified by 148 States, including Australia. One protection challenge for Australia in pursuing a regional approach is that while many of its neighbours host refugees, relatively few of them share the common legal framework provided by the 1951 Convention/1967 Protocol.

However, there is another important source of guidance agreed by States on refugee protection matters, including on regional cooperation. The States comprising UNHCR's intergovernmental governing body, its Executive Committee, have addressed the need for States to work together to ensure protection and have provided basic guidelines for comprehensive regional approaches to refugee protection. In emphasising the value of regional cooperation that is responsive to the particular needs of a given refugee situation, UNHCR's Executive Committee has noted that there is no blueprint for such approaches, but has stressed that protection considerations must govern the entire process.³ The importance of UNHCR's Executive Committee guidance, expressed in the form of conclusions adopted by consensus by all members at UNHCR's annual meetings, is due in part to the Executive Committee's broad and diverse membership. The Executive Committee has 98 member States, including not only States parties to the 1951 Convention/1967 Protocol, such as Australia, but also important countries of asylum that have not ratified the refugee treaties, such as Thailand.

2.2 Why do States participate in regional cooperation arrangements?

The objective of regional cooperation is to provide effective protection, which is often beyond the reach of a single State. A successful regional framework permits responsibility for refugee protection to be distributed equitably across States, based on principles of equity, respect for sovereignty, reciprocity and solidarity. Any regional arrangement must be understood as a complement to, and not a substitute for, individual State responsibility. It enables a joint effort in seeking solutions, which may also include sharing costs.

Regional protection plans allow for concerted action to improve conditions in countries of asylum (countries bordering the ones from which refugees are fleeing, which often receive large numbers of refugees), which may in turn reduce the need for refugees to travel onward to other, more distant host countries to look for even minimal standards of protection. Countries of first asylum can be overwhelmed by the number of people seeking protection, especially since many are developing nations. The great majority of the world's refugees – 86 per cent – are hosted in the developing world.⁴

Countries of asylum often need help in providing fair and efficient refugee status determination (RSD) procedures to asylum seekers, so that people do not have to wait for years in limbo for their claims to be decided. They also need assistance in providing humane reception conditions. Asylum seekers need lawful presence (permission to stay while their claim for refugee status is being assessed), as well as the right to seek employment, go to school and obtain health care.

Regional plans also allow countries to work together to find *solutions* for asylum seekers and refugees. People who are found not to be refugees need safe repatriation back to their country of origin. People who are recognised as refugees need to be able to avail themselves in a timely manner of one of the three durable solutions to their plight. The first solution, voluntary repatriation, recognises that most refugees wish to return to their country of origin. Their being able to do so may require assistance from

countries in the region to improve the security, political or economic conditions there.

The second solution, local integration in the country of asylum, is based on the reality that many refugees will neither be able to return to their home country, nor be selected for resettlement in a third country. Local integration is not just tolerance on the part of the host country; it requires true social acceptance and full legal rights.

The third solution, resettlement in a country such as Australia, Canada or the US, is available to less than one per cent of the world's refugees.⁵ These traditional resettlement countries have been joined in recent years by others, so that there are now 28 countries offering resettlement spaces to refugees in need. Regional protection plans can help countries agree either to provide additional resettlement spaces, or to expand further the number of resettlement countries, including by increasing development funding.⁶

2.3 How do regional protection arrangements work?

The legal basis for regional refugee protection arrangements varies depending on the region and the circumstances, and is discussed in more detail below. There are differences in regional legal regimes, and in how regional institutions enforce and adjudicate the law.⁷ These mechanisms range from binding continent-wide treaties in Africa and Europe, to shared legal standards incorporated in domestic legislation in Latin America, to situation-specific agreements in the Asia-Pacific.

3 Legal issues raised by regional refugee protection arrangements

Before turning to specific examples of State practice, the report first examines common legal issues raised. For regional cooperation agreements to be legally viable, they must be consistent with international refugee law and international human rights law. In that regard, two preliminary observations may be helpful.

First, when States join together to provide protection to and seek solutions for refugees, they are bound by the same legal standards that apply when each acts separately. States have obligations to refugees and asylum seekers under international (and regional) refugee law and human rights law, both as a matter of treaty ratification and customary international law. They also have obligations under international humanitarian law, anti-trafficking and smuggling laws, and the law of the sea that may constrain their actions in relation to such people.

Second, refugees or asylum seekers cannot be in a space where no laws apply, regardless of whether States purport to make such a claim individually or together. Whether they find themselves on the high seas, on a private ship or a naval vessel, in an international zone or an excised zone, in an extraterritorial processing centre, or a country deemed 'safe'; refugees and asylum seekers are always within the ambit of the law. The law of State responsibility makes clear that a State is responsible for respecting their rights whether it acts alone or in concert with one or more other States.⁸

Legal issues relevant to regional cooperation arrangements can be organised into three categories: substantive standards, procedural standards and standards of treatment. These are the same issues that are relevant to States generally in their dealings with refugees and asylum seekers, but a few points need emphasis in the context of regional cooperation.

3.1 *Non-refoulement* and other substantive standards

The principle of *non-refoulement*, the obligation not to return a person to persecution, torture, enforced disappearance or other serious harm, is codified in the 1951 Convention and 1967 Protocol, several international human rights treaties, and a number of regional refugee law and human rights treaties. As a rule of customary international law, the *non-refoulement* obligation is binding even on States that have ratified none of the relevant treaties.

A State's duty to respect the principle of *non-refoulement* applies irrespective of how many asylum seekers arrive at its border, or what resources are immediately available to assist them. UNHCR and its Executive Committee have addressed this issue many times over the years, most recently in the 2014 *Guidelines on Temporary Protection or Stay Arrangements*.⁹ The basic rule provides that a State must allow asylum seekers access to its territory, at least temporarily, while it addresses their immediate needs and (if necessary) seeks assistance from UNHCR and the international community. This practical basic rule of temporary protection should be distinguished from the Temporary Protection Visas issued by Australia to recognised refugees who arrive by boat, which penalises such refugees for the manner in which they entered the country in violation of Australia's obligations under article 31 of the 1951 Convention.

Concerns that an asylum seeker may have travelled to a host country with the help of smugglers, or as the victim of traffickers, do not absolve the host country of its obligation to respect the principle of *non-refoulement*. Rather, international law requires that victims of trafficking benefit from protection and assistance. Indeed, they may also qualify for refugee status as a result of their exploitation by traffickers.¹⁰

3.2 Procedural standards

Procedural standards for determining refugee status may vary depending on the circumstances. For example, it is common for African countries to grant refugee protection on a *prima facie* basis without requiring an individualised determination of status. This is facilitated in part by the broader refugee definition in force in Africa, but is also a pragmatic response to large numbers that can equally be used in countries that employ the 1951 Convention definition. In some countries, including in the Asia-Pacific region, UNHCR may conduct RSD at the request of the host State. However, at a minimum, even in temporary protection or stay arrangements where RSD is not contemplated, people need access to information and legal advice as to their situation and status.

3.3 Standards of treatment

Human rights law applies not just to citizens, but to all persons in a State's territory and/or subject to its jurisdiction. Human rights standards include access to territory; protection against arbitrary or prolonged detention; non-discriminatory, humane and dignified treatment, including access to shelter, education, health and basic services; and respect for family unity. In situations of large-scale influx, minimum standards of treatment may be based on UNHCR Executive Committee Conclusion No 22 of 1981, read in accordance with subsequent developments in international human rights law. In cases of extended stay, or where solutions will be delayed, standards of treatment will need to improve accordingly.¹¹

4 State practice on regional cooperation for refugee protection

What lessons can be learned from past, present and potential future examples of regional cooperation for refugee protection? This section is by no means a full account of every such attempt, but instead presents certain regional initiatives from the Asia-Pacific, the Americas, Africa and Europe, asking (to the extent possible) a common set of four questions to facilitate comparison and provide the basis for Section Five on lessons learned.¹² The elements of comparison are: the situation which gave rise to regional cooperation; the policy goals of various actors; the legal basis for cooperation; and the methods of implementation. Based on these summaries, Section Five then analyses the common denominators, draws out best practices, and suggests elements of a successful regional plan.

4.1 Asia-Pacific

4.1.1 Comprehensive Plan of Action for Indochinese Refugees (1979 and 1989)

Although commonly referred to as ‘the’ Comprehensive Plan of Action for Indochinese Refugees, this important model of regional cooperation was actually comprised of two international conferences and their related agreements, in 1979 and in 1989.¹³

a) Situation giving rise to regional cooperation

In the four years between the fall of Saigon in April 1975 and the middle of 1979, over half a million Indochinese fled to nearby countries in South-East Asia. Of that number, some 200,000 Vietnamese, Cambodians and Laotians had been resettled by mid-1979 in Australia, Canada and the United States, while nearly 350,000 remained in the nearby countries of first asylum. Seeking greater international assistance, several States announced that they would accept no new arrivals, and indeed Malaysia and Thailand had already started pushing boats back to sea.¹⁴

The international agreement crafted in 1979 addressed the immediate asylum crisis by promising solutions in the form of resettlement in western countries for nearly all of the so-called ‘boat people’ arriving in South-East Asia, on the assumption that they all qualified for refugee status. However, this arrangement needed revision less than a decade later.¹⁵ Despite – or because of – the large number of refugees being resettled to the US and other countries, equally large numbers of people continued to flee Vietnam. In response, the 1989 CPA limited resettlement to those who were determined to be refugees after RSD in the countries of first asylum. By the mid-to-late 1990s, the CPA succeeded in stopping unauthorised Vietnamese departures, and emptying the refugee camps and detention centres in the region.

While the CPA is unique in terms of the number of refugees resettled, it remains relevant as the first regional protection agreement to take a comprehensive approach to movements containing a mixed group of people, some of whom were in need of protection and others who were not.¹⁶

b) Policy goals of various actors

As is the case in all regional cooperation arrangements, the various actors involved in the CPA had differing policy goals. One measure of the success of the plan was that each group felt that its own contribution was necessary for the ultimate solution to the crisis.¹⁷

The chief country of origin: Vietnam

As the main country of origin of refugees, the victorious but impoverished Socialist Republic of Vietnam

sought to reap whatever financial and political benefits it could from cooperation with UNHCR and the international community. Vietnam wanted development assistance, trade and political engagement with the Association of Southeast Asian Nations (ASEAN) in light of the decline of its relationships with the Union of Soviet Socialist Republics and the People's Republic of China. The most potentially destabilising aspect of the CPA, the return of rejected asylum seekers to Vietnam, was eased by the economic and political benefits that they brought. In addition to UNHCR's reintegration grants and Quick Impact Projects,¹⁸ Vietnam's cooperation in accepting voluntary returns was also rewarded by bilateral and UN Development Programme (UNDP) funding.¹⁹

Countries/territories of first asylum: Hong Kong, Indonesia, Malaysia, the Philippines, Singapore and Thailand

The main goals of the countries of first asylum were to stop arrivals and find solutions other than local integration. Their concerns included domestic ethnic tensions, national security issues and difficulty in absorbing the perceived economic burden, as well as a desire not to have their contributions taken for granted by more developed countries.²⁰ Some also hoped to address human rights concerns, given the international criticism received for pushing back boats. It was also thought that in the longer term, bringing Vietnam, Laos and Cambodia into ASEAN would benefit the stability and prosperity of the region as a whole.²¹ In the short term, allowing the refugees to stay in camps and detention centres offered possibilities for local employment and trade.²²

Major resettlement countries: US, Australia, Canada and France

What motivated resettlement countries to accept nearly all Vietnamese asylum seekers in 1979 and then to scale back significantly in 1989? At the outset, the US, which took by far the greatest number,²³ wanted to help its former allies, a sentiment reinforced by the Vietnamese diaspora already in the US. Cold War national security goals dovetailed with this humanitarian impulse. After losing the war, the US sought to retain influence in the region by encouraging democracy and capitalism, and by promoting peace in Cambodia.²⁴ Australia, the closest major resettlement country, was able to maintain greater control over its borders by helping to limit spontaneous boat arrivals.²⁵ But after 10 years, resettlement countries were responding to larger numbers of asylum seekers and migrants arriving at their own borders, as well as some segments of the community concerned about the possibility for asylum systems to be abused.²⁶ This influenced their decision to scale back resettlement.

c) Legal basis for regional cooperation

The 1979 Conference on Refugees and Displaced Persons in South-East Asia, attended by 65 States, resulted in an agreement on the part of ASEAN nations to continue to provide first asylum so long as resettlement was available to all arrivals. Resettlement pledges more than doubled from 125,000 to 260,000. For its part, Vietnam agreed with UNHCR to allow its citizens to leave safely and legally through the Orderly Departure Program (ODP) instead of taking to unsafe boats. Over half a million Vietnamese eventually availed themselves of this program.²⁷ Finally, new pledges to UNHCR at the 1979 Conference totalled \$160 million in cash and in kind, more than double the totals of the previous four years.²⁸

But when countries of first asylum and resettlement states alike grew concerned that the open-ended provision of resettlement was encouraging unsafe boat departures despite the ODP, and when Vietnam agreed to accept the voluntary repatriation of rejected asylum seekers, the 1989 International Conference on Indochinese Refugees was able to craft a new consensus. The agreed objectives were to reduce clandestine boat departures, maintain first asylum, conduct RSD for new arrivals who came after a certain cut-off date, resettle all those who arrived before the cut-off date and only those post cut-off date

arrivals who were determined to be refugees, and, finally, to return rejected asylum seekers to Vietnam.²⁹

d) Implementation mechanisms and actors

A core group of CPA States formed a Coordinating Committee, with three Sub-Committees on Reception and Status Determination, Departures and Repatriation, and Resettlement. This work established the substantive details for how the CPA, as a basic political agreement, would be implemented in practice.³⁰ UNHCR coordinated and led many of the burden-sharing arrangements. UNHCR has been credited for playing 'a pivotal, and in many respects novel, role in all aspects of the CPA in the region, particularly in Vietnam. Although the CPA spelt out the broad contours of the Plan, the complexity and practical realities of implementing a multilateral agreement of this magnitude would only become apparent as the CPA evolved.'³¹

The International Organization for Migration (IOM), an intergovernmental body not part of the UN, provided logistical support for resettlement and played an important role in the ODP. As for non-governmental organisations (NGOs), the involvement of the Jesuit Refugee Service in assisting asylum seekers with RSD exemplified the critical role that qualified NGOs were able to play in the CPA. However, their potential was not fully realised because some asylum States had concerns about the neutrality of international NGOs.³²

4.1.2 Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime – Regional Cooperation Framework (2011)

A second example from the Asia-Pacific region concerns the struggle for an effective regional response to an on-going situation. The Bali Process is, at best, a nascent form of positive regional cooperation, one that does not yet even include the words 'refugee' or 'protection'. It is worth considering for UNHCR's success in introducing a protection component into a multilateral forum on transnational crime, as well as for its failure to be employed by States in the region during refugee movements in early 2015 in the Bay of Bengal, the Andaman Sea and the Strait of Malacca.³³

a) Situation giving rise to regional cooperation

The Bali Process grew out of a ministerial conference in 2002. It is now comprised of 45 countries, including the 10 ASEAN States as well as Australia, New Zealand and the US, along with UNHCR, IOM and the UN Office on Drugs and Crime (UNODC). Australia and Indonesia serve as co-chairs.

b) Policy goals of various actors

Given the large number and wide geographical sweep of the ASEAN Member States, it is difficult to generalise their policy goals. As one example, the co-chairs are at odds over Australia's practice of interdicting boats and returning them to Indonesian waters.³⁴ As the forum's name indicates, its chief interests are people smuggling, trafficking in persons and related transnational crime. At the outset, the main priorities were the technical aspects of developing Member States' border management and control capacities.

UNHCR has been included as a full participant since 2007 and is part of the Bali Process Steering Group, together with Australia, Indonesia, New Zealand, Thailand and IOM.³⁵ Observers credit UNHCR for its persistence in adding refugee protection to the Bali Process agenda in 2009,³⁶ noting that ASEAN lacks a forum to discuss refugees and asylum seekers. Australia's previous Labor government put a great deal of political will behind pursuing its view of refugee protection cooperation through the Bali Process.³⁷

c) Legal basis for regional cooperation

In March 2011, Australia and Indonesia as co-chairs endorsed a non-binding Regional Cooperation Framework underpinned by five core principles. Despite the difficult protection situation in the Asia-Pacific region – few States parties to the 1951 Convention/1967 Protocol, Australia’s violations of international refugee law, and Myanmar’s actions in persecuting the Rohingya – the Bali Regional Cooperation Framework manages to cover several important points: asylum seekers’ access to procedures; refugees’ access to durable solutions, including resettlement within the region and possibly even local integration; return of rejected asylum seekers in safety and dignity; and support for orderly migration.³⁸

d) Implementation mechanisms and actors

Interested countries were invited to operationalise the Regional Cooperation Framework in conjunction with UNHCR and IOM through bilateral and multilateral arrangements. At Australia’s urging, Malaysia and Australia moved swiftly to do so. In May 2011, the two countries agreed to exchange 800 asylum seekers who had arrived in Australia by boat for 4,000 recognised refugees then living in Malaysia, although the High Court of Australia then ruled the transfer unlawful.³⁹ Civil society entities were unpleasantly surprised at this use of the Regional Cooperation Framework, and even more so when it was learned that UNHCR was working closely with the two States on the plan.⁴⁰

In 2012, a Regional Support Office was opened in Bangkok to facilitate implementation of the Regional Cooperation Framework, in particular in relation to processing and case management, resettlement and burden-sharing, and sustainable return to countries of origin.⁴¹ However, as noted above, ASEAN and other States struggled to respond to asylum seekers arriving by boat in early 2015, holding an *ad hoc* series of meetings rather than relying on the Regional Cooperation Framework.⁴² Eventually, a deal was struck so that Indonesia and Malaysia agreed to continue to provide humanitarian assistance and temporary shelter to 7,000 irregular migrants then still at sea, provided that the international community completed the resettlement and repatriation process within a year.⁴³ While addressing the immediate crisis by enabling disembarkation, progress towards protection-oriented regional cooperation has been limited. It remains to be seen whether the Bali Process will form the basis for expanding effective protection for refugees and asylum seekers in the region.

4.2 The Americas

4.2.1 International Conference on Central American Refugees (CIREFCA) (1989)

Turning to another region, the International Conference on Central American Refugees (referred to by its Spanish acronym CIREFCA, for *Conferencia Internacional sobre Refugiados, Desplazados y Repatriados de Centro America*) provides a natural starting point, especially since it is often linked with the CPA as a successful model of regional refugee protection.

a) Situation giving rise to regional cooperation

Civil wars in El Salvador, Guatemala and Nicaragua in the 1980s killed some 160,000 people and displaced an estimated two million more in Central America. Of these, only 150,000 were recognised as refugees, while 900,000 were considered to be undocumented ‘externally displaced’ persons and another 900,000 were internally displaced.⁴⁴ Although planning for CIREFCA was already underway while the armed conflicts continued, it gained new momentum with the Esquipulas II Peace Accord in August 1987.⁴⁵

b) Policy goals of various actors

Countries in the region

Of the seven States in the region, three were primarily countries of origin of refugees: El Salvador, Guatemala and Nicaragua. The other four – Belize, Costa Rica, Honduras and Mexico – were primarily countries of asylum. The asylum countries varied in how tolerant or restrictive they were toward refugees, but all had a strong commitment to the peace process and saw solutions to displacement as an integral part.⁴⁶

Countries outside the region

The US was deeply involved in the wars in Central America, supporting the governments in El Salvador and Guatemala, and the opposition in Nicaragua. As a consequence, during the Reagan Administration (1981–89), US contributions to solutions for Central American refugees remained bilateral and highly focused on its geopolitical interests.⁴⁷ At the same time, Canada was pursuing a more generous refugee policy designed in part to underline its independence from the US.⁴⁸ Europe also defined its policy partly in opposition to the US, and was a significant donor to CIREFCA. The European Commission regarded CIREFCA as an integral part of efforts toward peace, development and democracy in Central America, and was motivated by solidarity with emerging Christian democratic governments, a desire to offset the influence of the US in the region, and a wish to assert Europe's growing global influence.⁴⁹

c) Legal basis for regional cooperation

The road to CIREFCA began with the non-binding regional 1984 Cartagena Declaration. The Cartagena Declaration expanded the refugee definition found in the 1951 Convention to include 'persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.'⁵⁰

The 1987 Esquipulas II Peace Accord in turn recognised displacement as a critical factor in Central America's conflicts. In 1989, the Peace Accord's provisions on displacement were augmented by the adoption of the CIREFCA Declaration and Concerted Plan of Action. UNHCR followed in close order with the 1990 Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America, which summarised these legal and policy developments and offered guidance on protection issues.

d) Implementation mechanisms and actors

The CIREFCA process brought an estimated US\$422 million in additional resources to the region, and has been praised for helping consolidate peace in Central America. Projects addressed a wide range of needs including immediate assistance, rehabilitation, economic development and institution-building. The most significant group of donors (providing 45 per cent of the total from 1989–93) was European States, both bilaterally and through the European Economic Community.⁵¹ The largest single initiative was the US\$115 million Italian-funded Development Program for Displaced Persons, Refugees and Returnees in Central America (PRODERE) to support the reintegration of displaced persons across the region.⁵²

However, while from UNHCR's perspective there was an implicit conditionality linking development assistance to adherence to international protection norms, this approach was undermined by unconditional

funding from UNDP and from Italy via PRODERE. The result was that some asylum States with positive practices, such as Belize, were not rewarded accordingly, and asylum States with more restrictive policies, such as Honduras, were not penalised.⁵³

NGOs played a critical role, negotiating with their respective governments and serving as implementing partners for 60 per cent of all CIREFCA projects, with 38 per cent of funding being channelled directly to them. NGOs were also involved in the multilateral process. For example, the Swedish Refugee Council appears to have played a particularly important role in enlisting the support of other international NGOs.⁵⁴

Because the US did not participate in CIREFCA and has never subscribed to the Cartagena Declaration definition, it tends to be omitted in assessments of CIREFCA. However, a key mechanism of protection and solutions was the 'self-help' role of the Central Americans who by-passed their region's highly politicised RSD systems and entered the US without authorisation. Most of them lived and worked in the US without permission and without applying for asylum, in large part because the US's own RSD system was also highly influenced by improper foreign policy considerations at the time, such that Guatemalan and Salvadoran asylum seekers – who opposed the governments the US was supporting – were afraid they would not be given a fair hearing. The US executive branch implicitly admitted the legitimacy of those concerns by settling a lawsuit brought on behalf of the asylum seekers, which required it to substantially revamp its asylum procedures, while Congress acted separately to pass legislation to protect Salvadorans.⁵⁵

It is important to take this overlooked factor into account, 'particularly in light of UNHCR's recent interest in how mobility and labour migration may intersect with and complement the traditional durable solutions framework.'⁵⁶ It has been argued that the decision of hundreds of thousands of Central Americans to migrate unlawfully to the US, rather than seek formal recognition and support as refugees, relieved pressure on the humanitarian system. The question is whether, from a normative and policy standpoint, undocumented migration represents a 'solution' for displaced persons and whether Central Americans' widespread reliance on it should prompt a rethinking of CIREFCA as a success story.⁵⁷

4.2.2 The spirit of Cartagena: The Cartagena Plus process (1984, 1994, 2004, 2010, 2014)

While CIREFCA has been the largest programmatic expression of refugee protection principles in Central and South America and the Caribbean, there is an impressive and unique body of regional policymaking taking shape under the auspices of the Cartagena Plus process. International conferences are held every decade to commemorate the 1984 Cartagena Declaration, to recommit to the spirit of Cartagena, and to expand the protection space in the region.⁵⁸ Each successive conference has focused on newly emerging protection problems and has concluded with a Declaration to serve as a common instrument of policy and guiding principles, along with a Plan of Action to structure coordination, cooperation and response mechanisms to meet the protection and humanitarian needs collaboratively identified. It has been noted that 'such a forum does not exist in any other continent.'⁵⁹

It is worth reviewing the Cartagena Plus process briefly for its example of States in a region systematically building a positive regional protection regime. Unlike the original Cartagena Declaration, which was adopted by individuals attending a colloquium, the subsequent Declarations have been adopted by the States participating in each conference.

The first follow-up conference, Cartagena Plus 10, resulted in the 1994 San José Declaration on Refugees and Displaced Persons.⁶⁰ It is perhaps the least known of the regional declarations and did not include a Plan of Action. Nevertheless, in responding to the problem of internally displaced persons (IDPs) in the Andean region, the San José Declaration was visionary in presenting a series of principles on internal

displacement well before the 1998 UN Guiding Principles on Internal Displacement.⁶¹

The 2004 Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America,⁶² otherwise known as Cartagena Plus 20, were focused in particular on Colombia, which at that time had at least three million refugees and internally displaced persons. The Mexico Plan of Action included three innovative programs for sustainable solutions building on regional solidarity and South–South cooperation. The Borders of Solidarity program focused on security and access to secure areas at the borders, as well as on the needs of the host communities. It was meant to provide a contrast to the prevailing concept of borders as a fortress wall.⁶³ The Cities of Solidarity program aimed to improve local integration and self-sufficiency of urban refugees. The Resettlement in Solidarity program established a regional plan to resettle Colombian refugees. As a result, all countries in the Southern Cone have entered into agreements with UNHCR to resettle refugees.⁶⁴

Another important innovation was broadening the scope of the consultations to include three sub-regional preparatory meetings, which provided greater opportunities for participation in the process.⁶⁵ Numerous countries in the region have implemented new refugee laws and policies in accordance with the Mexico Declaration and Plan of Action.⁶⁶

The 2010 Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas⁶⁷ is not in the 10-year Cartagena Plus process sequence as a result of the conference instead being convened to mark the 60th anniversary of UNHCR and the 1951 Convention, along with the 50th anniversary of the Convention on the Reduction of Statelessness. It represents another building block for the region, and is notable for its strong reiteration and expansion of the principle of *non-refoulement*; support for gender, age and diversity considerations in national laws on refugees and IDPs; and encouragement to States to adopt mechanisms to respond to new situations of displacement not foreseen by the 1951 Convention.⁶⁸

The most recent Cartagena Plus document, Cartagena Plus 30, is the 2014 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 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’),⁶⁹ adopted by 28 States and three territories in Latin America and the Caribbean.

The UN High Commissioner for Refugees has enumerated the ‘new frontiers’ which the 2014 Brazil Declaration and Plan of Action are meant to address: ‘forced displacement generated by transnational organised crime; mixed migration and refugee protection, including protection at sea; comprehensive durable solutions including migratory and labour alternatives; statelessness; regional cooperation and responsibility sharing mechanisms; as well as contemporary global topics, such as displacement generated by climate change and natural disasters.’⁷⁰

Cartagena Plus 30 had the broadest ever consultative process, with four sub-regional preparatory meetings and a ministerial closing event in Brasilia which enjoyed the participation of virtually all States in Latin America and the Caribbean, other observer States, refugees, IDPs and stateless persons, international and regional bodies, and more than 150 NGO and academic representatives.

In summing up the achievements of the vibrant Cartagena Process, it has been observed that ‘most remarkably, this defence of international protection has taken place within an ever more restrictive global environment.’ Latin America has also been lauded for the region’s ability ‘to generate both innovative ideas and effective proposals that have not only served well for situations of refugees and displaced persons in Latin America and the Caribbean but have also been the subject of study and use in other regions of the world.’⁷¹

4.3 Africa

4.3.1 International Conference on Assistance to Refugees in Africa (ICARA I & II) (1981 & 1984)

a) Situation giving rise to regional cooperation

The large and rapidly growing number of refugees in Africa in the 1970s, coupled with the reality that most were hosted in some of the world's poorest countries, led to a number of attempts on the part of African States to draw attention to the need for greater burden-sharing from wealthier African nations and from the international community generally. A 1979 Pan-African Conference in Arusha on the African Refugee Problem is said to have marked a turning point in African States' attitudes about refugee aid, in that they sought to receive a more equitable share of international assistance.⁷²

b) Policy goals of various actors

The two International Conferences on Assistance to Refugees in Africa (ICARA I and II), held in 1981 and 1984, were an attempt by Sub-Saharan African States to acquire additional international aid to support their hosting of African refugees. At ICARA I in 1981, a new and expanded principle of burden-sharing was advanced, calling on the international community to assist with the social and economic infrastructural costs associated with hosting refugees.⁷³ ICARA I was thus explicitly held as a pledging conference with the objective of assisting asylum countries in obtaining international assistance to meet the additional pressures placed on their services and facilities by the presence of refugees.⁷⁴ In arguments that still resonate today, African States contended that they hosted a disproportionate share of the world's refugees, the causes of whose displacement were as much global as local.⁷⁵

The issues of burden-sharing and durable solutions dominated and divided ICARA II in 1984, with African States and major donors taking different perspectives on the goal of the conference. Donors did not reject the host States' concept of expanded burden-sharing *per se*, but they were troubled by the lack of a direct connection between expanded assistance and durable solutions other than voluntary repatriation. The donors feared that waiting for repatriation could be an open-ended claim on their resources. At the time of ICARA II in 1984, some refugees, such as the Rwandan Tutsis, had already been in settlements for 25 years. Open-ended burden-sharing might make the host's State's situation tolerable and thus impede, rather than encourage, the search for durable solutions.⁷⁶

In contrast, the African host countries made clear their policy choices regarding durable solutions: they strongly preferred voluntary repatriation and were averse to local integration. Many host countries, hoping for voluntary repatriation and rejecting local settlement, kept refugees in temporary care or limited self-reliance situations for long periods of time, thereby increasing assistance costs.⁷⁷

c) Legal basis for regional cooperation

Africa's formal treaty framework for the protection of refugees and IDPs is the most advanced in the world. In the case of the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, this is not only because the refugee definition is expanded in article I(2) to include 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing the public order in either part of the whole of his country ... is compelled to leave', but also because the treaty specifically provides for burden-sharing. Article II(4) of the 1969 OAU Convention states that '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 [African Union], and such other 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.’

Yet the burden-sharing provision is binding only on other African States parties to the treaty. Regional initiatives are therefore often focused on seeking resources commensurate with the scale and complexity of displacement, and specifically on attempting to interest donor States in doing more to match the contribution represented by the continent hosting millions of refugees for lengthy periods of time. They are of interest because differing perspectives on burden-sharing emerged in the ICARA conferences and because they reveal a tension between root causes, assistance and solutions that is still a dynamic in responsibility-sharing discussions today.

4.4 Europe

Europe’s positive role in regional protection arrangements outside Europe has been touched on in earlier parts of the report, from participating in the CPA and resettling South-East Asian refugees, to providing important funding and political leadership in CIREFCA.

Before turning to the current situation, it is worth recalling that in order to respond to asylum seekers in Europe, the EU has been developing a Common European Asylum System (CEAS) since 2009. The CEAS is premised on the assumption that national RSD procedures could cope with a regular inflow of asylum seekers, hence, its emphasis on case-by-case determination and procedural standards oriented to the protection of individual rights. The possibility of a mass influx was not entirely ignored, with Europe’s experience of large-scale influxes during the breakup of Former Yugoslavia and the Kosovo crisis providing the rationale for the 2001 Temporary Protection Directive (which has never been triggered). Despite frequent references to solidarity and responsibility-sharing, the anticipated additional burden on ‘front-line States’ has not received the same degree of attention as the Dublin system, under which one State is identified as responsible for determining refugee status and taking responsibility for the refugee, or, in the event of a negative decision, returning the individual to his or her country of origin.

This part of the report examines the on-going political tensions over Syrian and other refugees coming across or around the Mediterranean,⁷⁸ in light of Europe’s regional standards and institutions.

a) Situation giving rise to regional cooperation

Since March 2011, the war in Syria has killed more than 250,000 people, displaced 7.6 million people internally, and sent more than four million people into exile.⁷⁹ The chief countries of asylum are Jordan (with 650,000 registered refugees and perhaps as many unregistered),⁸⁰ Lebanon (with 1.3 million registered but 1.6 million estimated refugees),⁸¹ and Turkey (with almost 2.2 million registered refugees).⁸² In May 2015, as the conflict continued and conditions in host countries worsened, large numbers of Syrians began to make the dangerous trip to Europe. By mid-October 2015, nearly 600,000 Syrians had arrived in Europe.⁸³

b) Policy goals of various actors

EU Member States have been divided in responding to the arrival of Syrians and other refugees, including Afghans and Eritreans. Nearly 84 per cent of arrivals in 2015 have come from the top 10 refugee-producing countries in the world.⁸⁴ States on Europe’s sea borders, especially Italy and Greece, have been unable to cope with the number of people arriving and have urgently sought greater assistance from fellow EU Member States. Germany has sought to lead by example, saying it expects to take up to 800,000 Syrians this year, and urging a much greater level of humanitarian solidarity by others.

The UK has been relatively unaffected by a direct influx of Syrian refugees because of its geographic location, but has been resolute in rejecting any plans for resettling more than a small number of refugees (4,000 this year and 20,000 over five years) and has exercised its right not to participate in the EU's mandatory 'relocation' scheme (sharing refugees within Europe by accepting transfers from Greece and Italy). To date, the EU Member States have agreed to share only 160,000 refugees between them. This figure is far smaller than the number who have already arrived and was itself subject to bitter opposition by the Czech Republic, Hungary, Romania and Slovakia, even though the nine Central and Eastern European States together will need to accept the transfer of only 15,000 refugees.⁸⁵

Turkey, which has long sought membership in the EU, is hoping to gain concessions from Europe in exchange for greater efforts to stop large numbers of refugees leaving Turkey for Europe.⁸⁶

c) Legal basis for regional cooperation

European asylum law, codified in instruments adopted under the CEAS, is a complex mix of refugee and human rights standards drawn from international law and the law of two different regional organisations, the Council of Europe and the EU. It remains subject to interpretation and application by the individual Member States, although two regional courts oversee this: the European Court of Human Rights (which has jurisdiction over the 47 Council of Europe Member States, including Turkey) and the Court of Justice of the European Union (which has jurisdiction over the 28 EU Member States). The standard-setting process within the EU has gained particular political importance.⁸⁷ That process has been in a continual state of transition since the 1997 Treaty of Amsterdam provided the treaty basis for EU asylum policy and set the stage for the development of common minimum standards. The Treaty on European Union (Lisbon), which entered into force in 2009, provides the basis for the current stage of the harmonisation process, namely the establishment of a CEAS based on the 'full and inclusive application' of the 1951 Convention and other relevant treaties.⁸⁸

Of particular relevance to present refugee movements into Europe is the Dublin Regulation, which serves to allocate responsibility for conducting RSD, generally to the first EU State which the asylum seeker entered.⁸⁹ This approach was based on the premise that asylum seekers would have equal access to a fair and efficient procedure regardless of which Member State examined their claim, an assumption that was rejected as unfounded by the European Court of Human Rights in 2011 in a case that turned on the severe deficiencies of the asylum system in Greece.⁹⁰

A related problem is that the Dublin Regulation has obvious implications for the resources of border States such as Italy and Greece. This imbalance had not been effectively addressed even before the large number of arrivals from Syria began in 2015, notwithstanding an amendment in 2012 which included a process for early warning, preparedness and management of asylum crises.

d) Implementation mechanisms and actors

Several institutions play key roles in the European asylum system. Within the Council of Europe, the European Court on Human Rights was established by and interprets the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). While the ECHR is not a treaty on refugees *per se*, the court has examined many cases involving refugees and the court's jurisprudence has filled protection gaps which arose from restrictive approaches by European States to their 1951 Convention obligations, especially in relation to the principle of *non-refoulement*.

Within the EU, the Treaty of Amsterdam gave the Court of Justice of the European Union jurisdiction over EU asylum matters. National courts may refer questions of interpretation of the EU asylum instruments to

the CJEU, whose rulings bind the Member States. The European Asylum Support Office was established in 2011 to develop practical cooperation between EU Member States to support the development of the Common European Asylum System.

5 Analysis and assessment

The preceding review of State practice in regional refugee protection arrangements provides a rich set of lessons learned. The fundamental elements of regional protection can be summarised as protection, participation, leadership and political will. This final section of the report examines each in turn.

5.1 Protection first

To be successful, regional protection arrangements must be premised on protection. Depending on the circumstances, this can involve ratifying the refugee treaties, including or expanding protection principles in establishing a permanent or *ad hoc* regional plan, conducting RSD and providing durable solutions.

5.1.1 Treaty ratification

a) Asia-Pacific

The most noticeable, and most often noted, feature of the Asia-Pacific region's protection landscape is the low ratification rate of the international treaties on refugees and human rights. Of the 10 ASEAN Member States, only Cambodia and the Philippines are parties to the 1951 Convention and/or 1967 Protocol.⁹¹ It has been pointed out that in consequence, there is little common ground for responding to mixed flows of refugees and migrants that affect multiple ASEAN countries in different ways.⁹²

Looking beyond ASEAN, the States parties to the refugee treaties in the wider Asia-Pacific region are: Afghanistan, Australia, China, Fiji, Japan, Nauru, New Zealand, Papua New Guinea, Samoa, Solomon Islands, South Korea, Timor Leste and Tuvalu. Missing from this list are major countries of origin, transit and/or asylum, such as ASEAN Member States Indonesia, Malaysia, Myanmar and Thailand, as well as India, Pakistan and Sri Lanka.

It has been observed that the asylum policy vacuum in the Asia-Pacific region is the legacy of a long-standing antipathy toward international refugee law on the part of many Asian States, along with a failure to develop a regional approach to the issue.⁹³ The lack of regional legal and institutional resources was evident in May 2015, as boats of refugees and migrants drifted in the Bay of Bengal, the Andaman Sea and the Strait of Malacca.⁹⁴ It has been pointed out that the resulting tentative response to a relatively small episode of displacement does not give confidence that the region is well-prepared for anything bigger.⁹⁵ In any case, protection principles are applicable no matter how large or small the number of refugees arriving, and there are clearly large protection gaps. While best practice would indicate the need for more widespread ratification of existing refugee and human rights treaties, along with work towards regional equivalents, few commentators find that a likely prospect.⁹⁶ If a critique of the CPA is that it did not lay a strong protection foundation for the future, a similar observation could be made today.

b) Central and South America and the Caribbean

While the States of Central and South America and the Caribbean do not have their own binding refugee treaty, there is widespread adherence to international refugee law, and international and regional human

rights law, all of which help to support the Cartagena Plus Process.⁹⁷ Of the 35 States in the Organization of American States (OAS), 30 are parties to the 1951 Convention and/or 1967 Protocol.⁹⁸ Furthermore, the non-binding 1984 Cartagena Declaration forms the basis for a broader refugee definition in the national legislation of many States in the region.

During CIREFCA, the four main countries of asylum in the region brought their own laws and practices into alignment with international protection standards. Honduras and Belize acceded to the 1951 Convention and 1967 Protocol; Belize passed the 1991 Refugee Act which included refugees in national development plans; Mexico introduced the Cartagena refugee concept into its national legislation; and Costa Rica passed a one year amnesty for all 'externally displaced' people, allowing them to regularise and integrate locally.⁹⁹

c) Africa

Africa benefits from widespread ratification of the 1951 Convention and 1967 Protocol (49 of the 54 African Union States) and the regional 1969 OAU Convention with its expanded refugee definition (45 ratifications), as well as the groundbreaking 2009 Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa (22 ratifications). In addition, there are sub-regional instruments such as the Great Lakes Pact and its Protocols. However, applicable standards are not always fully adhered to and many countries in the region face capacity constraints in ensuring protection.

d) Europe

All EU Member States have ratified the international refugee and human rights treaties. Turkey, a member of the Council of Europe but not the EU, has also ratified the 1951 Convention but maintains the geographical distinction limiting its application to Europe. The idea that the CEAS would be based on the full and inclusive application of the 1951 Convention has provided a touchstone for the on-going development of European asylum law, although as noted above, in practice it has not achieved consistent protection standards across all the EU Member States.

5.1.2 Including or expanding protection principles in establishing a permanent or *ad hoc* regional plan

Regional cooperation for refugee protection represents an important alternative to the increased reliance by States on deterrence. Best practices recognise that a narrow focus on deterrence is not effective when people are fleeing for their lives.¹⁰⁰ Because deterrence in its many forms is a frequent and all-too-predominant policy response, it is worth recalling its short and long-term drawbacks. The following five points are drawn from UNHCR's 2010 Discussion Paper on Regional Cooperative Approaches.¹⁰¹

First, deflecting refugees to neighbouring States is the *goal* of the policy, not simply an unfortunate collateral consequence. As such, it is a choice that understandably leads to tensions between States and makes regional cooperation more difficult than it otherwise would be.

Second, when a State refuses entry to asylum seekers on the basis that they lack entry documents, that State not only fails to recognise that movements of refugees are inherently disorderly and irregular (hence, the inclusion of article 31 in the 1951 Convention), but it actually adds to the chaos and unpredictable impact on the region of the refugees' flight.

Third, deterrence undermines border security by increasing the demand for smuggling. Asylum seekers need to pay more money and take greater risks to enter either their original choice of destination country

or one that is farther away. In either case, if they survive the journey, they arrive with their resources even more depleted. Subsequent attempts to bring family members to join them are also more expensive and risky, and continue to fuel smuggling.

Fourth, deterrence fails to address the situation of victims of smuggling and trafficking, the number of whom increases the more that States close their borders.

Finally, deterrence does nothing to address the reasons why people cross borders in search of safety. It therefore leaves the deterring State in a reactive stance. In contrast, a comprehensive protection-centred approach to complex mixed migratory movements is based on strengthening protection systems in countries of origin, transit and final destination. The success of such regional plans comes from the combination of protection, humanitarian assistance and solutions, along with political and financial commitments to remove the underlying root causes of displacement.¹⁰²

Regional arrangements can also provide a laboratory to explore and expand protection principles. The experience of the CPA encouraged the development of refugee law doctrine and practice, with the notable addition of incorporating best interests of the child determinations informed by the newly in-force Convention on the Rights of the Child.¹⁰³ Similarly, among CIREFCA's contributions were the development and national adoption of refugee law doctrine and practice, with UNHCR building on the new Cartagena Declaration, as well as convening the first regional forum (FOREFEM) in 1992 on 'A Gender Approach in the Work with Refugee, Returnee and Displaced Women in Central America.'¹⁰⁴

Current protection challenges present opportunities for more fundamental re-thinking and re-evaluation, and many urge that broader perspectives must be taken into consideration. The UN High Commissioner for Refugees, for instance, has spoken of the essential values of generosity, solidarity, inclusiveness, innovation, pragmatism and openness to new challenges.¹⁰⁵ But others contend that forced migration should be understood as a matter of global justice rather than of regional solidarity or hospitality. It has been argued, for example, that the EU bears greater responsibility for the root causes of forced migration than is generally acknowledged. Some have suggested that the idea of 'common but differentiated responsibilities' drawn from international environmental law should inform responsibility-sharing, with wealthier nations taking a larger role than developing nations in responding to forced migration.¹⁰⁶

5.1.3 Conducting RSD

A fair and efficient RSD process is one of the building blocks of a well-functioning protection strategy.¹⁰⁷ One reason why asylum seekers move from one host State to another is that RSD in the first host State is unavailable, unjust, too costly or too slow. To remedy this problem, neighbouring States may offer assistance directly or provide support to UNHCR to help build capacity.

During the CPA, UNHCR played a critical role in developing reception and RSD capacity through technical support and training courses. It provided pre-screening, and the host States then conducted the RSD hearings and appeals procedures.¹⁰⁸ Nevertheless, consistent RSD across the region proved to be a major challenge. The countries of first asylum did not share common legal or even cultural traditions, and often did not regard themselves as bound by the same set of international legal standards.¹⁰⁹

Europe currently struggles to achieve consistent protection standards across the EU, despite far greater similarities among asylum States and a far more robust international and regional legal foundation than Asia-Pacific nations had during the CPA or now. In response to the difficulties Europe is encountering with implementing the CEAS, it has been suggested that there should be a single European Migration and Protection Agency instead of 28 separate national systems.¹¹⁰

It is also necessary to think more creatively about the need for RSD in light of the resources available for it. UNHCR has suggested that it is important to prioritise RSD for individuals who need it most. It is exploring alternatives to individual case processing, for example through group-based temporary protection, and facilitating rights to residence or migration through regional economic or free movement integration schemes, such as in MERCOSUR.¹¹¹

5.1.4 Providing solutions

Regional arrangements can emphasise any or all three of the traditional durable solutions. There is also increasing interest in what is called the fourth solution of labour mobility, along with a renewed focus on the role of development in both protection and solutions.

a) Voluntary repatriation

CIREFCA made possible the voluntary repatriation of 27,000 Salvadorans, 45,000 Guatemalans and 62,000 Nicaraguans.¹¹² While this was justly celebrated as an important element of the plan's success, the focus on refugees and returnees meant that they were the principal beneficiaries of access to protection and support in achieving solutions, despite constituting only a small proportion of the total displaced population.¹¹³ UNHCR estimated that only 10 per cent of forced migrants benefitted from international assistance.¹¹⁴

In Africa, the ICARA process is seen as a major step in the development of a new approach to African refugees, and refugees generally, away from a local integration orientation and towards a focus on voluntary repatriation.¹¹⁵

b) Local integration

CIREFCA also provides an example of local integration as part of a regional plan's package of solutions, as over 20,000 Guatemalans benefitted from an offer to stay in Mexico.¹¹⁶

c) Resettlement

Under the CPA, over 2.5 million refugees were resettled in new countries, an impressive testament to the power of international solidarity. The CPA was exceptional in making resettlement the durable solution of choice for recognised refugees from 1989 onwards. Even more unusual was the practice in the region from 1979 to 1989, where resettlement countries agreed to treat virtually all asylum seekers as refugees for resettlement purposes in order to ensure that countries in the region would allow them to enter and remain until this durable solution could be achieved. It is often said that the particular circumstances of that refugee movement will not be replicated, and specifically that the US and other States would not agree to resettlement on such a scale again.

However, it should be recalled that other successful regional cooperation arrangements, such as CIREFCA, have had a more balanced mix of the three traditional durable solutions. Further, resettlement is attractive to countries because it allows entry decisions to be made deliberately and from a distance. Numbers can also be established in advance and in consultation with UNHCR and local reception agencies, allowing smaller or less developed countries to contribute resettlement slots to the best of their ability. These factors can make it more politically palatable.

Once resettled refugees are in their new country, they tend to become ambassadors for the practice of resettlement and can help to bring out the best humanitarian impulses in their new communities. Indeed,

one factor cited for the success of regional protection plans is the impact of diaspora communities in advocating for refugee-friendly policies. As wealthier countries become increasingly diverse, and second and third generation immigrants become more economically and politically integrated, this cosmopolitan engagement will grow.¹¹⁷

More broadly, a recent study details the considerable economic, social and civic contributions to Australia of first and second generation humanitarian entrants (including refugees), even as compared to other categories of migrants.¹¹⁸ Additionally, social science research indicates that the positive reinforcement provided by mutual participation in a regional protection plan is likely to favourably influence citizens' support for the plan in each country involved, particularly so when democracies are adopting or implementing international norms.¹¹⁹ For these and other reasons, the pool of resettlement countries is growing larger.¹²⁰

Finally, today's scale of displacement requires rethinking the conventional wisdom that truly large-scale resettlement is no longer a realistic response. It is more unrealistic to think that we do *not* need to resettle so many people. The alternatives of refugees dying while seeking protection, and countries and regions risking destabilisation, could be, and in fact are, becoming worse. Although the resettlement needs of Syrians are now at the forefront of media attention, there have also been suggestions that a more global effort could be necessary to resettle refugees from the Asia-Pacific region.

UNHCR estimates that over 1,150,000 refugees are in need of resettlement this year, an increase of 22 per cent over last year and the first time that the projected need has reached one million since reporting of resettlement needs began over 30 years ago.¹²¹ François Crépeau, the UN Special Rapporteur on the Human Rights of Migrants, recommends that the EU take one million of the world's refugees (0.2 per cent of the total population of the EU) over a period of years.¹²² Crépeau has also suggested the CPA as a model in order to resettle one million refugees from Turkey, Lebanon and Jordan over five years. He notes that for Canada, for instance, this would mean resettling fewer than 9,000 such refugees per year.¹²³ Amnesty International has urged governments to make a commitment to collectively resettle one million refugees over the next four years.¹²⁴

d) The fourth solution: labour mobility

As the UN High Commissioner for Refugees has aptly observed, we have to move beyond traditional solutions. Increasing attention is being paid to refugees' work rights, not only because earning one's own livelihood is a fundamental element to any durable solution, but also because it addresses public fears of refugees as a burden, and instead sends a signal that refugees are individuals with the desire and capacity to contribute to society. However, in many countries, refugees neither have the right to work, despite the provisions of the 1951 Convention, nor the right to travel to another country to seek work.¹²⁵

Some NGOs are addressing this problem, if only on a small scale. For example, the Blue Rose Compass secures scholarships at top universities for young refugees and then helps them find jobs. It reported that in 2014, MasterCard employed all of their graduating class in Dubai, and suggested that multinational corporations, with their experience in managing a global workforce, could take the lead in devising ways to help identify the skills of incoming refugees, validate their expertise and match them to work openings in other countries.¹²⁶

On a regional level, Latin America and the Caribbean are beginning to explore creative ways to apply regional migration and labour mobility schemes to benefit refugees.¹²⁷ These innovations are a complement to States' protection obligations. The 2014 Brazil Declaration and Plan of Action propose a detailed Labour Mobility Programme, initially in the Southern Common Market (MERCOSUR) region

comprised of 10 of the 12 South American countries: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay and Venezuela. The program includes:

- an in-depth study on the appropriate legal framework to facilitate labour mobility for refugees recognised in any member or associated State of MERCOSUR, including the necessary protection safeguards;
- the establishment of sub-regional or bilateral framework agreements between the country of asylum and the receiving country;
- the identification of the labour needs of the receiving country and the professional profiles of the refugees;
- the promotion of vocational and professional training programs.¹²⁸

e) The role of development in refugee protection and solutions

The basics of the ‘relief-to-development’ continuum have been well understood for decades: that development programs in countries of first asylum should follow as promptly as possible after the initial humanitarian response;¹²⁹ that host communities should also benefit;¹³⁰ and that development projects are a critical component, not only of voluntary repatriation and local integration, but now also of resettlement as well, considering that the roster of resettlement countries includes some less wealthy nations. Successful regional refugee protection schemes plan for development from the beginning, as exemplified by CIREFCA, which UNHCR and UNDP co-anchored.

But despite agreement on these very general principles, successful development in practice is challenging. UNHCR and the World Bank Global Program on Forced Displacement acknowledge that there remains too little evidence on the effective design of development investments that can support the displaced. In advocating a development response to forced displacement, they refer to ‘taking on a new frontier of engagement in which there is still much to learn.’¹³¹

There is always a need for experimentation and evaluation, particularly at present when the global refugee situation is so profoundly in need of new ideas due to ‘failures of international cooperation and burden sharing, together with a static approach to the evolving challenges to protection.’¹³²

Two current projects aimed at including development in protection are regional in focus, but are not the result of a regional cooperation plan. In the Middle East, UNHCR and UNDP have taken the lead in assisting Syrian refugees and countries of first asylum by creating Regional Refugee and Resilience Plans (3RP) for Lebanon, Turkey, Jordan and Iraq.¹³³ However, 3RP currently remains almost two-thirds unfunded.¹³⁴ In the Great Lakes region, UNHCR and the World Bank will undertake a US\$100 million project on Improving Resilience and Social Cohesion in Border Communities in the Democratic Republic of the Congo, Tanzania, and Zambia.¹³⁵

While a detailed discussion of development and displacement is outside the scope of this report, it is perhaps appropriate to close this section by recalling the question recently posed by the former Deputy High Commissioner for Refugees: can we imagine a world where States compete for the privilege of hosting refugees?¹³⁶

5.2 Broad participation

Experience shows that the second fundamental component of a regional refugee protection plan is a broad multilateral framework. It is necessary to engage with States across the widest spectrum, and in particular to promote practical and humanitarian relations with countries of origin. Only in this way can the necessary political, financial and human resources be mustered to deal with a range of issues

including not only displacement, but also security and development.¹³⁷

Widespread participation can also help to avoid the dangers of resorting to unilateral actions or bilateral arrangements that risk a coherent protection strategy. It is perhaps easier for policymakers to act on their international commitments toward refugees and more difficult for them to give in to any negative domestic political pressures when their peers from other States are around the table.

5.2.1 Countries of first asylum and transit

Countries of first asylum by definition host the majority of refugee arrivals, and are often subject to intense international scrutiny and criticism for violating refugees' rights. Yet it is clear that in many cases, impoverished refugees are fleeing to extremely poor neighbouring countries. International assistance that is slow to arrive, or does not come at all, seems to be less newsworthy than closed borders, and is understandably a source of extreme tension between developing and developed countries. The economic impact on countries of first asylum, and countries of transit as well, sometimes appears to be of interest to wealthier countries largely because of the risk that refugees will move onward in search of a community where they can work and their children can go to school.

The current example of the EU courting Turkey in order to help externalise its own asylum processing and protection, despite the tremendous generosity of Turkey in hosting over two million refugees, is reminiscent of its earlier efforts in Africa, which have been criticised for misunderstanding and misrepresenting the constraints on asylum in Africa and its position in the global refugee regime.¹³⁸ The antagonism that can develop between countries of first asylum and those further away is another reason why early engagement of all relevant parties is a key factor in a successful regional plan.¹³⁹

Although the CPA succeeded at providing solutions on a grand scale, it has also been criticised for failing to develop a long-term regional commitment to refugee protection.¹⁴⁰ Commentators have noted that the countries of first asylum were able to export refugees by compelling the international community to provide the largest resettlement program ever devised.¹⁴¹ The lesson to be learned is that while responsibility for protection and solutions must be shared as widely as possible, the fundamental legal obligations of countries of first asylum and countries of transit are separate and independent.

5.2.2 Countries of origin

Countries of origin must play an active role in any regional refugee protection arrangement for the simple reason that most refugees want to go home. Countries of first asylum and donor States also regard voluntary repatriation as the durable solution of choice. Although the situation of IDPs is outside the scope of this paper, they have been included in several comprehensive refugee protection plans where the willingness of the home country to work with the international community has benefitted them as well.

The degree and nature of country of origin cooperation varies with the circumstances. Even under the CPA, where recognised refugees were resettled, Vietnam participated in a number of important ways: agreeing to deter unauthorised boat departures and instead allow legal means of exit through the Orderly Departure Program; accepting the return of rejected asylum seekers;¹⁴² and permitting UNHCR to monitor them.¹⁴³

The majority of peace agreements now include detailed provisions on the rights of refugees and IDPs. Among best practices are provisions of equal benefit to all categories of displaced people, which they can use to advocate for themselves, with the additional support of a clear role for international monitoring.¹⁴⁴

In cases where an armed conflict has not yet ended, it may still be possible for regional arrangements

to proceed. CIREFCA provides one such example where the peace process and attempts to deal comprehensively with displacement in the region were complementary and concurrent.

Even in situations of on-going armed conflict, it is nevertheless reasonable to expect that as a matter of State responsibility, a country of origin should contribute to the care of the citizens it has driven into exile. It has been argued that host States and competent international institutions should be able to draw on the assets of a country of origin to fund humanitarian assistance efforts. Syria would be an excellent candidate for this, with successive UN Security Council resolutions determining the Assad government to be violating international law. An analogy can be drawn with the UN Compensation Commission established by the Security Council to handle monetary claims relating to losses suffered from Iraq's invasion of Kuwait in violation of international law.¹⁴⁵

5.3 Leadership by UNHCR

Leadership by UNHCR is a third component of a successful regional protection arrangement. As was noted with respect with to the CPA, a complex multilateral agreement requires an independent 'honest broker' such as UNHCR to oversee and facilitate its many processes.¹⁴⁶ Starting with confidence building discussions, UNHCR's first – and perhaps most critical – contribution is as convener, a current exemplary instance of which is the Cartagena Plus process. Beyond that, there are many roles it has played in regional plans depending on the needs and capacities of the countries and region involved – from first instance RSD to the highest levels of diplomacy. In both the CPA and CIREFCA, observers praised the leadership of talented and charismatic UNHCR officials, particularly the late Sergio Vieira de Mello and Leonardo Franco, but also credited the organisation for allowing them to flourish.¹⁴⁷

UNHCR also won praise for the substance of its leadership role in the CPA in invoking normative conceptions of equitable burden-sharing,¹⁴⁸ and for its skill and integrity in ensuring that protection principles were not compromised.¹⁴⁹

Yet UNHCR is the first to emphasise that it needs international partners both inside and outside the UN system, such as UNDP and IOM, as well as regional organisations, NGOs and all affected States.¹⁵⁰ The involvement of refugees is equally critical. Displaced persons who organise to advance their collective interests and defend their own rights typically fare much better than those who do not or cannot.¹⁵¹ The best practice is clearly to promote and facilitate this kind of self-help.

5.4 Implementation and political will

The final lesson learned from successful regional refugee protection arrangements is the importance of implementation and, therefore, political will. States must commit to dealing comprehensively with the interests of the various participants in the context of a single, integrated strategy which features specific interlinked commitments and roles for each, along with mechanisms for supervision and implementation.¹⁵²

The CPA was deemed a success in large part because it was ultimately seen as an effective instrument of multi-State cooperation and burden-sharing. It has been observed that:

By and large, it was implemented in good faith and on the basis of defensible principles of international law. Although geo-political pragmatism and expediency played a significant part in shaping many of the policies and strategies, refugee protection principles, human rights and a genuine humanitarian concern for those displaced, remained firmly embedded in the Plan and in its delivery.¹⁵³

While ICARA I and II were only one example, they tend to show that gaining donor support for the costs

of providing asylum in Africa posed major difficulties. Similarly, the main challenge in the Americas is implementation, which in part requires assistance from wealthier countries. To achieve the ambitious goals of the 2014 Brazil Declaration and Plan of Action, the UN High Commissioner for Refugees has called for ‘a real commitment by North American’ and other countries in the region to implementation; ‘effective and sustainable assistance from North America, and other regions ... in the spirit of regional solidarity and responsibility-sharing’; and stronger partnerships with the OAS and other regional and sub-regional entities in the Americas.¹⁵⁴

With respect to the Bali Process 2011 Regional Cooperation Framework Agreement, the non-binding principles agreed there include the need for asylum seekers to have access to assessment processes, and for refugees to have the chance to seek a durable solution (voluntary repatriation, settlement in the region or resettlement outside the region). However, it has been noted that the practical arrangements for implementing the principles are another matter entirely. These involve issues that require political will, such as full engagement with source countries to prevent irregular movement; capacity-building to enable processing in the region; giving practical force to the agreed principles of burden-sharing and collective responsibility; and ensuring that arrangements safeguard human dignity, while also promoting orderly, legal and regular migration.¹⁵⁵

Another important aspect of implementation is evidence-based policies. While there are general checklists for regional cooperation frameworks put together by UNHCR and others, one size does not fit all. Instead, the best practice is evidence-based policies responsive to the situation at hand.¹⁵⁶ The 2014 Brazil Declaration and Plan of Action noted that the sub-regional consultations recommended strengthening national and regional civil society networks, including academics, to carry out research in this area. There is already a proposal for an Asia-Pacific facility to collect, organise and analyse migration data to solidify the evidence base for policymaking and to identify knowledge gaps needed to support policymaking. Such evidence should be generated through independent, credible and rigorous research methods. A useful model might be the Regional Mixed Migration Secretariat for the Horn of Africa–Yemen region, established in 2011.¹⁵⁷

Finally, while successful regional protection arrangements are often best known for their founding conferences, which can themselves be expressions of political will, the clear best practice is that such gatherings represent part of a process, and not the plan itself. The conference is only the beginning.

There have been a number of calls for an international conference on refugees and migrants, meeting on a rolling basis to emphasise the importance of understanding protection as a process that requires the participation of a wide array of stakeholders across the broadest possible spectrum of interest. The goal is ‘a generations-long project of protection and opportunity,’ strengthening asylum but also realising human potential at home and abroad.¹⁵⁸

6 Conclusion

It has been observed that ‘there are severe limits on the effectiveness of endless appeals to humanitarian values and international legal obligations.’¹⁵⁹ Put another way, protection works best when it is congruent with States’ other policy goals, such as bolstering national security, encouraging a peace process, addressing mixed groups of refugees and migrants, promoting development and/or expressing national values.¹⁶⁰ At this historical moment, the unprecedented number of displaced people and their evident suffering may well serve to shift public opinion, in particular by showing that protecting refugees actually strengthens efforts to attain these other important goals. It may allow a more creative discourse on regional refugee cooperation to emerge.

Endnotes

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- 12 Penelope Mathew suggests a similar set of questions: how regional arrangements have developed, what sort of 'regionalism' they embody, how they engage countries outside the region, whether they share responsibility fairly, and whether they result in protection and durable solutions for refugees, in Penelope Mathew, 'Responsibility, Regionalism and Refugees: What Lessons for Australia?' in Angus Francis and Rowena Maguire (eds), *Protection of Refugees and Displaced Persons in the Asia Pacific Region* (Ashgate, 2013) 23.
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25 Mathew, above n 12, 24.

26 Towle, above n 20, 555.

27 Judith Kumin, 'Orderly Departure from Vietnam: Cold War Anomaly or Humanitarian Innovation?' (2008) 27(1) *Refugee Survey Quarterly* 104.

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1. Irregular movement facilitated by people smuggling syndicates should be eliminated and States should promote and support opportunities for orderly migration.
2. Where appropriate and possible, asylum seekers should have access to consistent assessment processes, whether through a set of harmonised arrangements or through the possible establishment of regional assessment arrangements, which might include a centre or centres, taking into account any existing sub-regional arrangements.
3. Persons found to be refugees under those assessment processes should be provided with a durable solution, including voluntary repatriation, resettlement within and outside the region and, where appropriate, possible "in country" solutions.
4. Persons found not to be in need of protection should be returned, preferably on a voluntary basis, to their countries of origin, in safety and dignity. Returns should be sustainable and States should look to maximize opportunities for greater cooperation.
5. People smuggling enterprises should be targeted through border security arrangements, law enforcement activities and disincentives for human trafficking and smuggling.

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- 40 Taylor, above n 35, 47–48.
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- 59 Maldonado Castillo, above n 50.
- 60 San José Declaration on Refugees and Displaced Persons (Adopted by the International Colloquium in Commemoration of the Cartagena Declaration on Refugees, San José, 5–7 December 1994) <www.refworld.org/docid/4a54bc3fd.html>.
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- 62 Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America (Mexico City, 16 November 2004) <www.refworld.org/docid/424bf6914.html>.
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- 64 Ibid 28.
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