

# 2 Safeguarding asylum

The notion of asylum is a remarkably constant feature of human history. Throughout the ages and in every part of the world, societies with very different cultures and value systems have recognized that they have an obligation to provide safety and support to strangers in distress. In the twentieth century, this longstanding social convention was progressively incorporated into international law, culminating in the establishment of the 1951 Refugee Convention relating to the Status of Refugees and its 1967 Protocol. These statutes set out the rights and obligations pertaining to people who have been obliged to leave their own country and are in need of international protection because of a 'well-founded fear of persecution' on account of their 'race, religion, nationality, membership of a particular social group or political opinion.'

By the second half of 2005, no fewer than 146 of the 191 member states of the United Nations had acceded to these international instruments, which, under the terms of its mandate, are promoted and supervised by UNHCR. Many countries have also recognized their obligations towards refugees by becoming parties to relevant regional agreements, including the Organisation of African Unity's (OAU) 1969 Convention governing the Specific Aspects of Refugee Problems in Africa; the 1984 Cartagena Declaration on Refugees in Latin America; and a variety of European agreements (see Box 2.1).

While the principles of asylum may be firmly established in normative, legal and institutional terms, their practical application remains imperfect. Indeed, recent years have witnessed a growing degree of 'asylum fatigue' in many parts of the world, a process that has threatened and in many cases undermined the protection that the 1951 UN Refugee Convention was intended to provide to refugees and asylum seekers.

In developing countries, where more than two thirds of the world's refugees are to be found, states which are struggling (and often failing) to meet the needs of their own citizens express growing concern about the pressures placed on them by the prolonged presence of large populations of refugees. Confronted with weak economies, inadequate infrastructures, environmental degradation and the HIV/AIDS pandemic, many of these countries believe that they receive inadequate support from the world's more prosperous nations in their efforts to assume responsibility for so many refugees.

Governments and local communities in the developing world also point out that the presence of refugees exposes them to security threats such as cross-border attacks, besides placing undue burdens on their administrative structures. In too many cases, moreover, national and local politicians have sought to mobilize electoral support by promoting xenophobic sentiments, exaggerating the negative impact of hosting

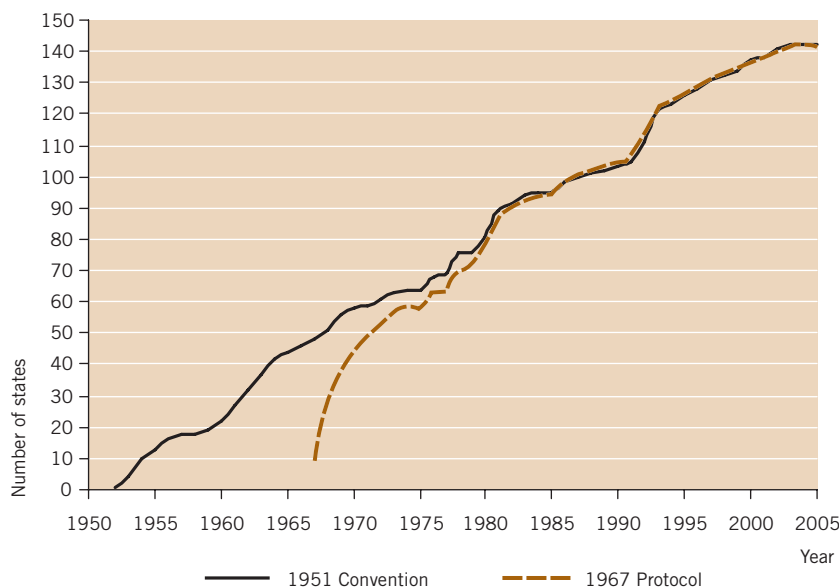
*Asylum seekers in Pavshyno detention center near Mukachevo in Ukraine, close to the border with Hungary, Poland, and Romania. Asylum seekers arriving in Ukraine originate mainly from Afghanistan, Bangladesh, India, Iraq and the Russian Federation (UNHCR/L. Taylor/2004).*

refugees and ignoring the fact that refugees can actually attract international assistance and investment to an area, creating new jobs and trading opportunities.

In industrialized states, the challenge to refugee protection derives primarily from the arrival of asylum seekers from poorer regions of the world. While the number of such asylum seekers has diminished significantly in recent years, and while the majority originate from countries that are affected by armed conflict and political violence, governments and electorates in the developed world tend to perceive these new arrivals in very negative terms. They are seen as people who submit ‘bogus’ claims to refugee status, threaten the sovereignty of the state by entering it in an illegal manner and force governments to spend large amounts of money on asylum and welfare systems. Furthermore, these arrivals are widely believed to put unacceptable pressure on scarce resources such as jobs, housing, education and healthcare. Finally, it is a commonly held perception that even if their application for refugee status is rejected, most asylum seekers will remain illegally in the country.

During the past decade, and more specifically since the 11 September 2001 attacks in the United States, the problem of asylum fatigue in both developing countries and industrialized states has been exacerbated by a growing concern that foreign nationals and members of ethnic minorities represent a potential threat to national security and public safety. As a result, asylum seekers and refugees have come under a growing degree of public suspicion and are subject to increasingly

**Figure 2.1** Number of states party to the 1951 UN Refugee Convention and the 1967 Protocol, 1950-2005



Note: As at 20 May 2005.

Source: UNHCR.

rigorous state controls. In a context where governments and electorates are unable to draw a clear distinction between the victims of persecution and the perpetrators of terrorist violence, there is an evident need to safeguard the principle of asylum. This chapter examines a number of areas in which refugee protection must be strengthened, while Chapter 3 looks at issues specifically associated with the physical safety and security of refugees.

## Challenges to protection

States have consistently reaffirmed their commitment to refugee protection. However, there remain a number of gaps, mostly arising from long-standing problems such as violations of the principle of *non-refoulement*; lack of admission and access to asylum procedures; detention practices that violate international standards; lack of registration and documentation; and shortcomings in refugee status determination procedures.

### Refoulement and border closures

At the very heart of the international asylum and refugee protection regime is the right of people whose lives and liberty are at risk to seek safety and security in another state. This principle underpins the notion of *non-refoulement*, which protects people from being returned to the frontiers of a country where they would be placed at risk on account of their race, religion, nationality, membership of a particular social group or political opinion. This principle is now recognized as a component of customary international law and is therefore considered binding on all states, including those that are not signatories to the 1951 UN Refugee Convention.

Despite the well-established nature of this principle, recent years have seen many instances in which asylum seekers have been rejected at borders or forcibly removed to countries where their safety cannot be assured.<sup>1</sup> In 2001, for example, thousands of Afghans fleeing the bombing of their country found that the borders of neighbouring states, which had hosted millions of Afghan refugees for over two decades, were closed.<sup>2</sup> Some refugees were eventually able to find their way across an international border, primarily to Pakistan. But thousands of others had no alternative but to remain in camps in the unstable border area.

In 2002, in the Great Lakes Region of Africa, tens of thousands of refugees from the Democratic Republic of Congo were returned to their country of origin under conditions that were far from secure.<sup>3</sup> In 2003, several hundred refugees fleeing renewed fighting in the Indonesian province of Aceh were removed from neighbouring Malaysia on the grounds that they were illegal migrants.<sup>4</sup> In the same year, South America witnessed a number of efforts to remove Colombian refugees from countries where they enjoyed temporary protection.<sup>5</sup>

## Box 2.1

## Towards a common European asylum system

The first phase in establishing a common European asylum system is almost complete. The 1997 Treaty of Amsterdam set the legal framework. It prescribed legally binding instruments for refugee protection and set minimum standards in a number of areas. The purpose was to harmonize national asylum systems. A 1999 European Council meeting in Tampere, Finland, set the political agenda to inform this legislative process. European Union member states agreed at the highest levels to work towards a common asylum system. They confirmed that the system should be based on absolute respect for the right to seek asylum and full application of the 1951 UN Refugee Convention.

#### The first phase—Instruments on minimum standards adopted

The deadline for adoption of the first legally binding instruments was set for five years after entry into force of the Treaty of Amsterdam, a period which expired at the end of April 2004. This deadline coincided with the enlargement of the European Union on 1 May 2005, when 10 new states joined as members. The legislation sets minimum standards for a European Union-wide temporary-protection regime; reception conditions for asylum seekers; and eligibility criteria for those given the status of refugees and others in need of international protection. Political agreement has been reached on minimum standards for procedures to determine or withdraw refugee status, though this is pending final

consultations with the European Parliament.

Regulations have been established to determine which state would be responsible for examining an asylum application lodged in a European Union member state by a third-country national—the so-called Dublin II Regulation—and a fingerprints database has been set up. A European Refugee Fund and other financial instruments supporting European Union asylum systems and initiatives have been established. Migration legislation adopted in this period also contains provisions relevant to asylum including *inter alia*, the directive on family reunification and migration control measures, such as carriers' sanctions and measures against trafficking and smuggling.

In principle, European asylum legislation is applicable to all member states of the Union. However, the United Kingdom and Ireland have only acceded to specific instruments, while Denmark has opted out of all asylum-related mechanisms.

The outcome of the first phase is mixed. The adopted legislation reflects some best practice in refugee protection, such as recognition of persecution by non-state actors. It also grants subsidiary protection status to individuals who do not fall within the definition of refugees in the 1951 UN Refugee Convention but are protected against removal by international human rights law. Furthermore, the legislation obliges

member states to provide a minimum standard of support to asylum seekers during the determination procedure, including healthcare, accommodation and other benefits.

However, member states found it particularly difficult to agree on procedures to determine just who should qualify for international protection and what rights they should enjoy. Most member states sought to maintain their existing asylum systems, as well as accommodate the conflicting interests arising in the post-11 September climate. The result often was agreement at the level of the lowest common denominator.

In this context, the European Union's draft Asylum Procedures Directive has been severely criticised by the European Parliament, NGOs and UNHCR for falling short of international standards in refugee and human rights law and best practice. Indeed, questions have been raised about their ability to set a framework which could lead to a common European asylum system.

The 1951 UN Refugee Convention and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms are considered part of the *acquis* to which all European Union members should conform. The Charter of Fundamental Rights of the European Union of 2000, although not yet legally binding, also enshrines the right to asylum and the prohibition of both the collective expulsion of aliens and *refoulement*.

## Restrictions on access

Large-scale *refoulement* and border closure are generally associated with developing countries affected by rapid and large-scale refugee influxes. Governments in such countries often do not have the capacity to establish more sophisticated forms of control over the presence of foreign nationals on their territory. In the industrialized world, where asylum seekers tend to arrive in smaller numbers and over longer periods of time, states have a broader array of measures to obstruct or deter the arrival of people seeking international protection.

### **The second phase—The Hague Programme**

The elements of the second phase of a common European asylum system were prescribed in the Hague Council in November 2004. The Hague Programme, a plan to develop the European Union into an area of freedom, security and justice, sets out a political agenda for the development of asylum law and policy. It reiterates that the common asylum system should be based on absolute respect for the right to seek asylum.

An extensive evaluation by the European Commission of the instruments related to asylum is expected by 2007. Still, the way in which the instruments are being transposed in at least some member states seems to confirm the fears of UNHCR and others that the agreed minimum standards may become a maximum to be achieved. Given the extensive and severe criticism encountered in relation to at least some of the legislation, future progress may depend on the courts, in particular the European Court of Justice.

Following adoption by the Hague Council of the Directive on Family Reunification, the European Parliament brought an action against the Council before the European Court of Justice in December 2003. It claimed that fundamental rights had been breached by the directive. It is conceivable that the European Parliament may do the same in relation to other instruments in future. Questions and cases may be

directed towards the court from national institutions as well.

The stated aim of the second phase is the establishment of a common asylum procedure and a uniform status for those granted protection, based on the full and inclusive application of the 1951 UN Refugee Convention and other relevant treaties. The second-phase instruments are to be adopted by 2010, after evaluation by 2007 of the legal instruments adopted in the first phase. The establishment of appropriate structures involving the national asylum services of the member states would facilitate cooperation. While separate national asylum systems may be maintained, the Hague Programme also calls for a study on the possibility of joint processing of asylum applications within the Union.

The draft Constitutional Treaty for Europe should provide the legal basis for the development of the common European asylum system. The Charter of Fundamental Rights would also be incorporated, making its standards binding on European Union member states. It will, however, remain to be seen what happens to the draft Constitutional Treaty following its rejection in France and the Netherlands.

### **Cooperation with third countries**

While steps are taken towards completing the European Union asylum system, cooperation on asylum and migration matters with third countries has become a high priority. The Hague Programme

acknowledges the need for the European Union to contribute in a spirit of shared responsibility to a more accessible, equitable and effective international protection system in partnership with third countries. Regional protection programmes, resettlement, return standards and readmission policies are to be strengthened in the coming years. Readmission agreements, maritime border controls and capacity-building in regions of origin and transit are current priorities of the Union in the field of asylum and migration. In this context—and more controversially—the Hague Programme also seeks to look at the implications of processing of asylum applications outside the European Union.

The interest in protection in regions of origin could serve to make additional resources available to countries that are carrying particularly heavy burdens in hosting refugees. In addition, there has been increasing interest in resettlement as a durable solution and tool for international protection, which is a positive development when not seen as a substitute for the grant of protection to spontaneous arrivals. However, in view of the challenges it faces in developing its asylum system, Europe will have to show that its cooperation with third countries is based on burden-sharing, not burden-shifting, and that it is able and willing to establish a common European asylum system that is in line with international standards and best practice.

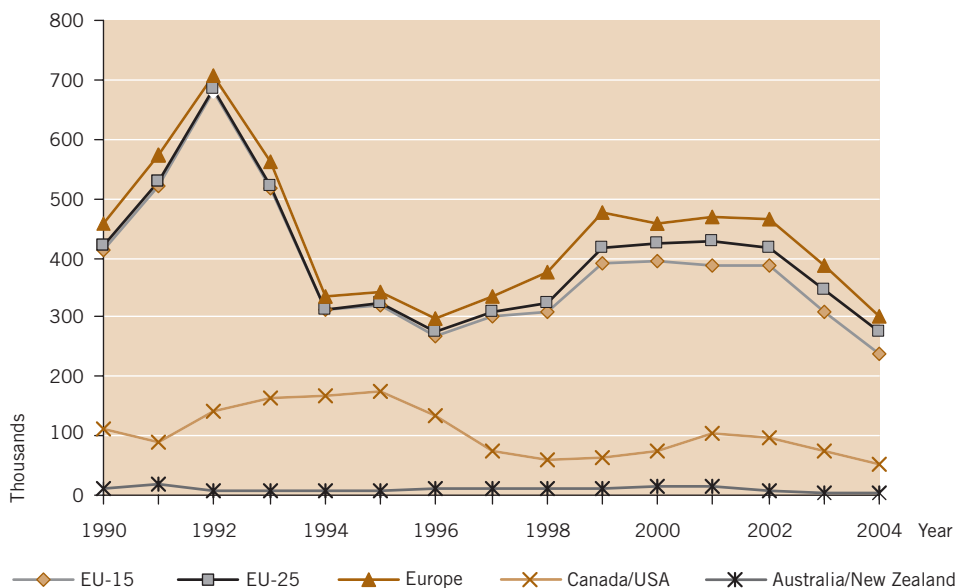
Passport and visa requirements are a primary case in point. Many refugees leave their home countries suddenly, without the opportunity to secure the documents they need to travel and enter another country. Others escape from countries that are in such a state of conflict and upheaval that such travel documents are impossible to secure. Even those with valid passports are frequently unable to secure the visa needed to enter an asylum country, since visas are not generally issued for protection reasons and may even be denied if it is thought that the applicant intends to seek asylum when she or he has reached the country concerned. Asylum seekers may consequently resort to the use of

false or altered documents and engage the services of professional smugglers in order to make their escape. Significantly, the 1951 UN Refugee Convention recognizes the necessity of such actions, stating that a person who is in need of international protection shall not be penalized for unlawful entry to another country.<sup>6</sup>

Passport and visa requirements are by no means the only method employed to obstruct or limit access to potential countries of asylum. During the past two decades, many countries have imposed sanctions on airlines and other international carriers that transport improperly documented travellers, a strategy that has obliged the carriers to instigate their own checks and controls. A number of industrialized states have also deployed their immigration officials to foreign airports, primarily in countries known to produce significant numbers of asylum seekers and irregular migrants.

In their efforts to identify and apprehend individuals who are travelling without the requisite documents, states are exercising their legitimate and sovereign rights to control their borders, safeguard national security and ensure public safety. In an era of international terrorism, it is entirely understandable that politicians and the public should place such concerns at the top of their agenda.<sup>7</sup> Nonetheless, there is a need to recognize that the measures employed to protect national sovereignty and security can be very blunt instruments, preventing people who are in need of protection from gaining access to the territory and asylum procedures of another state. In some cases,

**Figure 2.2 Asylum applications submitted in industrialized countries, 1990-2004**



Note: EU-15 refers to member states of the EU prior to 1 May 2004; EU-25 refers to member states of the EU as of 1 May 2004. Europe includes EU-25, Bulgaria, Iceland, Liechtenstein, Norway, Romania, Switzerland and Turkey.

Source: Governments; UNHCR.

the outcome of such measures is that people are refused admission and are removed to a country where their security is placed in jeopardy, thereby violating the principle of *non-refoulement*.

Denial of access to a potential country of asylum can also occur as a consequence of the 'safe third country' concept, whereby asylum seekers are refused admission to a state's territory and/or asylum procedures if they have arrived from a country that is considered to be safe or where they could have submitted an application for refugee status.<sup>8</sup> At first sight, this concept does not seem an unreasonable one, in the sense that it appears to prioritize the availability of protection over the asylum seeker's choice of destination. But in practice its application raises serious concerns, especially if the asylum seeker is not provided an opportunity to rebut the presumption of safety in the country from which she or he has arrived, and if that country is unable to consider the asylum seeker's claim to refugee status in a manner that is consistent with international protection standards.

While some states provide exceptions to the application of the safe third country concept, and do not invoke it when the asylum seeker has family members in the third country or when the person concerned is an unaccompanied minor, these exceptions are not the norm. Indeed, some countries have designated all of their neighbours as 'safe countries' for the purpose of asylum applications. This means that any asylum seeker who arrives by land is considered ineligible to submit a claim to refugee status and is liable to summary rejection and return at the border.

In the past five years, a number of governments and politicians in the industrialized states have suggested that it might be possible to prevent asylum seekers from gaining access to their territory, without at the same time denying them access to an asylum procedure and, if they are found to be in need of it, international protection. The favoured means of achieving these objectives is to be found in the notion of 'offshore' or 'extraterritorial processing', whereby certain categories of asylum seeker are removed from the territory of the state in which they have arrived and are transferred to a facility in another country or region pending an assessment of their claim to refugee status.<sup>9</sup> A more detailed analysis of such proposals and their implications for asylum and refugee protection is provided in Box 2.2.

Such policies and measures have compelled many asylum seekers to resort to people smugglers and to enter a country illegally or under a different pretext and claim asylum once they get in. Some asylum seekers who have entered illegally refrain from claiming asylum in an attempt to avoid deportation or restrictions being imposed on them, and instead choose to live as undocumented workers.<sup>10</sup>

## Interception

Arrivals by sea have become common in the Caribbean, the South Pacific and the Mediterranean, directing attention to the issue of interception and rescue at sea. The arrival of asylum seekers by boats brings into question states' obligations towards refugees, freedom of navigation and the control of coastal borders.<sup>11</sup>

## Box 2.2

### Outsourcing refugee protection: extraterritorial processing and the future of the refugee regime

Are affluent states about to outsource refugee protection to low-cost, no-frills countries? Some observers would affirm that this is already happening, with the deflection policies of the North leaving the South with a disproportionate share of the protection burden. The recent European debate on processing asylum claims in regions of origin or transit indicates that a radical change to the asylum regime is looming.

In 2003, the governments of Denmark, the Netherlands and the United Kingdom engaged in a review of asylum policies which culminated in a 'New Vision for Refugees'. Its central tenet was that certain classes of asylum seekers would be removed to centres outside Europe or at its fringes. This initiative effectively imported the so-called 'Pacific Solution' of the Australian Government into the European context. The Pacific Solution entailed the transfer of asylum seekers to, and the processing of their asylum claims in, third countries in the Pacific.

#### The European proposals

The United Kingdom's paper entitled *New International Approaches to Asylum Processing and Protection*, circulated in early 2003, was the core document in the European debate on the issue. Essentially, it consisted of four elements:

1. The creation of 'regional protection areas' (RPAs) to improve protection in the region. UNHCR would be responsible for providing 'protection and humanitarian support' to refugees, and would have to ensure that the prohibition of inhuman treatment in Article 3 of the European Convention on Human Rights was not contravened. This meant safeguarding asylum seekers from threats within RPAs as well as removing such threats.

2. The return of spontaneous arrivals in the United Kingdom or cooperating countries to an RPA. This would discourage 'economic immigrants using asylum applications as a migration route into third countries' and bring down the number of applications in the United Kingdom (provided the RPAs had sufficient geographical coverage).

3. International recognition of the need to intervene to reduce flows of genuine refugees and enable refugees to return home. Options in this regard ranged from assistance to countries of origin to military intervention.

4. An assumption that the main way in which refugees would move to a third country would be through RPAs, where managed resettlement schemes would add some options for onward movement. 'Although not all refugees would be accepted for resettlement, this would enable countries who currently accept asylum seekers to share the refugee burden but in a managed way'. Refugees who did not gain a resettlement place would be helped to integrate locally in their region of origin.

In its subsequent deliberations at the international level, the United Kingdom introduced an important distinction between RPAs in the region of origin and Transit Processing Centres closer to the external borders of the European Union.

Shortly after the United Kingdom informed its partners about its new vision, UNHCR attempted to take the lead in the evolving debate by presenting a three-pronged model to deal with the issue. The three prongs encompassed solutions in the region, improved domestic asylum procedures and the processing of manifestly unfounded cases in European Union-operated detention centres within the Union's borders.

They were met with little enthusiasm by European governments.

While Denmark, the Netherlands, Italy and Spain were outspoken supporters of the idea, a number of member states, including Sweden, Germany and France, were clearly opposed. By mid-2003 it had emerged that the United Kingdom could not muster enough support for a radical reformulation of the protection system.

Nonetheless, a number of experimental pilot projects with a regional protection component were launched in collaboration with the European Union, interested member states and UNHCR. In 2004, the German government changed its earlier stance for an appropriation of its idea. Later that same year Italy deported boat arrivals from the island of Lampedusa to Libya, which is not a signatory to the 1951 UN Refugee Convention. It seemed as if a crude version of the British government's 'vision' was being implemented, with Italy taking the lead. 'Outsourcing' had clearly grasped the imagination of the European Commission, which decided to sketch plans for 'Regional Protection Programmes'. However, unlike the United Kingdom's plan, the programmes would include the transformation of third countries to safe ones.

#### The barbed wire conundrum

What, then, is the problem with 'regional protection areas' or 'transit processing centres'? Essentially, it is the necessity for barbed wire. An RPA or processing centre must offer human rights protection on a level roughly equivalent to that within the European Union. This would be necessary to satisfy European courts that removal to such centres is in accordance with human rights and refugee law. Then, barbed wire is needed to keep out the local population of the country where the centre is located. On the other hand, if an RPA or processing centre offers



human rights protection below the European Union level its migrant inhabitants will continue their efforts to reach the Union. Barbed wire would be needed to keep them in.

Can extraterritorial processing offer an effective response to human smuggling? Not as long as such processing is based on the use of force rather than on convincing migrants that states offer better alternatives than smugglers. Confined to a camp or transit centre, asylum seekers are expected to swap the right not to be *refouled* for the privilege of a place in the resettlement queue. Some will see this as their only chance in circumventing the camps and trying to access the informal labour markets in the North. Refugees and other migrants will be at least as desperate to use the services of smugglers under a camp regime as they are today. We can reasonably assume that they will move to destination states in the same numbers as before, but perhaps abstain from filing an asylum application.

### Processing in camps: the legal issues

Processing in camps raises intricate legal and practical issues. The most pressing one is about state responsibility: which state will bear the legal responsibility for offshore processing? Will it be the territorial state where the processing camp is located? Or the state financing and removing asylum seekers there? Or will it be both? The right answer will depend on a number of factors, and presumes the existence of a precise blueprint of how the processing camps are to work. Yet this much is clear: under Article 1 of the European Convention on Human Rights, states cannot evade legal responsibility for their actions abroad.

Then again, will the asylum seeker understand this? And if so, will there be access to a lawyer at the camp?

Will that lawyer be able to work the human rights mechanism of another continent? The answer in all three cases is: not likely. European governments might dilute their responsibility further by employing international organizations and private enterprise as operative partners. Media will find it difficult to access camps and follow their operation, which will remove the fate of its inhabitants from television screens and newspapers. In effect, judicial monitoring and public awareness will be significantly reduced.

Which groups of asylum seekers should be removed for processing in camps? This question reveals a grave dilemma. To move almost all processing and much of the protection work outside European Union territory and to deter spontaneous arrivals, a large majority of such arrivals would need to be targeted for removal. However, to deliver on international legal obligations, persons to be removed after screening would need to be very carefully screened in accordance with their protection needs, thus undermining the objectives of volume, speed in processing and deterrent effect. Either the scheme will hardly make a difference in terms of migration control, or it will violate international law by exposing individuals and groups to discriminatory treatment.

What safeguards are applicable at the removal stage? First, it will be necessary to operate screening procedures before removing asylum seekers to an offshore processing camp. In cases where removal would arguably amount to a violation of rights and freedoms under the European Convention on Human Rights, some form of legal remedy is indispensable.

What are the protection standards to be applied in the processing camps? The minimum elements of physical safety and shelter are necessary, yet insufficient from the perspective of

international law if the individual needs of persons reallocated to such camps are not taken into account. Invariably, there must be an element of legal protection. In the 2000 case of *T.I. vs. The United Kingdom* before the European Court of Human Rights, the respondent government argued that the applicant was safe in Germany, among other things because the country was party to the European Convention on Human Rights. Any violation of its Article 3 by German authorities, it was averred, could be brought before the Strasbourg judges again. The same logic would apply to the return from the United Kingdom or another contracting state to an offshore processing camp. There must be an effective legal remedy to avert violations of human rights.

Finally, consider a situation where a refugee in a processing camp finds that all resettlement quotas are exhausted, local integration is unavailable and voluntary repatriation inconceivable due to persistent risks in the country of origin. Such a refugee would be confined to indefinite detention, which would fly in the face of international refugee and human rights law.

Interception at sea represents one of the most direct means whereby states seek to prevent asylum seekers from gaining access to their territory and domestic asylum procedures. This approach came to particular prominence in the second half of 2001, when a number of boats carrying asylum seekers were intercepted as they approached Australia. Controversially, the occupants of these boats were not allowed to land on Australian territory but, in the context of an 'extraterritorial processing' initiative which became known as the Pacific Solution, were transferred to other countries (Indonesia, Nauru and Papua New Guinea) where their claims to refugee status were examined (see Box 2.3).

Interception at sea has assumed a variety of different forms and has been practiced in a number of regions. During the Indochinese exodus of the 1970s and 1980s, boats carrying asylum seekers from Viet Nam and Cambodia were routinely apprehended and towed out to the sea by Southeast Asian countries of first asylum. For many years the US Coast Guard has intercepted ships carrying asylum seekers and unauthorized migrants, primarily from Cuba and Haiti. When permitted, access to US asylum procedures has consisted of a summary interview on-board the Coast Guard vessel. Defending its actions, the United States has stated that such interceptions are not in violation of the *non-refoulement* principle, which it considers to apply only to refugees within the territory of the state, and not to asylum seekers at sea.

In the Mediterranean region, the issue of interception and rescue at sea has arisen in response to the growing number of people transiting through North Africa before seeking entry by boat to the European Union. In June 2004, for example, a German-flagged vessel, the *Cap Anamur*, rescued a group of 37 people in the Mediterranean. The incident involved three European Union member states: Malta, Italy and Germany. When confronted with the plight of the *Cap Anamur*, Italy and Germany stated that they considered it an absolute duty to respect the international norm that imposes an obligation to lodge an asylum application in the country of first arrival (which they considered to be Malta, as the ship had crossed its territorial waters) and argued that a derogation of such a norm could open the door to numerous abuses.<sup>12</sup> After several days during which the vessel was not allowed to disembark at any port, and following the intervention of UNHCR and a number of NGOs, the boat was finally allowed to let its rescued passengers off in Sicily on humanitarian grounds.<sup>13</sup>

The occupants of boats intercepted in the Mediterranean have generally been taken for processing to a European port where they have been given the opportunity to submit an asylum claim. But instances have come to light in which vessels have been escorted into international waters with no provision made for the disembarkation of passengers. It should be noted that interception measures that effectively deny refugees access to international protection, or which result in them being returned to the countries where their security is at risk, do not conform to prevailing international guidelines and may even amount to a violation of the 1951 UN Refugee Convention.<sup>14</sup>

## Box 2.3

## The Tampa Affair: interception and rescue at sea

Some of the most searing images from the last quarter-century have been pictures of refugees and would-be migrants in grave peril on foundering boats. From the aftermath of the Viet nam war till today, images of 'boat people' have highlighted the desperate measures that people will take to escape their homelands. Unseaworthy and overcrowded vessels, often carrying mixed groups of refugees and migrants organized by unscrupulous smugglers, have become all too common in the Mediterranean, the Caribbean and the South Pacific regions.

No one knows how many boat people have died, but thousands have been rescued at sea. In the reality of dangerous journeys undertaken to gain access to reluctant coastal states, the time-honoured maritime traditions of rescue at sea collide with the growing determination of states to prevent illegal entry to their territory.

A recent renowned rescue at sea was carried out by the Norwegian merchant ship *Tampa* in August 2001. Sailing from Perth, Australia under the command of Captain Arne Rinnan, the freighter of the Wallenius Wilhelmsen Line received a call for assistance from the Rescue Coordination Centre of the Australian Maritime Safety Authority. The *Tampa* changed course and was guided by an Australian coastal search airplane to reach an Indonesian boat crowded with passengers and in acute distress. The boat was breaking up in heavy seas as the *Tampa* arrived just in time to transfer the 433 people on board to its own decks. The Norwegian ship had facilities on board for only 50 people, including its crew of 27.

The closest port to the site of the rescue was on Christmas Island, an Australian territory, but Australia's Immigration Department forbade the *Tampa* to enter Australian territorial waters. The Australian government was determined to stop unauthorized arrivals of asylum seekers, and so refused to disembark the *Tampa*'s passengers and permit the vessel to proceed on its scheduled route. After long and tense negotiations—during

which conditions on board the *Tampa* reached crisis proportions—a complicated and costly arrangement saw the passengers forcibly removed from the ship and dispersed to camps in Nauru, a small state nearby. Some 132 unaccompanied minors and families were accepted by New Zealand, where almost all received refugee status. None went directly to Australia. In this long process, the owners and agents of the *Tampa* incurred substantial losses.

At the time, the obligation to render assistance to vessels in distress was codified in international maritime law in such instruments as the UN Convention on the Law of the Sea (1982) and the International Convention on Maritime Search and Rescue (1979). The obligation to extend aid applies without regard to the nationality, status, or circumstances of the persons in distress. Under these rules, ship owners, ships masters, coastal nations and flag states (the states where ships are registered) all have responsibilities for search and rescue.

The International Convention on Search and Rescue mandates that a rescue is not complete until the rescued person is delivered to a place of safety. That could be the nearest suitable port, the next regular port of call, the ship's home port, a port in the rescued person's own country, or one of many other possibilities. The convention provides that 'a situation of distress shall be notified not only to consular and diplomatic authorities but also to a competent international organ if the situation of distress pertains to refugees or displaced persons.' The ship itself cannot be considered a 'place of safety'—indeed, carrying a large number of unscheduled passengers could endanger the crew and passengers themselves, owing to overcrowding, insufficient food and water and the tensions of life at close quarters.

The inability to disembark rescued passengers in a timely fashion and return to scheduled ports of call led to strong reluctance in the maritime industry to engage actively in search and rescue missions. For their

principled actions in the face of such profound disincentives, in 2002 UNHCR gave the captain, crew and owner of the *Tampa* its highest award, the Nansen Refugee Award.

The *Tampa* affair helped focus international attention on the question of who has responsibility for accepting asylum seekers rescued at sea, adjudicating their claims, and providing a place of safety for those who are confirmed in their need for international protection. In 2002, the general assembly of the International Maritime Organization (IMO) adopted a resolution seeking to identify any gaps, inconsistencies and inadequacies associated with the treatment of persons rescued at sea. IMO solicited the input of a number of UN agencies in a search for a coordinated approach to the issue.

Consequently, in 2004 IMO's Maritime Safety Committee adopted pertinent amendments to the International Convention for Safety at Sea and the International Convention on Maritime Search and Rescue. (These amendments are to enter into force on 1 July 2006.) At the same session, the committee adopted the current Guidelines on the Treatment of Persons Rescued at Sea. The purpose of these amendments and the current guidelines is to ensure that persons in distress are assisted, while minimizing the inconvenience to assisting ships, and to safeguard the continued integrity of the International Convention on Maritime Search and Rescue.

The amendments impose upon governments an obligation to cooperate to ensure that captains of ships that have rescued persons in distress at sea are released from their obligations with the minimum further deviation from the ship's intended route. The government or party responsible for maritime safety and rescue where survivors are recovered is responsible for ensuring that a place of safety is provided. The guidelines, on the other hand, aim to help governments and masters of ships fulfil their legal and humanitarian obligations to persons rescued at sea.



*Asylum seekers from various countries at the Sangatte Red Cross Centre near Calais, France before attempting to cross the border into the UK via the Channel Tunnel. (UNHCR/H. J. Davies/2002)*

## Reception and detention

Those refugees and asylum seekers who are able to leave their own country and enter another state often find themselves in a very vulnerable situation. They are likely to be in need of life-sustaining material assistance including food, water, shelter, sanitation and healthcare. In many situations they will be vulnerable due to the traumatic experiences they have gone through, their separation from family members and friends, and their arrival in a country with an unfamiliar language, culture and bureaucracy. In such circumstances, unaccompanied minors, refugee children and adolescents, female heads of household and the elderly and infirm are often at particular risk of hardship and abuse.

In practice, the reception conditions experienced by asylum seekers and refugees vary widely and often fail to meet minimum standards. In the last five years, serious cases of rejection at borders or forcible return of refugees and asylum seekers have been reported.<sup>15</sup> In developing countries, refugees frequently arrive in remote and isolated border regions of their asylum country where resources are scarce, where government bodies, international agencies and NGOs have a limited presence, and where the local population is barely able to eke out a living. All too frequently, refugees who cross a border in order to escape from turmoil in their own country find themselves in areas where the rule of law barely exists and which are characterized by high levels of crime, banditry, social unrest and political violence.

Even in more prosperous states, asylum seekers and refugees may encounter many difficulties in meeting their basic needs. In many of the industrialized states, the assistance that they receive from the state and other bodies may be subject to restrictions and provided on a time-limited basis. While waiting for their status to be determined they may be prohibited from entering the labour market, and therefore feel obliged to accept casual and illegal work in the informal sector where they are vulnerable to exploitation by their employers. In the worst cases, they may resort to more dangerous, illicit activities in order to survive, thereby exposing themselves to the risk of arrest and imprisonment.

The necessary public support for the reception of asylum seekers has continued to be hampered by the tendency of certain elements in the media and some politicians to mix the issues of illegal migration and refugees without sufficient concern for accuracy.<sup>16</sup> Areas of concern include the summary dismissal of asylum claims deemed manifestly unfounded on the basis of very broad criteria and unduly restrictive interpretations of what defines a refugee. The latter include very narrow and restricted notions of what amounts to persecution, who qualify as agents of persecution and what constitutes effective state protection. Furthermore, appeals procedures are often inadequate.<sup>17</sup>

One issue that gives rise to particular concern in the context of reception standards is that of detention. While the legal framework of refugee protection does not forbid governments from holding asylum seekers in detention, various conclusions of UNHCR's Executive Committee have recognized that detention must be regarded as an exceptional act, used only, for example, to establish a person's identity, to ascertain elements of their asylum claim or to protect national security and public order. The manner and duration of detention should be proportionate to these ends, and should also be subject to judicial or administrative review.

In some instances, all illegal entrants, including refugees and asylum seekers, continued to be detained on a mandatory basis. States have cited national security and public order as justification for such detention, and emphasize the need for such measures to determine identity and nationality and to deter other potential asylum seekers.<sup>18</sup>

Many countries detain refugee claimants and their children at various points of the asylum process. Most disturbingly, asylum seekers can be detained for failing to arrive with the necessary travel documents, and can remain in detention for the entire length of the asylum process. And while many states have established special holding centres for asylum seekers and irregular migrants, in other countries they are detained in regular jails, alongside common criminals.

## Identification, registration and documentation

For the principle of asylum to be effective, people who are in need of international protection have to be identified, registered and provided with appropriate documentation. The need to strengthen registration as a protection tool has been

increasingly recognized. The proper registration and documentation of refugees and asylum seekers are important in assessing and monitoring assistance needs. They are also significant protection tools, notably against *refoulement* and arbitrary detention. Registration facilitates access to basic rights and family reunification, enables identification of those in need of special assistance, and supports the implementation of appropriate durable solutions.

Where registration procedures are weak or ineffective, the practical consequences can be severe. Unregistered and undocumented refugees may be at risk of arrest, detention, *refoulement* or deportation, may be denied the material assistance they need in terms of food, water, shelter and healthcare, and may be unable to benefit from the family tracing and family reunion activities that are normally established in the aftermath of a refugee emergency. Such refugees are also disadvantaged when it comes to the establishment of voluntary repatriation, local integration and resettlement programmes that are intended to provide lasting solutions to their plight. In addition, the children of refugees and asylum seekers who are unable to register marriages and births may find themselves effectively stateless, and thereby deprived of rights both in their country of asylum and in their nominal country of origin.

Lack of official documentation continues to impede access to residence permits, public healthcare and social assistance, and to result in *refoulement*, arrest and detention. In some countries refugees were either not given any identity documentation or received documents valid for limited purposes and not necessarily recognized by the police, security forces or other government elements. In these situations, the lack of proper documentation made refugees more vulnerable to denial of rations and other assistance as well as to abuse, including beatings, extortion, arbitrary arrest and detention, and widespread intimidation.

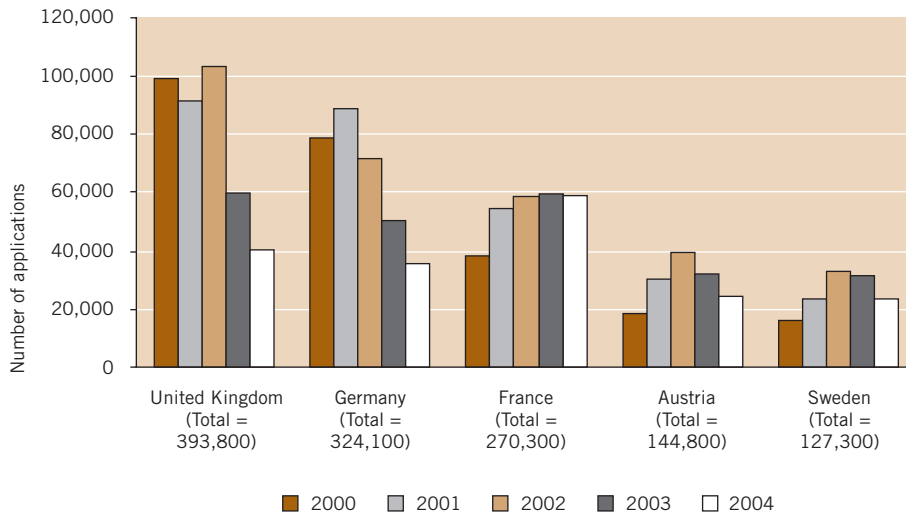
The heightened focus on registration has yielded positive developments. It has encouraged efforts in many countries to register adult refugees individually, to provide more comprehensive demographic profiles of populations and to issue documentation on a more systematic basis. Some participating countries are Colombia, Côte d'Ivoire, Georgia, Ghana, Guinea, Sierra Leone, Tanzania, Uganda, Uzbekistan and Yemen.<sup>19</sup>

## Status determination

In order to benefit from the provisions of the 1951 UN Refugee Convention, a refugee must first be recognized as someone who has a well-founded fear of persecution in her or his country of origin and is therefore in need of international protection. This process of identification and status determination takes place in two principal ways. When large numbers of people from a conflict-affected country cross an international border and seek asylum in another state, it is common for them to be recognized as refugees on a *group*, or *prima facie*, basis. This means that each individual does not have to be assessed on his or her need for protection.

In situations where asylum seekers arrive in smaller numbers and over longer periods of time, however, they are usually required to undergo a refugee status

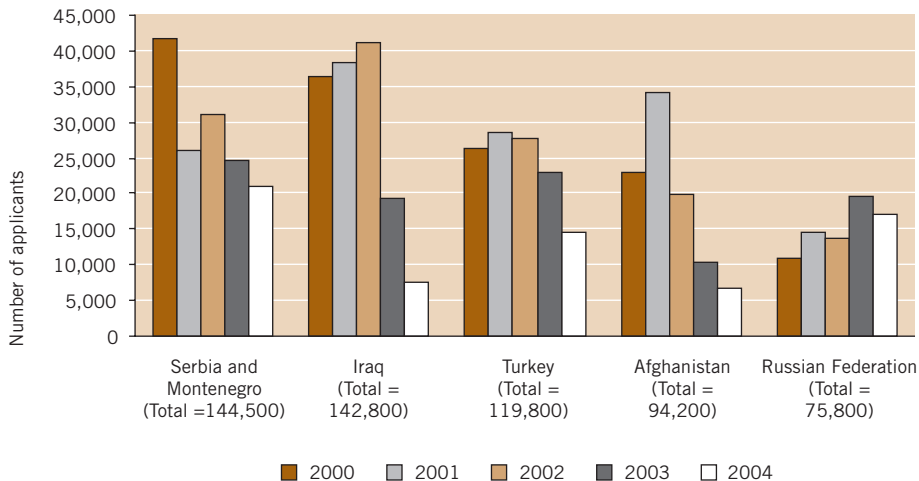
**Figure 2.3** Asylum applications submitted in the top five European receiving countries, 2000-2004



Note: The figure for France for 2000 excludes applications by minors.

Source: Governments.

**Figure 2.4** Main origins of asylum applicants in the top 10 European receiving countries, 2000-2004



Note: The top 10 receiving countries in Europe during 2000-2004 were Austria, Belgium, France, Germany, Italy, Netherlands, Norway, Sweden, Switzerland and the United Kingdom.

Source: Governments.

determination process, in which their need for international protection is assessed. In certain countries such procedures have attained a relatively high degree of sophistication, thoroughness and fairness. In many others, however, the process of status determination continues to be characterized by limitations and weaknesses.

First, asylum seekers may find that their claims to refugee status are not given a full or fair hearing, especially if they originate from or have transited through a country that is deemed to be 'safe' by the authorities in the state where they are seeking asylum. Other asylum seekers, especially those whose applications are considered to be 'manifestly unfounded' may be channelled into accelerated asylum procedures which do not enable them to secure adequate legal representation or to produce supporting evidence for their claim.<sup>20</sup>

Second, asylum seekers do not always have an adequate opportunity to appeal against the rejection of their claim to refugee status. And in some countries they are not allowed to remain pending the outcome of their appeal, but are returned to third countries or to their countries of origin before the appeal decision has been rendered. The benefit of a successful appeal will evidently be lost in such cases if the person concerned has already been exposed to lasting harm.

Third, the quality of the process used to assess asylum applications is not always adequate, often because states lack the capacity to undertake this task effectively and because they are unable or unwilling to invest sufficient resources in it. Adjudicators in many countries are poorly paid, inadequately trained and insufficiently motivated, and do not have access to the reliable country-of-origin information that is needed to assess an asylum application fairly and thoroughly. In many countries, moreover, the state's limited capacity has led to the growth of substantial asylum backlogs, requiring asylum seekers to live in precarious circumstances for months or years while waiting for a final decision on their case. States in developing regions are especially limited in their ability to undertake refugee status determination. In many instances they cede much or all of that function to UNHCR, which is also hard-pressed to undertake such a time- and labour-intensive task with the human and financial resources at its disposal.

Fourth, asylum decisions lack consistency, with acceptance rates for refugee claimants varying significantly from one country of asylum to another. In 2002, for example, the overall recognition rate for asylum seekers in Canada was 58 per cent, while in Greece it was less than 1 per cent.<sup>21</sup> Such variations can be partially explained by the fact that asylum countries have different caseloads, some of which are more likely to have *bona fide* claims than others. However, this does not explain why the acceptance rate for Chechen asylum seekers varies from virtually zero in some countries to close to 100 per cent in others.<sup>22</sup> Such inconsistencies arise because of varying interpretations of the criteria for refugee status and because the standard of proof required differs substantially from one country to another. Thus, while decision-makers in some states recognize that refugees often have difficulties in obtaining lawful travel documents, decision-makers elsewhere consider the use of false documents to be an indication of the asylum seeker's lack of credibility.



In recent years, certain groups of refugees in both large-scale influx situations and individualized asylum systems have been singled out and stigmatized on account of their ethnicity, beliefs or nationality.<sup>23</sup> A number of states in various regions effectively discriminated against asylum seekers when they denied them access to asylum procedures on the basis of their country of origin, because they came via certain countries or were from a particular minority.

In some countries, the absence of an appeal on the judgement of the merits of a claim weakens the credibility of the refugee status determination procedure. In addition, a number of restrictive measures have strengthened barriers to admission and thus access to asylum procedures. Shortcomings in procedural safeguards related to refugee status determination remain, most notably in accelerated procedures and the use of the 'safe third country' concept, both of which result in increasing restrictions on access to asylum procedures and infringement of the right to seek asylum. The increase in the use of alternative forms of protection at the expense of recognition under the 1951 UN Refugee Convention leaves asylum seekers and refugees in a state of uncertainty as to the duration and content of the protection afforded.

## Restricted rights

Refugees who are recognized on a *prima facie* basis may not be obliged to submit individual asylum applications, but this is not to suggest that their protection and welfare is guaranteed because they have been admitted to and allowed to remain in a country of asylum. This chapter has already referred to the material hardships that are frequently experienced by refugees in developing countries, while the following chapter examines the many threats that exist in relation to the physical security of such refugees. Above and beyond these difficulties, many of the displaced, especially those living in protracted refugee situations, are confronted with serious restrictions on their human rights in areas such as:

- Freedom of movement: Refugees are often confined to camps or to other designated areas and can leave them only with special permission. They may be subject to fines and even penal sentences if they fail to comply with such regulations.
- Civil and political rights: In many situations refugees are barred from engaging in political activities, from holding mass meetings and from establishing their own associations and organizations.
- Legal rights: Refugees in developing countries often lack a clearly defined legal status, do not have long-term residence rights and have no prospect of seeking naturalization in their country of asylum.
- Socio-economic rights: A further right denied to many refugees is the ability to engage in agricultural, wage-earning and income-generating opportunities. They do not have access to land, they are not allowed to enter the labour market, they cannot take out loans, and restrictions on their freedom of movement make it difficult for them to engage in trade.

- Freedom of choice: Refugees living in camps frequently find themselves under the control of authoritarian political and military leaders within their community. This situation further limits their ability to exercise basic human rights, including the right to return to their country of origin at a time of their own choosing.<sup>24</sup>

## Responses

Confronted with this wide range of challenges, and considering them to be far more serious today than they were at any time since the establishment of the 1951 UN Refugee Convention, some commentators have suggested that the international refugee protection regime is breaking down and have even predicted its imminent demise.

Such a conclusion would be mistaken for three reasons. First, it would be wrong to believe that there was ever a ‘golden age of asylum’ in which states and other actors unfailingly respected the notions of asylum and refugee protection. Indeed, many if not all of the protection problems now encountered by refugees and asylum seekers, including *refoulement*, the closure of borders, interception at sea, detention and restricted rights have a host of historical precedents.

Second, while there is certainly a need to focus on the challenges that exist in relation to asylum and refugee protection, there is also a need to acknowledge the continuing achievements of the refugee protection regime. In the past five years alone, millions of refugees and asylum seekers throughout the world have been able to escape from life-threatening circumstances in their own country, to benefit from international protection and to find a lasting solution to their plight, whether by means of voluntary repatriation, local integration in their country of asylum or resettlement in a third country.

Third, while governments have sometimes responded to their economic, political and security concerns by acting in a manner that has negative consequences for refugees and asylum seekers, they have also acknowledged the need for a multilateral response to refugee problems. They have reaffirmed their commitment to the 1951 UN Refugee Convention and have endorsed an agenda that provides them with a coherent set of protection goals, activities and indicators.

In 2001, UNHCR initiated the Global Consultations on International Protection. This process evolved around three ‘tracks’, with the overall goal of reinvigorating the refugee-protection framework. The first track sought to strengthen the commitment of states to respect the centrality of the 1951 UN Refugee Convention and its 1967 Protocol in the international refugee protection system. The second track provided a forum to take stock of developments in refugee law and to clarify disputed notions through a series of expert discussions on the interpretation of the Convention and its Protocol.<sup>25</sup> The third track was structured around a number of protection policy matters to address contemporary challenges.<sup>26</sup>

The commitment to refugee protection and the relevance of the 1951 UN Refugee Convention and its 1967 Protocol were reaffirmed in December 2001 at the end of the first track of the Global Consultations by the adoption of the Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.<sup>27</sup> The Declaration was an important achievement, not only because it was the first statement of its type in the 50-year history of the Convention, but more significantly because it was issued at a time when some governments had started to ask whether the Convention was relevant to current realities. The Declaration reaffirmed the contemporary relevance of the Convention and underscored the importance of the legal norms on which it is based.

The Global Consultations tried to resolve areas of inconsistent interpretation and state practice. The process attempted to identify new approaches that would bridge gaps in refugee protection in a cooperative manner to ensure that burdens and responsibilities were more equitably shared. Following the Consultations, and in order to provide for the implementation of the 2001 Declaration, the Agenda for Protection was adopted to guide action by UNHCR, states, NGOs and other partners in furthering protection objectives in the years ahead.<sup>28</sup>

The Agenda for Protection provides a framework for fulfilling the commitments reaffirmed by states in the Declaration. It sets out six inter-related goals and details actions for achieving them. The goals focus on issues that are inadequately covered by the Convention. These include, for example, the issue of refugee registration, the protection of refugee women and children, protection responses in situations of mass influx and expanded opportunities for durable solutions.

Since the conclusion of the Global Consultations and establishment of the Agenda for Protection, new efforts have been made to mobilize support for asylum and refugee protection at the regional level. In 2003, for example, a memorandum of understanding was signed by UNHCR and the African Commission on Human and Peoples' Rights,<sup>29</sup> aimed at strengthening cooperation between the parties in order to promote and protect more effectively the human rights of refugees, asylum seekers, returnees and other persons of concern. Another recent initiative is the Regional Parliamentary Conference on Refugees in Africa: the Challenges of Protection and Solutions, held in Cotonou (Benin) in June 2004. The conference was attended by parliamentarians of 26 African countries and adopted a Declaration and a Programme of Action.<sup>30</sup> This Programme of Action is aimed at implementing the commitments contained in the Declaration by developing concrete objectives and strategies to support African parliaments in their work in favour of protecting refugees and finding durable solutions.

In the Latin American context, representatives of 18 countries in the region gathered in Mexico City in November 2004 to commemorate the 20th anniversary of the adoption of the Cartagena Declaration on Refugees. The meeting resulted in the adoption of the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America.<sup>31</sup> The Declaration reaffirms the fundamental right to seek and receive asylum, the enduring validity of the principles and norms

## Box 2.4

## Urban refugees

As the world's urban population has grown, so has the number of urban refugees. Within two decades even sub-Saharan Africa—the world's most rural region—will see more than half its population living in urban areas. Declining state services in rural areas, the removal of agricultural subsidies and changing family structures have encouraged the trend. As for refugees, more of them are moving to urban areas to escape the restrictive encampment schemes instituted by host countries. The percentage of the total refugee population that lives in urban, rather than rural areas is highest in Europe and Latin America. However, the absolute numbers of urban refugees in Asia and Africa make them a significant group in those regions as well. A sizeable number of urban refugees are in countries of first asylum. For instance, some 2 million Afghans, many of whom may be refugees, live in Pakistan's cities.

Urban refugees include people trading the assistance they receive when in camps for the freedom to participate in urban labour and commodity markets. This pattern is particularly pronounced in sub-Saharan Africa, where internally displaced persons

forced off rural holdings by conflict, persecution or famine are moving to cities. In Europe, North America and Australia most (but not all) urban refugees have been resettled from other parts of the world and receive assistance from international, national and private organizations.

The presence of refugees and displaced persons in urban areas raises significant protection concerns, especially when refugees self-settle outside the purview of official programmes. Camp-based refugees are formally distanced from many of their host communities' socio-economic and political processes, but those in urban settings have no option but to engage with local populations, markets and institutions. Given the prevailing conditions in the cities (or neighbourhoods) where they typically settle, refugees share many challenges with citizens: public health hazards, urban violence and lack of housing, education and health services. These challenges are heightened as levels of domestic migration and urbanization almost invariably outpace job creation and improvements to urban services and infrastructure.

Urban refugees—and other immigrant communities—also face challenges linked to their position as outsiders. Local officials and host populations may prevent them from accessing even those services to which they are legally entitled. Where refugees have religious or ethnic ties with marginalized or persecuted local populations they may face even greater difficulties.

Two other protection concerns emerge from refugees' limited access to documentation, services and jobs. The first is critical for urban refugees who rely almost exclusively on existing social services, compete in labour and housing markets and are subject to the same regulatory regimes as host populations. Although papers designating an individual's refugee status and right to residence are critical, these do not ensure protection. Whereas camp-based refugees primarily interact with specially trained staff, urban refugees depend on civil servants who may be unfamiliar with, or simply not respect, their papers. Moreover, full access to education, housing, employment and financial services often requires documents not always available to refugees,

contained in the 1951 UN Refugee Convention and its 1967 Protocol, and the importance of using the norms and principles of other international instruments of humanitarian and human rights law to strengthen international protection. The Declaration also recognizes the non-derogative nature of the principle of *non-refoulement*, including non-rejection at the border, and the commitment of Latin American countries to keep their borders open to those in need of international protection.

The Mexico Plan of Action is intended to address the region's principal protection challenges. These include the development of asylum systems, the strengthening of protection capacities among governments and NGOs, and the plight of refugees who have settled in urban centres and are struggling to attain self-sufficiency. The Plan proposes concrete projects ranging from research and doctrinal development of international refugee law to institutional capacity building, as well as programmes on durable solutions promoting the self-reliance and local integration of refugees.

One of UNHCR's primary concerns over the past five years has been to ensure that the commitments made in the Declaration of States Parties to the 1951 Convention

such as professional qualifications, school or banking records and birth certificates. Without these, urban refugees are hindered in accessing services and markets and are vulnerable to exploitation, police abuse, arbitrary arrest and deportation. Refugees' inability to speak local languages may further limit their options and their ability to protest abuse from employers, landlords, police or citizens.

Difficulties accessing local markets and services are mirrored in urban refugees' relationships with voluntary agencies and other NGOs. While there may be more such agencies in urban areas than in purpose-built settlements, few may be explicitly committed to refugee protection. In many instances, local NGOs and religious organizations give priority to assisting citizens or exclude non-nationals (including refugees). Even where local organizations accept responsibility for refugees, they may lack specialized skills for assisting with asylum claims, monitoring cases or advocating for the displaced. Furthermore, refugees' tendency to relocate frequently further hampers service providers' attempts to track and assist vulnerable groups.

The attitudes prevalent among host governments, international aid/donor agencies and host populations add to protection challenges. There is, for example, a tendency to treat those arriving in cities with considerable suspicion. This often emanates from a belief that urban refugees are mainly 'irregular movers' who have surrendered protection, usually in rural camps, to search for opportunities elsewhere. Depending on national policy, those fitting this description may not be entitled to asylum or assistance. In other cases, policies explicitly confine refugees to camps or only allow urban settlement under strict conditions.

In almost all instances, refugees must prove their right to be in the city. They may also need to address hostility from urban residents who do not distinguish between refugees and growing numbers of unwelcome economic migrants, both domestic and international. In such contexts, government officials may concentrate on regulating rather than assisting refugees to prevent the asylum process from becoming a way around normal immigration channels. Even those who formally establish their rights as refugees may become

scapegoats for politicians, unions and others.

To address these and other challenges, in December 1997 UNHCR introduced a Policy on Refugees in Urban Areas. While it represented an important step in protecting the rights of urban refugees, the policy has been difficult to implement. For one, urban refugees' *de facto* integration (or invisibility) has made it difficult to develop specialized programmes for them. Moreover, those programmes that do exist are relatively expensive and difficult to fund, given the generalized suspicions outlined above. Engaging directly with metropolitan governments is an additional challenge for an organization such as UNHCR that is more familiar with negotiations and advocacy at the national level. Recognizing these concerns, UNHCR is currently reviewing its urban-refugee policy in consultation with relevant stake holders.

and or its 1967 Protocol and Agenda for Protection are effectively operationalized. Significant improvements have been made, for example, in the way that refugees and asylum seekers are registered and provided with documents that attest to their status. Such efforts have helped to protect them from *refoulement* and arbitrary detention, have improved access to assistance and family reunification and contributed to the search for durable solutions, especially voluntary repatriation and resettlement.

In addition, a variety of initiatives have been taken to meet the protection needs of particular refugee groups, including women, children, victims of sexual and gender-based violence and those affected by HIV/AIDS. With regard to refugee children, for example, UNHCR has established counselling programmes that provide younger refugees with a better understanding of their rights, thereby helping to protect them against military recruitment, forced labour and sexual exploitation. Significant attention has also been given to the provision of primary and secondary education, especially for refugee girls, who are generally under-represented at school.

## Refugee protection and globalization

Governments and UNHCR are currently striving to formulate appropriate and effective responses to the challenge of asylum in a rapidly changing international environment. While there is a broad consensus within the international community concerning the continued relevance of the 1951 UN Refugee Convention, demonstrated by the positive outcome of the Global Consultations, there is also a recognition that the world has changed significantly in the past five decades. The number of states has proliferated as a result of decolonization and the demise of the communist bloc. The process of globalization has created an enormous amount of new wealth, but has distributed that wealth in a highly uneven manner. Developments in communications and transportation have led to unprecedented levels of human mobility and facilitated the instantaneous transfer of information and money from one part of the world to another. And serious new threats have arisen in the form of transnational terrorist and criminal networks.

Such developments have had major effects on the dynamics of human displacement and have generated an intense and sometimes polarized debate with regard to the way that refugees, asylum seekers and other uprooted people can be most effectively protected, while at the same time safeguarding the legitimate interests of states. The following sections examine three of the issues that have been most prominent in that debate: the relationship between national security, asylum and refugee protection; the asylum–migration nexus; and the challenge of building protection capacities in countries of asylum.

### **National security and asylum**

While the trend of implementing ever more restrictive policies towards asylum seekers and refugees had started well before the events of 11 September 2001,<sup>32</sup> the new climate of heightened security concerns served to legitimise these practices. It also allowed for closer cooperation among states in criminal matters at the risk of the protection needs of refugees being overlooked.

Indeed, just a few days after 11 September, the UN Security Council adopted a resolution calling upon states to take appropriate measures under the relevant provisions of national and international law before granting refugee status to ensure that the asylum seeker has not been involved in terrorist acts.<sup>33</sup> It further called on states to ensure that refugee status is not abused by those involved in terrorist acts, and that asylum claims should not be grounds for refusing requests for the extradition of alleged terrorists.<sup>34</sup>

Since that time, the security concerns of states have increasingly been invoked as a justification for the introduction of laws and policies which impinge upon the principle of asylum and the protection of refugees. Border controls have been tightened in many parts of the world, while the grounds for the detention, exclusion, expulsion and extradition of foreign nationals have been broadened. Security considerations have

also prompted some states to restrict access to asylum procedures and resettlement opportunities. More generally, in their efforts to strengthen national security and safeguard public safety, governments have paid less heed to the principles of multilateralism, due process and fundamental human rights—precisely those principles on which the refugee protection regime is founded.<sup>35</sup>

The perception persists that asylum provides a convenient cover for terrorists and their sympathizers. While this view may be based to a significant extent on the unfair stereotyping of asylum seekers (especially those who have travelled in an irregular manner, who are young and male, and who originate from countries that are associated with political violence and religious extremism) it cannot be entirely discounted. Asylum systems are not immune to abuse, and it would be naïve to believe that terrorists have ignored the opportunity to consider how the systems might be exploited.

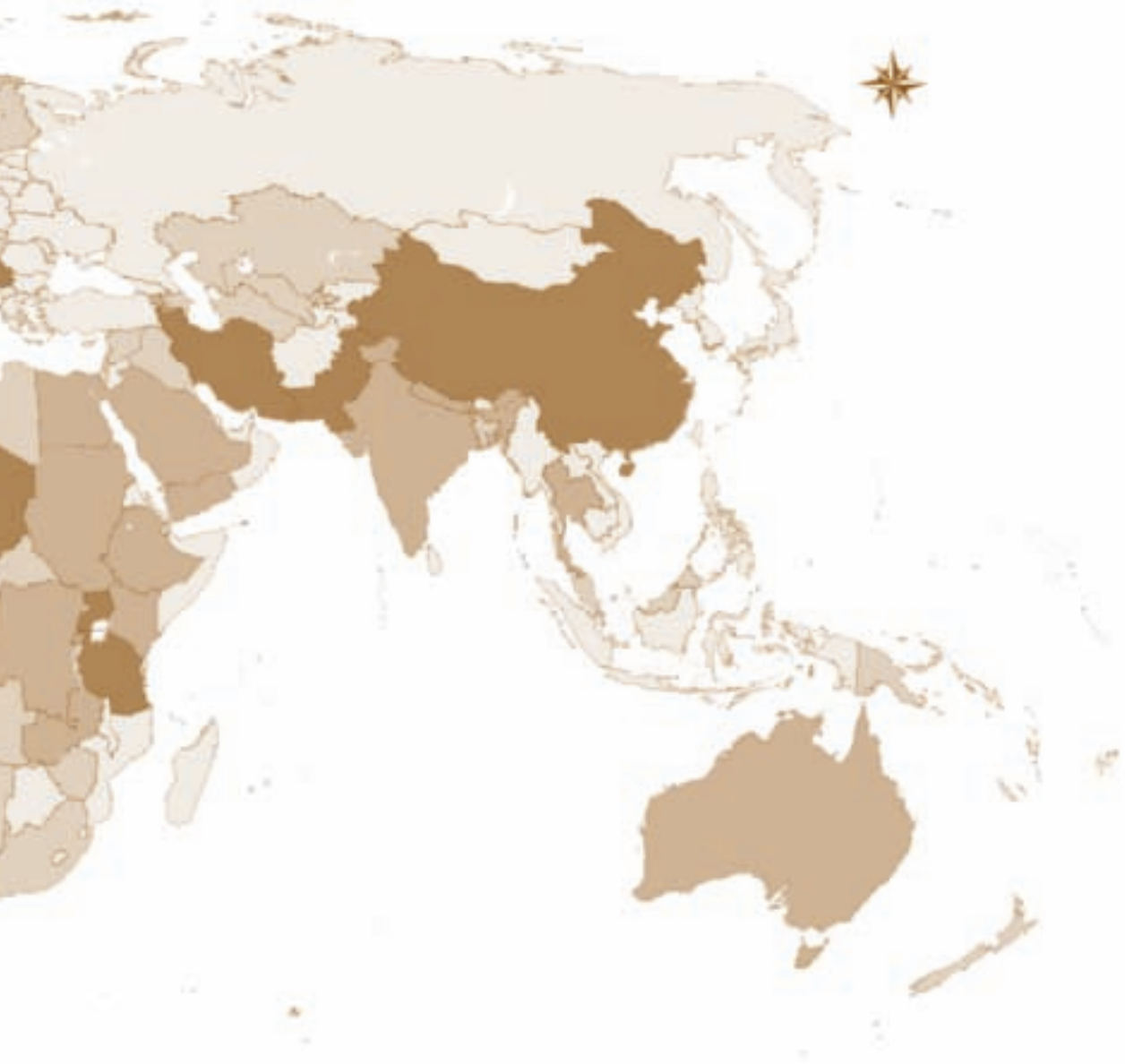
At the same time, the security threat posed by the movement and presence of asylum seekers must be put into perspective. Asylum seekers are, for example, amongst the most closely scrutinized of all foreign nationals; they are routinely fingerprinted and checked against national and international security databases. Those who arouse any suspicion are liable to be detained, and to be monitored upon their release. If a terrorist wishes to enter and remain in a country undetected, submitting an application for asylum would not appear to be the most promising means of achieving that objective.

It is also essential to point out that the international refugee protection regime incorporates some robust mechanisms to prevent the abuse of asylum by those responsible for serious crimes. Article 1F of the 1951 UN Refugee Convention, for example, provides for the exclusion from refugee status of those responsible for war crimes, crimes against peace and humanity and serious non-political crimes committed outside the country of refuge prior to their admission to that country.<sup>36</sup> People who have engaged in acts contrary to the purposes and principles of the United Nations are also excluded from the protection of the Convention. In addition, the Convention allows for an exception to the principle of *non-refoulement*, permitting states to expel refugees from their territory if there are reasonable grounds for regarding them as a danger to national security, or if they have been convicted of a serious crime which constitutes a danger to that country.

The danger in the current international context is that states will use the issue of terrorism to legitimize the introduction of restrictive asylum practices and refugee policies, a process which began well before the events of 11 September 2001.<sup>37</sup> Indeed, there is already evidence to suggest that the exclusion clauses of the 1951 UN Refugee Convention are being invoked more frequently, using low thresholds of proof and without adequate due-process protections. Terrorism is, of course, a matter of life and death, and it is incumbent upon states to ensure that their citizens enjoy the highest possible level of safety and security. At the same time, when decisions about the fate of asylum seekers are taken in haste, are made on the basis of inadequate evidence and are not open to public or judicial scrutiny, there is the serious risk of a miscarriage of justice which could place the life and liberty of those asylum seekers at serious risk.<sup>38</sup>









*These Liberian refugees have been resettled in the UK as part of a resettlement programme for vulnerable families. Here they are being provided with orientation by a Migrant Helpline aid worker. (UNHCR/H. J. Davies/2004)*

## The asylum–migration nexus

In recent years, the issues of asylum and refugee protection have become inextricably linked with the question of international migration, especially those migratory movements that are undertaken in an irregular, undocumented or clandestine manner. That linkage is manifested in three principle ways. First, many migrants who are looking for work and who are not in need of international protection submit asylum applications once they have arrived in another country, hoping they might be granted refugee status because they have no other legal means of entering and remaining in that state, even on a temporary basis. Second, population movements from a single country may include some people who have a genuine claim to refugee status and others who do not, especially when that country is simultaneously affected by persecution, armed conflict, political instability and economic collapse. Third, many refugees and asylum seekers are obliged to move from one country to another irregularly because they are unable to obtain the passports, visas and tickets they need to travel in an authorized manner. Such phenomena are often referred to collectively as ‘mixed migrations’ or the ‘asylum–migration nexus’.<sup>39</sup>

The new linkages that exist between asylum and migration derive from several dimensions of the globalization process: the growing disparity in standards of living and levels of human security in different parts of the world; the growth of global transportation, communication and social networks; and the ease with which capital and goods can now flow from one country and continent to another, while the movement of labour remains subject to strict controls.<sup>40</sup>

States, especially those in the developed world, have responded with some alarm to the issue of mixed migration, pointing to the relatively low proportion of asylum seekers who qualify for refugee status, the expense of maintaining their asylum

procedures and social welfare systems, the difficulty of deporting those asylum claimants whose applications are rejected, and the security risks associated with the growth of irregular migration and human smuggling.<sup>41</sup>

Their primary response to this situation has been to introduce a raft of measures intended to obstruct or deter the arrival of irregular migrants in general and asylum seekers in particular, including those who have a *bona fide* claim to refugee status. In exercising their sovereign and legitimate right to control their borders and safeguard national security, states have made it increasingly difficult for people to 'seek and enjoy asylum in another state', a right guaranteed by the Universal Declaration of Human Rights. The number of asylum seekers registered in 50 European and non-European industrialized countries dropped by 40 per cent from 2001 to 2004.<sup>42</sup> While the drop may in part be due to a stabilization of the situation in war-torn countries such as Afghanistan, the Democratic Republic of Congo, Liberia and Sierra Leone, it also seems that the restrictive measures introduced by the world's more prosperous states have had their intended effect.

A principal goal of the Agenda for Protection is that of 'protecting refugees within broader migration movements.' If that objective is to be realized, it is essential to ensure that the principle of asylum is not undermined by the effort to stem irregular migration. First, states must respect Article 31 of the 1951 UN Refugee Convention, which states that refugees must not be penalized on account of their illegal entry or presence in a country, 'provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.' Second, police officers, border guards, immigration and asylum officials must be trained and convinced to uphold the principles of international refugee law. Third, states should establish fair, thorough and efficient refugee status determination procedures, so that asylum seekers are quickly informed of the outcome of their case. In situations of mass influx, the provision of *prima facie* refugee status to new arrivals has proven to be a particularly valuable means of safeguarding asylum and refugee protection. Fourth, if the integrity and credibility of asylum systems are to be preserved, steps must be taken to ensure the departure of those asylum seekers whose applications for refugee status are rejected after a full and fair examination of their case. In this respect, unsuccessful asylum seekers have a particular obligation to respect the law and to respect the wishes of the authorities when they are asked to leave the country. Fifth, there is a strong case to be made for the industrialized states, many of which are confronted with the prospect of diminishing and ageing populations and whose economies increasingly rely on illegal and casual migrant labour, to establish regular migration programmes.

Unless they are able to access the labour markets of the North by legal means, migrants from the South will continue to submit invalid claims to refugee status, further undermining public confidence in the whole notion of asylum. Similarly, an expansion of refugee resettlement programmes would allow more people who are in need of international protection to move in an orderly manner to, and gain residence rights in, a country which offers them a more promising future.

Finally, action is required to address the issue of 'onward movements', whereby refugees and asylum seekers move in an irregular manner from a country where they have already been granted (or had the opportunity to seek) asylum, often because they are unable to find an adequate degree of protection or standard of living in that state, and have no prospect of finding an early solution to their plight.<sup>43</sup> As demonstrated by the recent experience of sub-Saharan Africans who have moved to the countries of North Africa in the hope of gaining access to the European Union, the people involved in such movements have to spend large amounts of money for the services of human smugglers, and are then obliged to undertake very hazardous journeys in which their lives and liberty are at constant risk. Even then they have no guarantee that they will reach their destination. It is for this reason that UNHCR gives such priority to building protection capacities in countries of asylum.

## Enhancing protection capacities

The notions of asylum and refugee protection mean very little unless people who are obliged to seek sanctuary in another state are able to enjoy an adequate degree of physical, legal, material and psychological security in that country. Sadly, that is frequently not the case. Too many refugees are obliged to live in precarious conditions, receiving inadequate assistance, unable to establish their own livelihoods, deprived of freedom of movement and at risk of detention, exploitation and violence. Desperate to escape from such difficult conditions, and without any means of moving by authorized means, they readily become prey to human smugglers and traffickers.

The debate around enhancing protection capacity in regions of origin of refugees, and thus preventing onward movement towards industrialized states, has been overshadowed by suspicions about the motives of the states seeking to legitimize policies of forced removal to countries in the region of origin. Strengthening protection capacities in countries/regions of origin is consistent with the 1951 UN Refugee Convention. The Convention recognizes that international cooperation for the protection of refugees is necessary in order to palliate the heavy burdens on certain countries as a result of granting asylum. It also calls on governments to continue to receive refugees in their territories and to act in a spirit of international cooperation in order that these refugees find asylum and the possibility of resettlement.<sup>44</sup> However, it has been argued that recent initiatives on regional protection proposed by some states are more geared towards burden-shifting rather than burden-sharing.

To address these problems, greater efforts are required to enhance protection capacities in countries of asylum. This is especially the case in developing and middle-income countries, many of which have acceded to the 1951 UN Refugee Convention and given sanctuary to large numbers of refugees but which simply do not have the legal, institutional and economic means to provide them with a safe haven. This approach was epitomized by a United Kingdom proposal in 2003 for the

## Box 2.5

## The Comprehensive Plan of Action for Somali Refugees

The Comprehensive Plan of Action (CPA) for Somali Refugees aims to address one of the most protracted and neglected refugee situations in Africa. More than 16 years of conflict have resulted in population displacement on a massive scale. At the start of the civil war in 1988, internal opposition to the Somali dictator, Siad Barre, led to the flight of some 400,000 refugees from north-west Somalia to Ethiopia and Djibouti. Following the overthrow of the Barre regime in 1991, more than half the Somali population was displaced. By 2005, despite the repatriation of more than 1 million refugees to Somalia over the previous 12 years (485,000 of these with UNHCR assistance) there remained some 350,000 refugees in neighbouring countries and the wider diaspora. Of Somalia's 400,000 and more internally displaced people, many are women and children. The scale of the ongoing humanitarian situation in Somalia requires an integrated, comprehensive response from the international community.

Two other factors reinforce the need for a CPA in Somalia. The first is the relative stability in particular areas of the country. Despite ongoing conflicts in the southern and central regions, by the end of the 1990s working administrations had been established in Somaliland (1991) and Puntland (1998). The second factor is the peace process. In May 2000 a new round of peace talks between warring Somali factions opened at Arta, Djibouti. In October 2000 the Transitional National Government was established with a view to forming a national government towards the end of 2003. In October 2004 Abdullahi Yusuf Ahmed was proclaimed president of the new Somali Transitional Federal Government.

The Somalia CPA was initiated by UNHCR in collaboration with the Somali authorities, regional host states, the European Commission, Denmark, the United Kingdom and the Netherlands in mid-2004. The objectives of the CPA are to provide effective protection and a range of durable solutions to Somali refugees and internally displaced persons. The

CPA aims to develop an integrated approach by using all three of the durable solutions to refugee displacement: repatriation, local integration and resettlement.

The main focus of the CPA is on the repatriation programme underway in Somalia since the early 1990s to ensure the sustainability of returns and reintegration. Within Somalia, the CPA also seeks to identify durable solutions for the internally displaced. With regard to the host states in the region, it seeks to explore and support any possibility of improving refugees' access to local integration, which until now has been extremely limited. The resettlement component of the CPA, which aims to move the most vulnerable groups of Somalis from countries of first asylum, is currently limited in scope, although there is growing interest in resettlement schemes on the part of several European Union states with significant Somali populations. Where durable solutions are not immediately available, the CPA seeks to improve the prospects for refugee self-reliance pending eventual return, and to enhance the quality of protection and assistance available in Djibouti, Ethiopia, Kenya and Yemen.

The CPA Preparatory Project, based on a 'gaps analysis' and national consultations with governments in the region, has formed the basis of negotiations on the CPA. Work on the drafting of the CPA is now fully underway and, following further consultations with the widest possible group of stakeholders, the final document will be presented to the international community. On the basis of commitments made to specific programme areas at this conference, projects will be developed and implemented by UNHCR and its partners from 2006.

The CPA is related to the wider UN Joint Needs Assessment (JNA)/Somali Reconstruction and Development Programme which is being developed and led by the United Nations Development Group and the World Bank at the request of the International Community and the Transitional Federal Government of Somalia. Both the JNA and the

CPA involve the same stakeholders: Somali counterparts, the UN, NGOs, returnees and IDPs. The priorities identified in the JNA consultations with stakeholders point to many of the same areas identified by the CPA consultations and to be addressed by the latter. Consequently, these two processes will be mutually reinforcing and closely coordinated. However, the CPA aims to focus on programmes that will be implementable irrespective of the direction of the ongoing peace process.

One of the most pressing problems facing the CPA is the continuing political instability in central and southern Somalia and the obstacle this presents to voluntary repatriation. The Transitional Federal Government, which moved from Kenya to Somalia in June 2005, must now overcome its internal divisions and establish viable state institutions. Reaching agreement on the status of Somaliland, which is seeking to assert its independence from Somalia, represents a significant part of ensuring a consolidated peace.

No less significant is the reluctance of the international community to provide the funding and political support to lay the foundations of a comprehensive humanitarian and development programme in Somalia. A vital component of a civil peace in Somalia is the disarmament and demobilization of the countless military factions spawned by 16 years of war. External political initiatives and scrutiny of the demobilization process are necessary ingredients of security in Somalia.

The outcome of the Somalia CPA has internal, regional and global implications. Continued population displacement inside Somalia has the potential to destabilize the region as a whole. The global effects of continuing insecurity in Somalia are also evident in the large number of Somalis now living in North America and Europe. What is currently lacking, but sorely needed, is the political will in the international community to develop an integrated approach to Somalia spanning security, economic development and humanitarian assistance.

establishment of 'regional protection areas' in locations close to countries that produce significant numbers of refugees and asylum seekers.<sup>45</sup>

The proposal sparked concern among NGOs and UNHCR, and became the subject of inter-governmental negotiations at the European level. In the case of extraterritorial processing, there has been extensive criticism that such practices may threaten the human security of refugees,<sup>46</sup> given the historical human rights consequences of the precedence of third-country processing centres and the use of concepts such as 'safe havens' and containment.<sup>47</sup> Furthermore, such practices demonstrate illegalities and impracticalities (see Box 2.2).

In 2003, the European Commission proposed a similar approach enabling people to enjoy effective protection as quickly and as close to their own country as possible, thereby averting the need for them to seek such protection elsewhere.<sup>48</sup> The Commission subsequently affirmed the crucial role of European Union member states and other industrialized countries in assisting countries of first asylum to establish such conditions.<sup>49</sup> On this basis, in 2005 the Commission adopted a communication on 'regional protection programmes' which entails enhancing the protection capacity of areas in regions of origin and creating the conditions in which refugees can benefit from the durable solutions of voluntary repatriation, local integration or resettlement.<sup>50</sup>

Attempts to strengthen the capacity of asylum countries in regions of origin have long been on UNHCR's agenda. Making the most of the impetus of these initiatives, in August 2004 UNHCR launched the Strengthening Protection Capacity project, which develops in three stages and focuses on four countries: Benin, Burkina Faso, Kenya and Tanzania.<sup>51</sup> An essential component of the project was the development of a Framework for Identifying Gaps in Protection Capacity. This analytical framework is being used more widely in other countries. For instance, it has been adopted by the Central Asia Protection Gaps Initiative, and for the Preparation of Gaps Analysis and Action Plans for Asylum Building in CIS (Commonwealth of Independent States) Countries. It is also being used by the Preparatory Project for a Somali CPA (comprehensive plan of action).<sup>52</sup> Needless to say, efforts of this type are unlikely to prove effective unless they receive financial support from the world's more prosperous states and unless refugee-hosting countries pursue policies that are conducive to protecting refugees and their rights.

The notion of 'protection in regions of origin' is a potentially valuable one that can be used to mobilize the support needed to provide refugees with better conditions of life and improve their prospect of finding durable solutions. But it is not a panacea. Many of the areas in which large numbers of refugees are to be found—northern Kenya, northern Uganda, western Tanzania and eastern Chad, to give just four African examples—are all confronted with serious economic, infrastructural and security problems, and do not provide the conditions in which to provide a high standard of refugee protection. It is equally clear that a good proportion of the world's refugees will be unable to find an early solution to their plight within their region of origin, and that the onward movement of refugees and asylum seekers will continue to take place while standards of living and levels of human security differ so greatly from one part of the world to another.

Given that some 70 per cent of the world's 9.2 million refugees are to be found in developing countries,<sup>53</sup> there is also a risk that the effort to improve protection in regions of origin will require poorer states to assume responsibility for an even greater proportion of the world's refugees. For these reasons, UNHCR considers it essential for the industrialized states to maintain equitable and effective asylum systems, to admit a larger number of refugees by means of resettlement programmes, and to provide tangible support to the notions of burden and responsibility-sharing, as endorsed by the Global Consultations on International Protection.

## The way forward

The provision of international protection, and the application of international human rights and humanitarian principles on which it is based, are being increasingly challenged by political, social and economic realities. Core elements of refugee status, and the rights and responsibilities therein, are being questioned. More and more, asylum seekers are portrayed not as refugees fleeing persecution and entitled to sanctuary, but rather as illegal migrants, potential terrorists and criminals—or at a minimum as 'bogus'. Increasingly, asylum policies are being driven by security concerns and the need for enhanced migration management. Consequently, asylum policy has become alienated from refugee policy.

A key facet of globalization is the increasing mobility of the world's population. In response, control of migration has become an important aspect of national policy and international cooperation. This has led to a tendency to criminalize migrants, including asylum seekers, by associating them with people smugglers and traffickers. International legal instruments and institutions originally established to assist refugees are increasingly being used to stem unwanted migration. While it remains the prerogative of states to control their borders, they remain obliged to provide basic safety and assistance to those deemed in need of international protection. Therefore, the imperative should not be to prevent movement, but rather to balance effectively the security concerns and political interests of states and the aspirations for economic betterment of migrants in a manner that protects the interests of both.

In this context, strengthening protection remains a primary objective for the international community. To achieve this, more support should be provided to enhance protection capacity. This should include ensuring procedures are in place to provide access to appropriate, fair and efficient assessments of protection needs and to provide durable solutions thereafter. In turn, this necessitates more investment in national asylum systems and enhanced multilateral cooperation so that burdens and responsibilities are shared equitably.

## Chapter 2

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