

7 Asylum in the industrialized world

The 1951 UN Refugee Convention was primarily drawn up in response to the mass displacement in Europe at the end of the Second World War. Half a century later, it is in Europe, and in the world's other industrialized countries, that the institution of asylum is facing some of its greatest challenges. Anxious to protect their borders from unwanted immigration, and suspicious of the motivations of many of those seeking asylum, governments of industrialized countries have adopted a range of new measures to control and restrict access to their territory. For refugees fleeing persecution, these measures have in many cases severely affected their ability to gain access to asylum procedures and safety.

This chapter examines refugee policy developments in Europe, North America, Australia, New Zealand and Japan. The first section assesses European countries' approaches to refugee protection, focusing on developments during the 1980s and 1990s. These include efforts to combat illegal migration and their consequences for refugees and asylum seekers, moves to harmonize asylum policies within the European Union, and responses to the massive displacement resulting from war in the Balkans. It also traces the transformation since 1989 of countries in Central and Eastern Europe from refugee-producing to refugee-receiving countries.

The second and third sections describe how in the United States, Canada and Australia, which are all traditional countries of immigration, government-supported resettlement programmes have offered millions of refugees a new start since the end of the Second World War. These sections examine how, in spite of the hospitality shown to refugees through these programmes, political interests have repeatedly threatened to undermine governments' obligations towards asylum seekers. In both North America and Australia, government policies have increasingly been influenced by the need to respond to growing numbers of asylum seekers arriving spontaneously.

One of the main challenges now faced by all industrialized states in meeting their obligations towards refugees is that of dealing with the phenomenon of 'mixed flows' of refugees and other migrants, and the related phenomenon of 'mixed-motive migration'. Many people leave their home countries for a combination of political, economic and other reasons.¹ This mixture of motives is one factor creating a perception of widespread abuse of asylum systems, which is often manipulated by politicians and the media.

In addition, the illegal trafficking and smuggling of people is increasingly becoming a complicating feature of the migration landscape. With regular arrival routes closed, many refugees are turning to smugglers to reach safety, in spite of the dangers and the financial costs involved. Asylum seekers who resort to human smugglers seriously compromise their claims in the eyes of many states. When

combined with the increased tendency of states to detain asylum seekers, the effect is to stigmatize further asylum seekers in the public mind as criminals.

States have legitimate interests in controlling access to their territory, but they also have international legal obligations to provide protection to those fleeing persecution. Industrialized states have particular responsibilities in matters of refugee protection. Not only were they instrumental in drafting the major international refugee and human rights instruments half a century ago, but more importantly, the example they set will inevitably influence the way in which refugees are treated by other states in the years ahead.

The evolution of asylum policy in Europe

At the end of the Second World War, Europe faced a massive humanitarian challenge. While the continent struggled to rebuild its shattered infrastructure and economy, over 40 million displaced people needed to be repatriated or resettled. In addition, in 1956, some 200,000 people fled following the Soviet crushing of the Hungarian uprising, and in 1968 a smaller number left Czechoslovakia after the Soviet suppression of the 'Prague spring'. While the 1951 UN Refugee Convention provided the international legal framework for the protection of these refugees, asylum in Europe—and indeed in the West in general—also had an ideological tinge. It reflected a broad political commitment to take in refugees from communist countries.

Refugees from other continents first began arriving in Europe in large numbers during the 1970s. They included refugees fleeing from Latin America as a result of the military coups in Chile and Uruguay in 1973, and then in Argentina in 1976. Refugees from these countries found refuge in both Western and Eastern Europe [see Box 5.4]. Also, although the majority of refugees fleeing from countries in Indochina after 1975 were resettled in North America, some 230,000 were resettled in Western Europe.

By the 1980s, increasing numbers of people from all over the world were fleeing directly to Europe. Unlike the organized resettlement of Indochinese refugees from countries of first asylum, these were unplanned movements. Spontaneous arrivals of asylum seekers had been rising since the early 1970s, and in the mid-1980s they began to cause serious concern. The number of asylum seekers in Western Europe increased from under 70,000 in 1983 to over 200,000 in 1989. This increase was linked to the number of internal conflicts and serious human rights violations in Africa, Asia, Latin America and the Middle East. It was also due to changes in immigration policy during the economic recession which followed the steep increase in oil prices in the 1970s. No longer in need of migrant workers, many European countries ceased to encourage labour migration, although family reunion continued. As a result, at least some would-be migrants turned to the asylum channel. Improved communications, easier access to air transport and growing numbers of

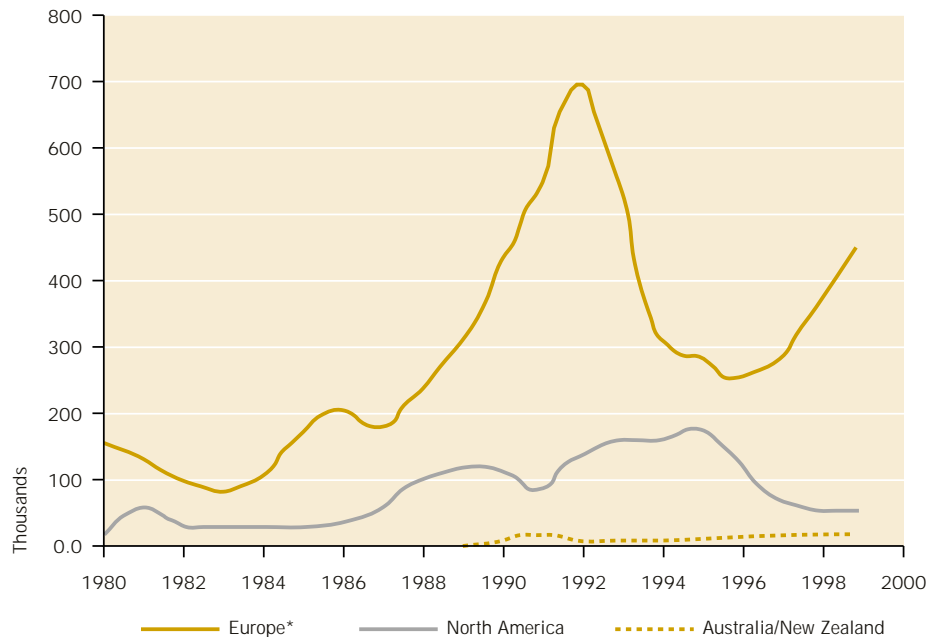
people seeking better economic and social opportunities world-wide were other important factors.²

These new, non-European asylum seekers rarely fitted the Cold War mould. Tamil asylum seekers from Sri Lanka were among the first groups to arrive independently in large numbers, and they raised particular problems for European states during the 1980s. They included people fleeing for a variety of reasons, including persecution and the indiscriminate effects of an ill-understood civil war.³ Their arrival generated fierce debate about states' obligations towards people who travel half-way around the world to seek asylum, when they might have found an alternative closer to home—in this case in Tamil Nadu in India. Many European governments suspected, often unfairly, that the primary motivation of these asylum seekers was economic. Most European governments imposed visa requirements on Sri Lankan nationals as a result. There was great controversy, however, over proposals to return the Tamil asylum seekers to a place still riven with fierce civil war.

Set against the number of refugees in the developing world, the proportion arriving in Western Europe was still modest. But the case-by-case determination of refugee status required by European asylum procedures, and the need to provide at least minimal social assistance to the asylum seekers, meant that the administrative

Asylum applications submitted in Europe, North America, Australia and New Zealand, 1980–2000

Figure 7.1



* For details of countries included, see Annex 10.

Source: Governments.

and financial burden escalated. According to one estimate, the total cost of administering asylum procedures and providing social welfare benefits to refugee claimants in 13 of the major industrialized states rose from around US\$500 million in 1983 to around US\$7 billion in 1990.⁴ The latter figure represented over 12 times the global UNHCR budget that year.

Asylum after the fall of the Berlin Wall

The fall of the Berlin Wall in November 1989 put the international refugee protection system in Western Europe under even more serious pressure than had been the case during the 1980s. Suddenly, people from the former communist bloc were free to leave their countries. There were concerns about uncontrollable floods of people pouring into Western Europe. The chaotic exodus from Albania to Italy during the 1990s—particularly in 1991 and 1997—and the mass arrival of refugees from the former Yugoslavia from 1992 brought home to Western European governments the fact that they were not immune from forced population movements originating in their immediate vicinity.

Asylum applications in Western Europe peaked at nearly 700,000 in 1992. As a result of its liberal asylum laws and its geographic position, the Federal Republic of Germany received by far the largest proportion of them—over 60 per cent that year, nearly half of whom were Romanians and Bulgarians. Most did not have a well-founded fear of persecution, but were anxious to exercise their new-found freedom of movement. They quickly learned that the right to leave one's country is not automatically matched by a right to enter another country.

A new defensiveness appeared in Western European countries' asylum policies. Receiving states were not prepared for such large numbers. Existing capacity was quickly overwhelmed, and states proved unwilling to commit resources commensurate with the scale of the problem. At the same time, tens of thousands of asylum seekers also arrived from countries outside Europe, including Afghanistan, Angola, Ghana, Iran, Iraq, Nigeria, Pakistan, Somalia, Sri Lanka, Viet Nam and Zaire.

The prevailing refugee policy framework, with its emphasis on assessment of each individual claim, appeared increasingly ill-equipped to cope. In 1992, High Commissioner Sadako Ogata voiced her concern about the future of refugee protection: 'As we move into the 1990s there is no doubt that Europe is at a crossroads. Will Europe turn its back on those who are forced to move, or will it strengthen its long tradition of safeguarding the rights of the oppressed and the uprooted? Will Europe build new walls, knowing that walls did not stop those who were fleeing totalitarian persecution in the past?'⁵

It was in this context that European governments decided to deal with the large-scale influx of asylum seekers from the wars in the former Yugoslavia by establishing temporary protection regimes. In the Federal Republic of Germany, which hosted the largest numbers of refugees from the region, the government tried in vain to persuade other European states to engage in 'burden-sharing' as a complement to temporary protection regimes. Then, in 1993, Germany amended its constitution to

Box 7.1

European Union asylum policy

Attempts by member states of the European Union (EU) to create an 'ever closer union' have included moves to harmonize their policies on immigration and asylum. The documents outlined below are a combination of binding conventions and non-binding inter-governmental agreements to which most, but not always all, member states are party.

1986 Single European Act

This committed European Community member states to creating a single internal market by the end of 1992. Although this has been achieved for goods, services and capital, free movement of people has proved more elusive.

1990 Dublin Convention

This established common criteria for EU member states to determine the state responsible for examining an asylum request. It seeks to put an end to the practice of asylum seekers moving or being moved from country to country with their claim either being assessed several times or not at all. It entered into force for all 15 EU member states on 1 September 1997, although states began to implement it well before then.

1990 Schengen Convention

This seeks to reinforce external border controls to permit free movement within participating states. It includes provisions to strengthen police and judicial cooperation and to introduce common visa policies and carrier sanctions. It followed the similar 1985 Schengen Agreement between six EU member states. The Convention came into force on 1 September 1993 and began to be implemented in individual states from March 1995. All EU member states except Denmark, Ireland and the United Kingdom are parties.

1992 Treaty on European Union

This treaty—also known as the Maastricht Treaty—established the European Union. It incorporated

existing European Community issues and increased inter-governmental cooperation on issues including 'justice and home affairs'. This includes measures to harmonize asylum and immigration policies and the introduction of the concept of EU citizenship. It came into force on 1 November 1993.

1992 London Resolutions

European Community ministers responsible for immigration approved three resolutions in London in 1992. They defined 'manifestly unfounded' asylum applications, host (or safe) third countries which asylum seekers transited and to which they can be returned, and countries where there is generally no serious risk of persecution. These concepts were aimed at accelerating procedures to assess asylum claims. The resolutions are not binding, but they have been applied in EU member states and further afield.

Other EU Council resolutions and recommendations

During the 1990s, the EU Council of Ministers approved a series of resolutions, recommendations and joint positions, which are also not legally binding. Among the instruments adopted are two recommendations on readmission agreements, approved in 1994 and 1995. These established a model agreement for returning asylum seekers whose applications for asylum had been rejected or deemed unfounded. Between 1993 and 1996, a series of 'burden-sharing' measures set out principles of solidarity in situations of large-scale influx. In June 1995, the Council of Ministers approved a resolution on minimum guarantees for asylum procedures, outlining procedural rights and obligations. In March 1996, a Joint Position was agreed on the harmonized application of the definition of the term 'refugee'. Many of these measures have been described by critics as representing harmonization on the basis of a lowest common denominator.

1997 Treaty of Amsterdam

This includes a commitment by member states to develop common immigration and asylum policies within five years. Until then, decision-making will continue to be on an inter-governmental basis, thus allowing some states, such as those party to the Schengen Convention, to opt for closer co-operation even if others do not wish to do so. After five years, the development of common asylum policies will come under the Council of Ministers' normal decision-making procedures, where unanimity is not always required. The European Parliament has acquired a limited consultative role in developing these policies, while the European Court of Justice is permitted to issue preliminary rulings and to act as a last court of appeal in interpreting the relevant EU treaty provisions. The treaty came into effect on 1 May 1999.

1999 European Council meeting in Tampere

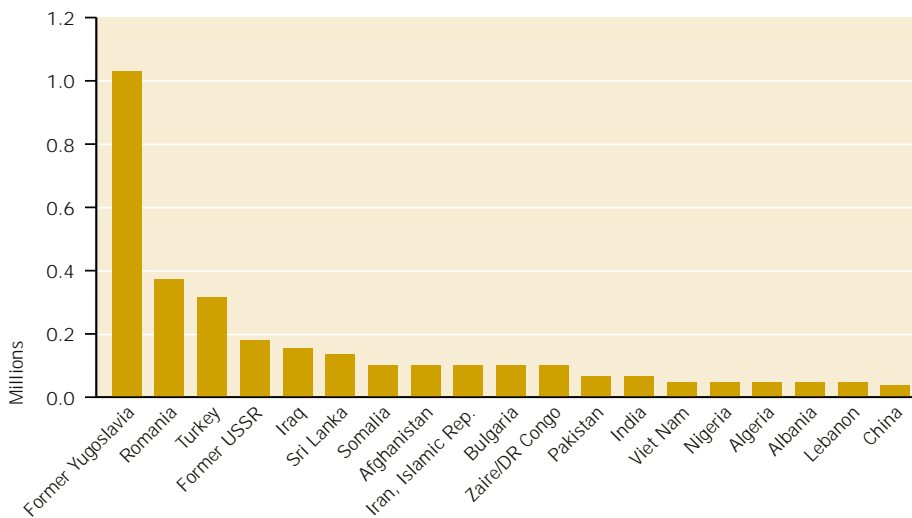
In October 1999, EU heads of state and government meeting in Tampere, Finland, reaffirmed the importance they attached 'to absolute respect of the right to seek asylum'.¹ They 'agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the [1951 UN Refugee] Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*'. This common European asylum system was initially to include 'a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status'. Subsequently, 'measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection' were to be agreed.

remove its unqualified guarantee of a right to asylum, prompting the development of new policies aimed at both limiting the admission of asylum seekers and facilitating their return to countries through which they passed. Other governments across Europe introduced similar restrictive measures, based on three resolutions approved by European Community ministers responsible for immigration in December 1992 [see Box 7.1].

As channels for legal entry began to close, asylum seekers, along with other migrants, turned increasingly to smugglers and traffickers to reach Western Europe. Many used false documents or destroyed their papers en route. This, in turn, reinforced public scepticism about the real motives of asylum seekers. In an effort to counter the growing hostility toward asylum seekers, support groups made efforts to promote more positive images of refugees and to seek public support for refugee protection. Throughout this period, these advocacy groups were reluctant to acknowledge the need for unsuccessful asylum seekers to be returned to their countries of origin—a factor which helped to polarize the debate on asylum issues. At the same time, certain political parties and elements of the media often appeared to be more concerned with playing to racist and xenophobic, anti-immigrant sentiments in an effort to win votes or boost sales. In October 1998, for example, one local newspaper in the United Kingdom, the *Dover Express*, went as far as to describe asylum seekers as ‘human sewage’.⁶

Main country/territory of origin of asylum seekers in Western Europe, 1990–99*

Figure 7.2



* For details of countries included, see Annex 11.

'Fortress Europe'

The new, restrictive policies introduced in Western Europe, which were aimed at combating illegal immigration and abuse of asylum systems, shifted the balance between refugee protection and immigration control. The term 'fortress Europe' became a shorthand for this phenomenon.

Four types of measures were taken to tackle the 'mixed flows' of irregular migrants and refugees with which European countries were confronted. These measures tended to affect both groups indiscriminately and had the effect of making it more difficult for people seeking protection to reach a country where they could ask for it. UNHCR warned as early as 1986: 'Piecemeal restrictive measures, unilaterally adopted, cannot suffice. Their consequence, more often than not, is to shift rather than lift the burden and to set in motion a self-defeating chain of events . . . In the longer term they cannot fail to bring about a general lowering of accepted international standards.'⁷

First, countries sought to adopt 'non-arrival' policies aimed at preventing improperly documented aliens, who included potential asylum seekers, from reaching Europe. Visa requirements and 'carrier sanctions'—fines against transport companies for bringing in passengers without proper documentation—became widespread. Some countries began to post immigration liaison officers abroad to 'intercept' improperly documented migrants and to prevent them from travelling to these countries.

Second, for those asylum seekers who managed to arrive at the borders despite these efforts, 'diversion' policies were designed, shifting to other countries the responsibility for assessing asylum seekers' claims and providing protection. This approach was made possible not least by the emergence of Central European countries as places where refugees could, at least in theory, find protection. After 1989, most of these countries rapidly acceded to the 1951 UN Refugee Convention and, during the 1990s, UNHCR, the Council of Europe and other agencies, and Western European governments devoted considerable effort to building the capacity of these countries to cope with asylum seekers and refugees.

As a result, Western European governments drew up lists of 'safe third countries' to the east of the European Union, creating a kind of 'buffer zone'.⁸ They concluded re-admission agreements on the return of illegal entrants with Central and Eastern European and other governments, and began sending asylum seekers back to 'safe' countries through which they had travelled. These agreements rarely contained any particular guarantees for asylum seekers. They created a risk of 'chain deportations', whereby asylum seekers could be passed from one state to another, without an assurance that their request for protection would eventually be examined. UNHCR described this practice as 'clearly contrary to basic protection principles' and as not providing sufficient protection against *refoulement*.⁹ Not surprisingly, the Central and Eastern European countries, with the encouragement of their neighbours to the west, themselves introduced similar controls to reduce the number of arrivals.

Third, governments increasingly opted for a restrictive application of the 1951 UN Refugee Convention in an effort to exclude certain categories of claimants from the scope of the refugee definition. In some countries this continues to result in situations where people who have suffered persecution at the hands of ‘non-state agents’ are not considered to be refugees, and are often offered a lesser form of protection with fewer rights and benefits [see Box 7.2]. As a result of this and other factors, the proportion of applicants recognized as refugees under the Convention has declined. Many of those denied refugee status are given the possibility of remaining in the countries where they applied for asylum, but with a lesser status than formal refugee status granted under the 1951 Convention. Examples include ‘B’ status’, ‘humanitarian status’ and ‘exceptional leave to remain’.¹⁰ Thus, their need for protection is acknowledged, but the receiving countries’ obligations—especially with regard to family reunification and the issuing of Convention travel documents—are kept to a minimum. The multiplicity of statuses gave rise to considerable confusion in the public mind about who is a ‘real’ refugee.

Finally, various ‘deterrent’ measures were introduced, including the increasingly widespread automatic detention of asylum seekers, the denial of social assistance, and the restriction of access to employment.¹¹ In addition, restrictions were placed on the right of refugees already in the country to bring their family members to join them.

Searching for a common European Union policy

Western European countries’ efforts to adapt their asylum and immigration policies coincided with efforts to achieve closer economic and political integration through the creation of a single European market. This involved the removal of all internal barriers to commerce and the free movement of people within the European Community, which became the European Union when the Maastricht Treaty on European Union entered into force in 1993. The wish to remove obstacles to trade and other flows within the European Union went in parallel with the desire to maintain control over the movement of people from non-member countries. At the same time, governments feared that freedom of movement within the European Union would create numerous new problems in the immigration and asylum arena. The result was a complex and protracted process, as the 12—and later 15—member states of the European Union tried to ‘harmonize’ their policies relating to border controls, immigration and asylum [see Box 7.1].¹²

Much of the immigration and asylum-related activity during the 1990s focused on coordinating and tightening member states’ admission policies. The 1990 Schengen Convention included provisions for reinforced police and judicial cooperation, common visa policies, and the strengthening of carrier sanctions. The 1990 Dublin Convention listed criteria to determine, among contracting parties, which member state was responsible for examining an asylum request. It was designed to prevent asylum seekers from ‘shopping around’ for the ‘best’ country to hear their claim, and to solve the problem of asylum seekers for whom no country was willing to take responsibility, a phenomenon known as ‘refugees in orbit’.

Box 7.2

Non-state agents of persecution

Picture yourself in a village where government troops and rebels harass you, demand food, beat up your family and threaten to kill you or cut off your hands. You decide to flee from an intolerable situation and request asylum in another country. When you describe your plight to an immigration officer, you explain that the most serious threats and harassment came from the rebels. The immigration officer looks gravely at you and says that you are not a real refugee because it was not the government forces that persecuted you, but an armed group which is not an instrument of the state. Of course, you could not care less whether you are tortured by one or the other. But some countries do. They do not recognize as refugees people who are persecuted by so-called 'non-state agents'.

The 1951 UN Refugee Convention provides protection against persecution. Persecution is not defined, nor is anything said about the perpetrators of such persecution. This has led to much debate about the extent of the Convention's protection. When one speaks of persecution, one often thinks of sinister state services, the use of torture by police officers, or soldiers oppressing civilians. At the time of the Holocaust, an entire state machinery was engaged in the persecution of particular people. When the drafters of the Convention formulated the definition of a 'refugee', they were no doubt thinking primarily of persecution by state services.

One of the main purposes of the 1951 UN Refugee Convention is to prevent people from being returned to places where they may suffer serious violations of human rights or persecution. It does not say that a state must be responsible for the persecution. Any group which holds substantial power in a country can persecute. UNHCR has therefore con-

sistently advanced the view that the Convention applies to any person who has a well-founded fear of persecution, regardless of who is responsible for the persecution. UNHCR's position is shared by the overwhelming majority of the states party to the Convention. In some countries, however, claims to refugee status will fail if the feared persecution emanates from non-state actors and the government of the country of origin is unable or unwilling to provide protection. This minority view is held by France, Germany, Italy and Switzerland.

Other international human rights treaties, such as the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, make no distinction between the state and other actors who are responsible for torture or other inhuman or degrading treatment. A person should be protected against such treatment regardless of who is the perpetrator.

The power of enforcement through police and armed forces no longer rests exclusively with states. A country like Somalia does not have a government with firm control over its territory and its people; indeed, it has no government that enjoys international recognition. Instead, it has fiefdoms where armed bands and warlords control different stretches of land. The dominant political and military power in Afghanistan, the Taliban, is not recognized by some other countries as a legitimate state agent. In countries such as Angola, Colombia and Sri Lanka, groups other than the government exercise power over entire regions.

Persecution is not the exclusive domain of the state, or even of non-governmental armed groups. It can

also be perpetrated by a sect, a clan, or a family. Traditional customs may amount to persecution. If the government is unable or unwilling to suppress such customs, people may be forced to flee their country to save their life, liberty or physical integrity. In 1985, the UNHCR Executive Committee recognized that the vulnerable situation of women frequently exposes them to physical violence, sexual abuse and discrimination. It agreed that women who face harsh or inhuman treatment because they have transgressed the social mores of the society in which they live may be included under the terms of the 1951 UN Refugee Convention.

An example of gender-based persecution is the case of two Pakistani women who claimed refugee status in the United Kingdom on the grounds that they were maltreated to the point of being persecuted by their husbands. According to the House of Lords, the highest panel of judges in the United Kingdom, they were refugees under the Convention since the government of Pakistan was unwilling to do anything to protect them due to the fact that they were women.ⁱⁱ

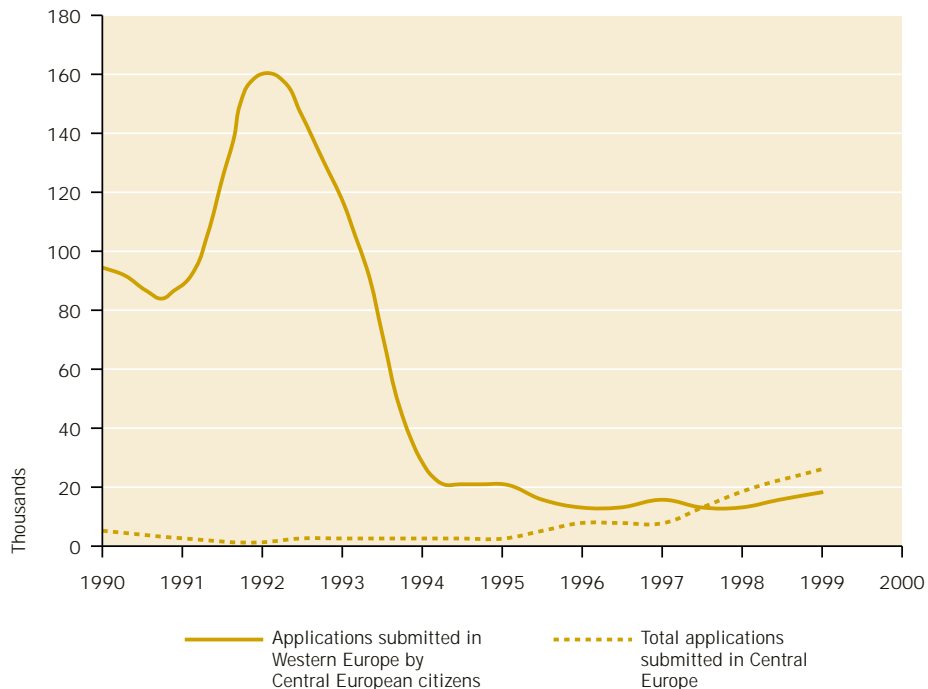
Societies which discriminate against women or homosexuals may condone persecution on the grounds of sex or sexual orientation. Some societies permit, even encourage, female genital mutilation. For certain women or girls, this custom may amount to persecution. If they refuse to submit to the custom and, by doing so, 'transgress the social mores', will the state step in to protect them? In the absence of state protection, their only way to avoid serious harm is to flee their country and become refugees.

While the Schengen and Dublin Conventions are binding on states which have ratified them, other harmonization activities have taken place outside a binding framework in a far from transparent inter-governmental process. Even so, agreement among European Union countries more often than not could only be reached at the level of the lowest common denominator. In one of the most crucial discussions, European Union governments sought to reach agreement on how to interpret the refugee definition given in the 1951 UN Refugee Convention. Largely because of Germany's narrow interpretation of the definition, and France's desire to limit its obligations vis-à-vis Algerians fleeing their country, the European Union's March 1996 Joint Position on a harmonized application of the definition of the term 'refugee' takes a restrictive approach, regarding persecution as being 'generally' at the hands of the state.¹³ As a result, the treatment of persons fleeing persecution perpetrated by non-state actors continues to differ from one state to another. Indeed, there has been considerable variation among member states in their implementation of supposedly harmonized policies on asylum.¹⁴

Within the European Union, some countries receive significantly higher numbers of asylum applications than others. Having taken in 350,000 Bosnians in the early

Central European asylum applications, 1990-99*

Figure 7.3



* Western Europe comprises the European Union, Norway and Switzerland. Central Europe comprises Bulgaria, Czech Republic, Hungary, Poland, Romania and Slovakia.
Source: Governments.

1990s, the German government pushed hard for some kind of burden-sharing arrangement. In 1995, the European Union adopted a non-binding Resolution on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis.¹⁵ The mass outflow of refugees from Bosnia and Herzegovina in the mid-1990s and from Kosovo in the late 1990s meant that the issue of burden-sharing was a prominent issue in Europe throughout the decade. It remains a contentious one. Germany's share of Western Europe's asylum applications nevertheless declined from 63 per cent at the beginning of the 1990s to 23 per cent in 1999.

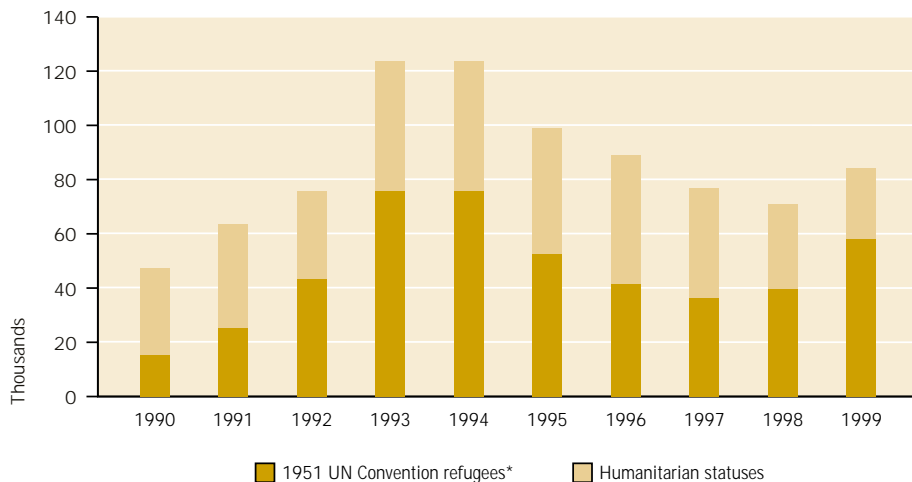
The process of harmonizing asylum policies in Europe continues. UNHCR has endorsed these efforts where they have been aimed at making asylum systems fairer, more efficient and more predictable, not only for the benefit of governments but also for refugees and asylum seekers themselves. In many cases, however, it is the standard of the lowest common denominator which has prevailed, resulting in diminished rather than enhanced protection for refugees.

Temporary protection and the former Yugoslavia

Until the 1990s, it was generally assumed that when individuals were recognized as refugees in Europe, they would be able to remain in their country of asylum indefinitely. During the conflict in the former Yugoslavia, however, a new approach to asylum was introduced whereby states offered temporary protection to people fleeing the conflict, meaning that they would be expected to return once the conflict was over. UNHCR endorses temporary protection as an emergency response to an

Annual number of asylum seekers granted asylum in Europe, 1990–99

Figure 7.4



* 1999 figure excludes Austria and France. For further details and explanations, see Annex 10.
Source: Governments.

Box 7.3 Funding trends

Global government spending on humanitarian assistance has increased steadily in volume over the last 50 years. It rose dramatically in the early 1990s, peaking at US\$5.7 billion in 1994. As a share of gross domestic product (GDP), however, humanitarian assistance dropped between 1990 and 1998 from 0.03 per cent to 0.02 per cent, or 20 cents out of each US\$1,000.ⁱⁱⁱ

The proportion of official development assistance (ODA) allocated by governments to humanitarian assistance, as opposed to long-term development, also grew significantly in the early 1990s. At its height, in 1994, it represented 10 per cent of total ODA. The proportion fell in the latter part of the decade, however, dropping to around six per cent of total ODA by 1998.^{iv}

While the total volume of government funding for humanitarian operations has increased, the proportion of this channelled through international

organizations such as UNHCR, as opposed to that given directly to governments of recipient countries, or channelled through non-governmental organizations in the donor's own country, has decreased. Increasingly, governments are giving priority to bilateral funding arrangements rather than multilateral assistance.

UNHCR expenditure and funding sources

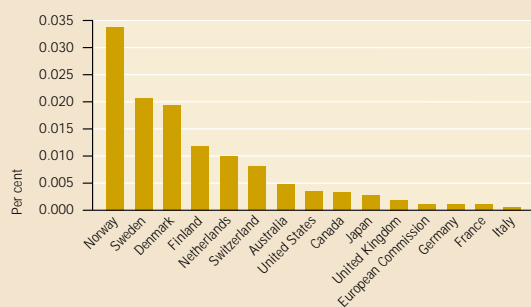
UNHCR's budget has risen dramatically over the 50 years of its existence, as the extent and scope of the organization's work has expanded. From a budget of only US\$300,000 in 1951, annual expenditure grew to around US\$100 million in the mid-1970s. Two significant increases then took place in the late 1970s and early 1990s.

The first major increase was between 1978 and 1980, when expenditure more than tripled, from US\$145 million to US\$510 million.

This was at the time of the major refugee emergencies in Indochina. The second, equally large increase, was between 1990 and 1993, when expenditure more than doubled, from US\$564 million to US\$1.3 billion. This increase was mainly because of the large repatriation operations at the beginning of the decade and the major relief operations in northern Iraq and the former Yugoslavia. Expenditure subsequently dropped to US\$887 million in 1998, and then rose to just over US\$1 billion in 1999 as a result of the Kosovo crisis. None of these figures take into account contributions of goods such as tents and medicines, or assistance with transportation and other services. If these were taken into account, the figures would be significantly higher.

UNHCR's relative spending in different regions has reflected the changing geographical focus and operational scope of the organization. In the early 1960s, more than half of UNHCR's expenditure was on

Contributions to UNHCR as a percentage of GDP by major donors, 1999*



* 1998 gross domestic product.
Source: World Bank, *World Development Report 1999/2000*, pp. 252-3; UNHCR.

Figure 7.5

Top 15 contributors to UNHCR, 1980-99

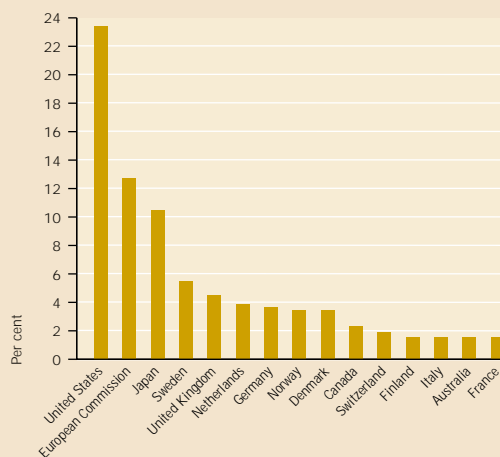


Figure 7.6

programmes for European refugees still remaining from the Second World War. Less than a decade later, European spending accounted for only seven per cent of the total budget. By 1999, UNHCR had programmes in over 100 countries. In the 1990s, UNHCR spent an average of US\$40 to US\$50 per year for each 'person of concern'—whether refugee, asylum seeker, returnee, internally displaced person or other—although there were significant disparities in per capita expenditure from region to region.

UNHCR's main source of funding has always been voluntary contributions, mainly from governments. During the 1990s, an average of less than three per cent of the organization's total annual income came from the UN regular budget. Most government funding comes from a small number of key industrialized states. In 1999, for example, North America, Japan and western European countries accounted for 97 per cent of

all government contributions to UNHCR.

Increasingly, donor countries tend to earmark funds pledged to UNHCR for particular countries, programmes or projects, depending on their national priorities. In 1999, only 20 per cent of contributions were not earmarked, significantly reducing the organization's flexibility to use funds where they are most needed. In 1999, UNHCR received just over 90 per cent of the funds requested for programmes in the former Yugoslavia, while it received only around 60 per cent of those requested for some of its programmes in Africa. Indeed, the international community spent some US\$120 per person of concern to UNHCR in the former Yugoslavia during 1999, which was more than three times the amount spent in West Africa (about US\$35 per person). Even after taking into account the different costs due to climatic differences, the disparity remains great.

Like other humanitarian organizations, UNHCR is attempting to broaden its donor base. For instance, UNHCR is encouraging the private sector to donate funds for humanitarian programmes and to participate in post-conflict reconstruction. In 1999, in response largely to events in Kosovo and East Timor, UNHCR received an estimated US\$30 million in contributions from the general public, foundations, corporations and non-governmental organizations. In some cases, companies have offered their services free of charge in refugee emergencies. During the Kosovo crisis, for example, Microsoft provided UNHCR with computer equipment and software that was used to register the refugees. In approaching commercial corporations and the private sector in general, UNHCR has emphasized its belief that meeting the basic needs of refugees and displaced persons is a global responsibility.

UNHCR expenditure, 1950–2000*

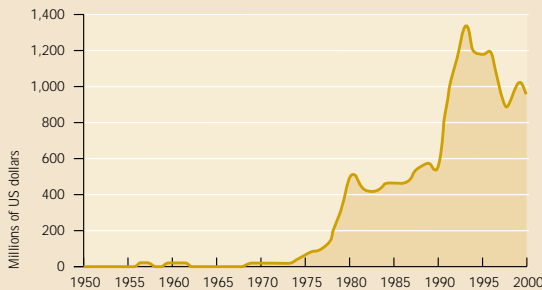


Figure 7.7

UNHCR expenditure by region, 1990–2000*

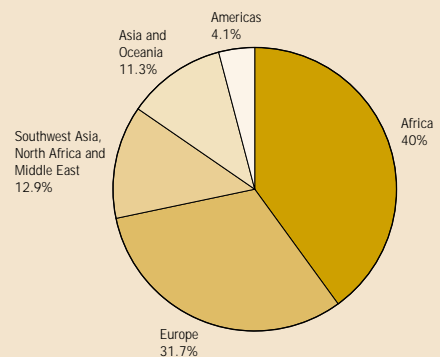


Figure 7.8

* This includes United Nations regular budget, general programmes and special programmes. Projected figure for 2000.

* Actual expenditure for 1990–99 and projections for 2000.

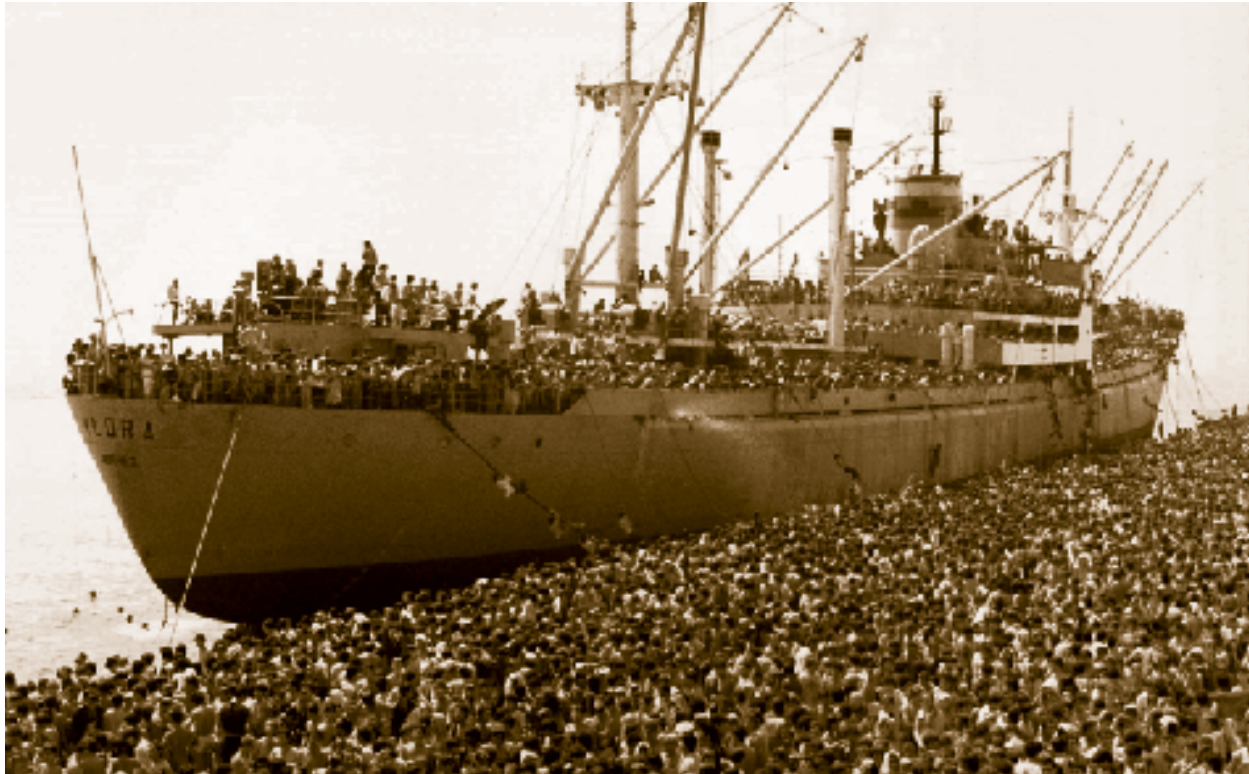
overwhelming situation, where there are self-evident protection needs and where there is little or no possibility of determining such needs on an individual basis in the short term. The organization considers that the purpose of temporary protection is to ensure immediate access to safety and the protection of basic human rights, including protection from *refoulement*, in countries directly affected by a large-scale influx. Temporary protection may also serve to enhance prospects for a coherent regional response, beyond the immediately affected areas.¹⁶

In 1992, UNHCR called on states to offer at least temporary protection to the hundreds of thousands of people fleeing the conflict in the former Yugoslavia. Reaction to UNHCR's appeal varied. As the exodus continued, tensions over the reception of the refugees in Western Europe grew. In 1993, European Union governments were the first to suggest the creation of 'safe areas' in Bosnia and Herzegovina. They agreed that protection and assistance 'should wherever possible be provided in the region of origin' and that 'displaced persons should be helped to remain in safe areas situated as close as possible to their homes'.¹⁷ The massacres which later took place, when Bosnian Serb forces overran the 'safe areas' of Srebrenica and Zepa in 1995, showed just how precarious this approach can be.¹⁸

When temporary protection was offered in Western Europe to refugees from the former Yugoslavia, it was not without problems.¹⁹ Questions were raised regarding the entitlements of people who had been granted temporary protection, as well as the extent of receiving states' responsibilities towards the refugees once the war was over. Even before the ink was dry on the December 1995 Dayton Peace Agreement, a vigorous debate was under way about return. Should it be voluntary or enforced? What constituted return 'in safety and dignity'? Should refugees be required to return if they could not go back to their home areas but would have to settle in another part of the country? The controversy intensified in 1996, when it became clear that large-scale, voluntary returns were not likely to take place quickly.

When open conflict erupted in Kosovo in both 1998 and 1999, European governments were at first reluctant to repeat the temporary protection experiment. They continued to channel asylum seekers from Kosovo into regular status determination procedures, as had been the case throughout the 1990s. The numbers rose rapidly from early 1999, and when the NATO bombing of the Federal Republic of Yugoslavia began on 24 March 1999, a mass exodus of Kosovo Albanians to Albania and the former Yugoslav Republic of Macedonia began. Fears mounted of a new, uncontrollable flow of refugees from the Balkans.

In an effort to keep the door of the former Yugoslav Republic of Macedonia open to the fleeing Kosovo Albanians, and thereby to preserve asylum in the region for the majority of the refugees, a Humanitarian Evacuation Programme was launched, in which UNHCR played a leading role. During May and June 1999, approximately 92,000 Kosovo Albanian refugees were flown out of the former Yugoslav Republic of Macedonia to more than two dozen receiving countries. Although the majority returned home by the end of the year, this particular example of international burden sharing appears likely to remain the exception rather than the rule.



Albanians on the quayside of the port of Brindisi, southern Italy. Thousands of Albanians fled the political upheavals in their country in the early 1990s. (ASSOCIATED PRESS/1991)

The Treaty of Amsterdam and beyond

Despite the resources devoted to border control measures, the enforcement approach to migration and asylum has not solved the problem of large numbers of migrants entering Europe in an irregular manner. Instead, it has tended to drive both migrants and asylum seekers into the hands of smugglers and traffickers, compounding the problems for governments and often putting the individuals themselves at great risk.²⁰

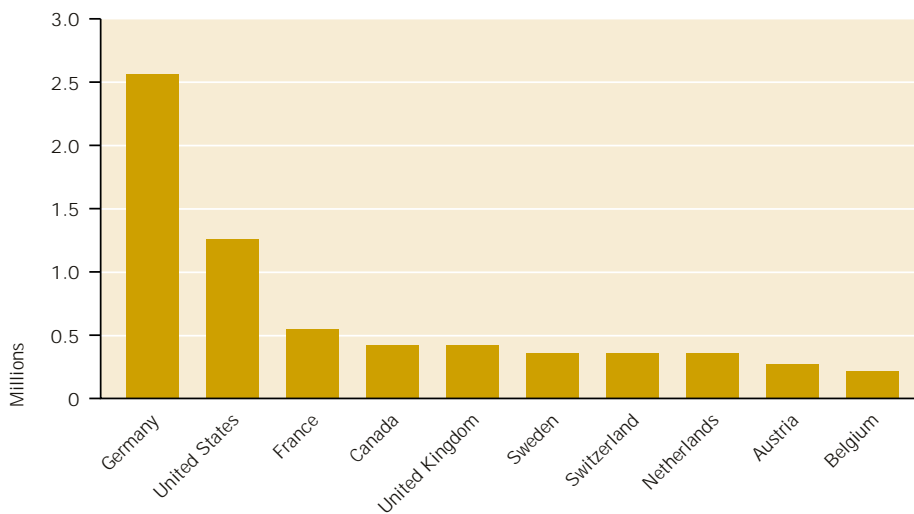
In their attempt to control this complex issue, European Union governments have taken further measures to strengthen their harmonization efforts. The Treaty of Amsterdam, which was signed in 1997 and which came into force in May 1999, represents a milestone in the development of a European Union asylum policy. It sets out an agenda to move asylum matters over a five-year period from an area where they are subject to inter-governmental agreement by the member states to one where policy development and decision-taking clearly fall within the competence of the European Union institutions. This development should allow UNHCR and other organizations to work more closely and systematically with the institutions of the European Union, including the European Commission, which under the Treaty has greater powers to initiate common asylum policy measures.

At the same time, however, governments' frustration over their inability to control migration has led to some radical proposals, such as the one contained in a 'migration strategy' paper prepared during the second half of 1998 under the aegis of the Austrian presidency of the European Union. In addition to proposing a 'defence line' to protect Europe from illegal migrants seeking employment or asylum, the strategy paper called for the 1951 UN Refugee Convention to be amended or replaced altogether. The implication was that the Convention was to blame for the inability of governments to curb unwanted migration—a purpose for which it was never designed. Widespread criticism of the paper prompted its withdrawal, but similar rumblings have been heard elsewhere in Europe and as far afield as Australia.

In contrast to these developments, the heads of state and government of the European Union, meeting in October 1999 in Tampere, Finland, reaffirmed their 'absolute respect of the right to seek asylum', the need for common policies which 'offer guarantees to those who seek protection in or access to the European Union', and their commitment to establish a common European asylum system 'based on the full and inclusive application of the Geneva [Refugee] Convention'.²¹ European leaders outlined a range of measures to be taken, ranging from common minimum conditions of reception of asylum seekers to measures on subsidiary forms of protection and temporary protection. They included a 'comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit'. The challenge now is to ensure that these assurances are translated into reality—a difficult task given the range of measures which the same governments

Asylum applications submitted in main receiving industrialized states, 1980–99*

Figure 7.9



* Applications to the United Kingdom and United States include joint applications for more than one person. Applications to all other countries are for one person only.
Source: Governments.

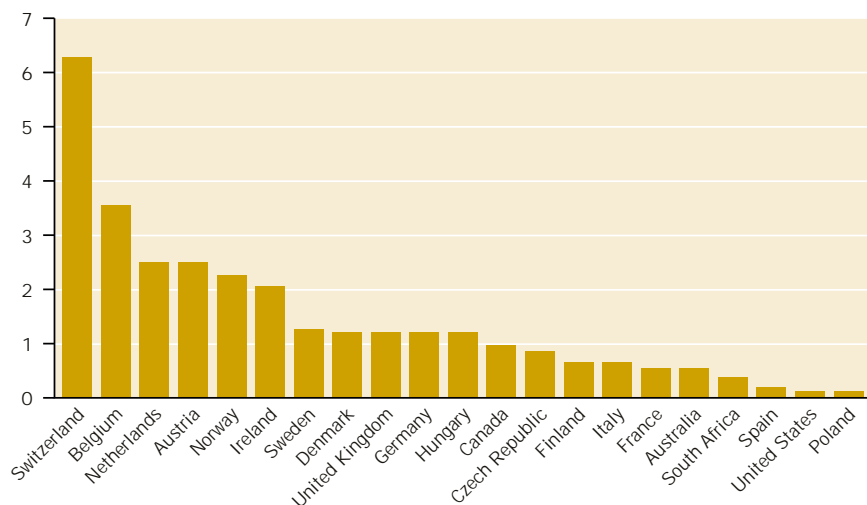
have introduced to prevent asylum seekers from gaining access to their territory. UNHCR has urged European countries 'to ensure that policies and practices designed to control irregular immigration do not jeopardize the rights of refugees and asylum seekers'.²²

In parallel with these developments, the Council of Europe, whose membership includes the vast majority of European states, not just the 15 European Union member states, has worked to strengthen the protection of refugee rights as basic human rights. In 1991, the European Court of Human Rights clearly established the principle that asylum seekers should not be returned to a country where they would be exposed to the danger of torture or ill-treatment.²³ Provisions of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, regarding issues such as detention, the right to family life and the right to effective remedy, have also been shown to apply to asylum seekers and refugees. As such, the work of the Council of Europe underpins and complements that of the European Union and also enhances the rights of refugees and asylum seekers across the continent.

Another key factor in the future of refugee protection in Europe will be the ability of countries in Central and Eastern Europe to respond to requests for protection. In the decade since the end of the Cold War, many of these countries have made huge strides in establishing their own asylum systems and are now no longer simply countries through which asylum seekers pass. In 1999, for example, Hungary received more asylum applications than Denmark and Finland combined [see also Figure 7.3].

Number of asylum applications per 1,000 inhabitants submitted in main receiving industrialized states, 1999*

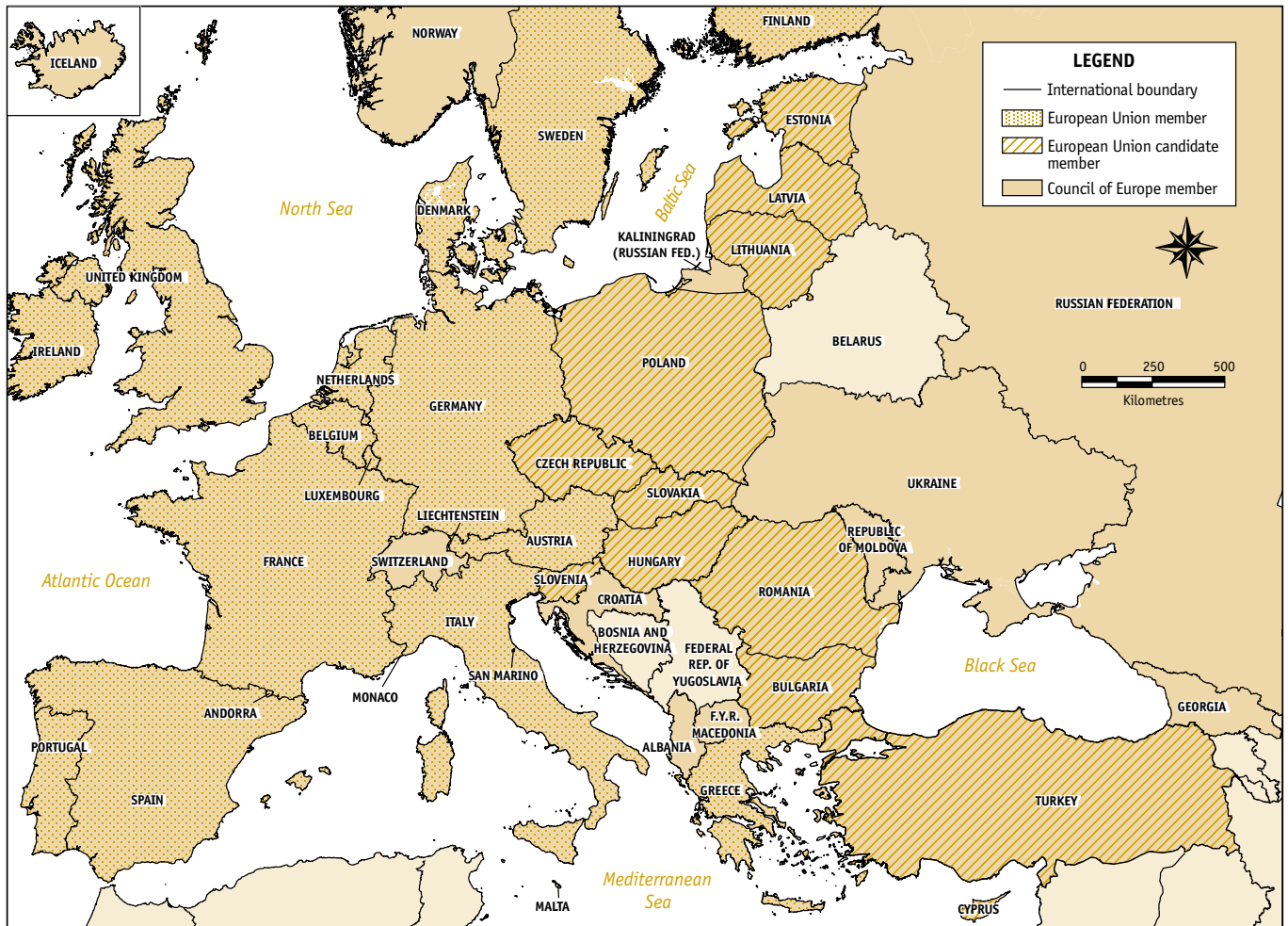
Figure 7.10



* Applications to the United Kingdom and United States include joint applications for more than one person. Applications to all other countries are for one person only. Industrialized countries receiving 2,500 or more asylum applications during 1999. For details and explanations, see Annex 10.

Political map of Europe, 1999

Map 7.1



At the end of the 1990s, Europe again stood at a crossroads. In the years ahead, changing demographic trends may make governments more receptive towards immigration. Some analysts maintain that as a result of low birth rates and ageing populations, significant numbers of immigrants would be needed over the next half-century, just to keep the ratio of retired people to active workers at current levels. A recent report by the United Nations Population Division estimated that, at current birth and death rates, an average of 1.4 million immigrants per year would be needed in the European Union between 1995 and 2050, for it to keep the ratio of the working population to the non-working population constant at the 1995 level. The report also mentions that, according to recent national estimates, net migration into the European Union amounted to an average of 857,000 people per year from 1990 to 1998.²⁴

If governments react by significantly easing restrictions on legal immigration, they may discover that this takes some of the pressure off the asylum channel, and public and political support for the institution of asylum could be strengthened. Alternatively, an increase in immigration may lead to more irregular migration. Nevertheless, if migration possibilities remain elusive, there is every reason to expect that both asylum seekers and migrants will continue to crowd the asylum process, and the institution of asylum will remain under strain. The changing dynamics of the migration debate may well determine the future of refugee protection in Europe.

Resettlement and asylum in North America

Unlike Europe, the United States and Canada are traditional countries of immigration. As such, they are accustomed to planning for the arrival of newcomers, and to integrating them into their societies. Refugees have long been regarded as one category of immigrants, and many of those displaced by the Second World War found new homes in North America in the framework of ongoing immigration programmes. Both countries have long had well-defined refugee intakes and, in both, the government and the voluntary sector work closely together to resettle refugees.

During the Cold War years, both the United States and Canada welcomed refugees from the communist bloc. But their geographical location, flanked by the Pacific and Atlantic Oceans, meant that it was not until the 1980s that asylum seekers—as opposed to refugees selected for resettlement—began to arrive spontaneously and in large numbers in North America. Systems designed to deal with relatively small numbers of individual asylum applications could not respond to the demand, and calls for change came from many quarters. Like their European counterparts, both the United States and Canada have struggled to find the right balance between refugee protection and immigration control, with the added challenge of having to strike the right balance between the resettlement of refugees and the admission of immigrants.

US policy towards refugees during the Cold War

Between 1975 and 1999, the United States offered permanent resettlement to more than two million refugees, including some 1.3 million Indochinese. During this period, the United States accepted more refugees for resettlement than the rest of the world put together. Throughout the Cold War years, the political value of accepting refugees from communism guaranteed European refugees a warm welcome. Despite being a key UNHCR supporter, the United States never acceded to the 1951 UN Refugee Convention, although in 1968 it acceded to its 1967 Protocol, thereby agreeing to accept most of the obligations of the 1951 Convention. From the late 1950s, US law defined a refugee as a person fleeing communism or a Middle East country, and refugee policy was almost entirely dictated by foreign policy interests.²⁵

The effect was that these people were assured protection in the United States, while others were not assured the same protection.

From the mid-1970s, the United States began to resettle large numbers of Vietnamese refugees. This resettlement programme had its roots in a sense of obligation toward former allies in Southeast Asia and in the fear that the refugee flows could destabilize the remaining non-communist countries in the region. In addition, when there was a foreign policy interest to do so, the United States admitted people as refugees directly from their countries of origin. These 'in-country' processing arrangements were used, for example, to resettle Jews and dissidents from the Soviet Union, those seeking refuge from the regimes of Nicolae Ceausescu in Romania and Fidel Castro in Cuba, as well as Vietnamese resettled under the UNHCR-sponsored Orderly Departure Programme.

In the late 1970s, members of Congress joined forces with refugee advocates in the non-governmental sector to bring about a reform of US refugee policy. The administration of President Jimmy Carter, keen to highlight human rights promotion as a centrepiece of its foreign policy, responded positively. In 1979, a new Office of the US Coordinator for Refugee Affairs was created, and the following year the 1980 Refugee Act incorporated the 1951 UN Refugee Convention definition and introduced a statutory asylum procedure. The new law did not, however, remove refugee policy entirely from presidential control. It allowed the executive branch considerable latitude in shaping refugee policy, which was often harnessed to foreign policy objectives.

A case in point concerns Salvadoran and Guatemalan asylum seekers in the 1980s. The United States denied the asylum claims of the overwhelming majority of asylum seekers from these two countries. This was at a time when the US government was accepting large numbers of refugees who were fleeing the left-wing Sandinista government in Nicaragua. US officials maintained that they were not discriminating against Salvadoran and Guatemalan nationals. Rather, they said that most of them did not qualify as refugees either because they had migrated for economic reasons or, even if their reasons were not economic, they had not suffered or did not fear individual persecution. Refugee advocates suggested that the denial of asylum was due to the fact that they were fleeing right-wing governments supported by the United States. In 1985, advocacy groups challenged the US government's treatment of Salvadoran and Guatemalan asylum seekers in the courts, alleging bias in the US determination of these claims. In 1990, the government agreed to settle the case, and to review the claims of all asylum seekers from these two countries denied asylum between 1980 and 1990.²⁶

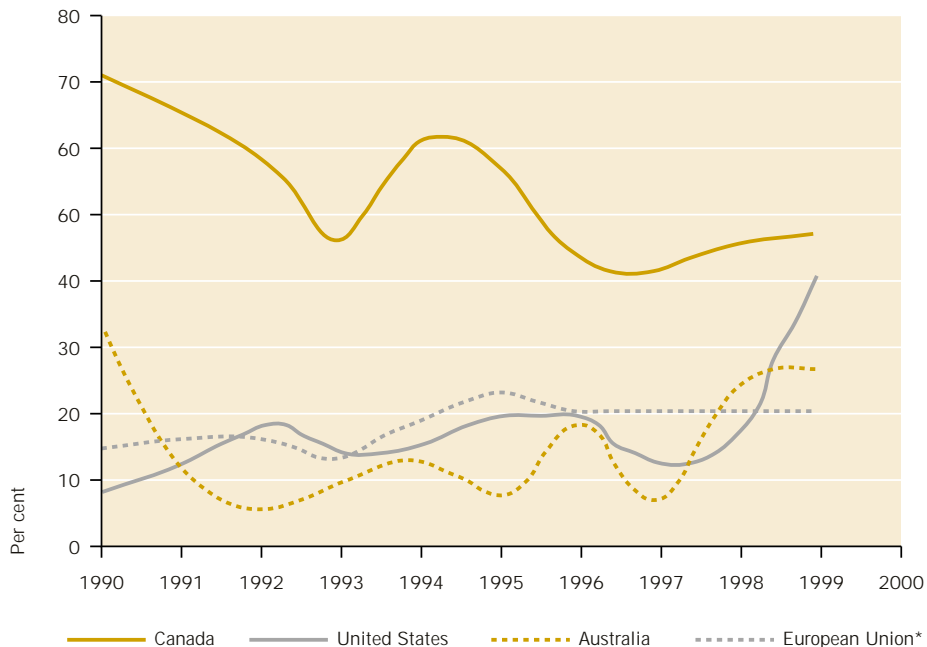
Similar allegations of bias have been raised regarding the differing treatment of Haitian and Cuban asylum seekers. For the first 25 years after Fidel Castro came to power in Cuba in 1959, the United States had an open-door policy towards asylum seekers from Cuba. This policy was severely tested in 1980, when Castro relaxed exit restrictions and over 125,000 Cubans (including over 8,000 criminals and psychiatric patients) set sail for Florida in the 'Mariel boatlift'. Despite the controversy which this provoked, most were allowed to remain. Yet during that same

period, Haitians were interdicted at sea, denied asylum in the United States, and sent back to Haiti [see Box 7.2]. While the government maintained that many Haitians were fleeing for economic reasons, refugee advocates remained critical of the US government's actions.

Emigration pressures continued to rise in Cuba, especially after the dissolution of the former Soviet Union, its principal ally, in 1991. As economic and social conditions deteriorated in Cuba, the numbers of Cubans attempting to reach the United States continued to rise. Amidst growing anti-immigrant sentiment in the United States, a new exodus of Cubans began in the early 1990s. More than 35,000 'rafters' were picked up by the US Coast Guard in mid-1994. The administration of President Bill Clinton decided to interdict the Cubans and detain them at the US naval base in Guantánamo, Cuba, and other locations in the region. To halt the flow, the US government reached a controversial agreement with Cuba in September 1994, in which Cuba reverted to its previous policy whereby Cuban citizens required a permit to leave the country, which government authorities could issue or not at their discretion.²⁷ For its part, the US government promised to admit 20,000 Cubans each year through other immigration admission channels.

Proportion of asylum seekers recognized as refugees or granted humanitarian status, 1990–2000

Figure 7.11



* 1999 figure excludes Austria, France and Luxembourg. For further details and explanations, see Annex 10.

Box 7.4

Haitian asylum seekers

Since the 1970s, successive US governments' treatment of migrants arriving by boat has severely restricted Haitians' access to asylum procedures. US government statistics show that between 1981 and 1991, over 22,000 Haitians were interdicted at sea, and that only 28 of these were allowed into the United States to pursue asylum claims.

UNHCR, other humanitarian organizations and advocacy groups have repeatedly argued that the United States' interdiction and return of Haitian asylum seekers—without the implementation of appropriate procedures to identify those with a well-founded fear of persecution—could lead to forcible return to an unsafe place (*refoulement*), which is prohibited under Article 33 of the 1951 UN Refugee Convention. In the early 1990s, advocacy groups in the United States challenged the government's interdiction policy in the federal courts, and the issue was appealed to the highest US court, the Supreme Court.

In 1993, the Supreme Court ruled that the United States' obligation under Article 33 did not apply outside US territory, where the Haitians were interdicted.^v By contrast, UNHCR maintains that the principle of *non-refoulement* applies wherever states may act.^{vi} In 1997, the Organization of American States' Inter-American Commission on Human Rights contradicted the US Supreme Court's position, declaring that the guarantees under Article 33 also apply outside national borders.^{vii}

Some advocacy groups have argued that because of its leading role in international affairs, the US government's actions towards Haitians have

contributed to the undermining of the principle of asylum elsewhere around the globe. They argue that if the world's richest nation can turn asylum seekers away, then poor nations ill-equipped to handle large refugee influxes should be able to do so too. During the 1980s, while the United States supported UNHCR's efforts to prevent countries in Southeast Asia from forcibly returning Vietnamese boat people, at least one of the governments responsible for doing so countered that what it was doing was no different from what the United States was doing to Haitians.

Double standards

Throughout the 1960s and 1970s, there was great disparity in the way in which US authorities treated asylum seekers from Cuba and Haiti. Critics argue that the US government treated Cubans as refugees because they were fleeing a communist government, while it viewed Haitians as economic migrants, despite manifest evidence of widespread persecution in Haiti. It is often pointed out, particularly by African-American political leaders, that those arriving from Cuba were predominantly white, while those from Haiti were mainly black.

For 30 years, two harsh dictators ruled Haiti: first, François Duvalier—known as 'Papa Doc'—from 1957 to 1971, and then his son Jean-Claude Duvalier—known as 'Baby Doc'—from 1971 to 1986. The country's first democratically-elected president, former priest Jean-Bertrand Aristide, took office in February 1991, but was ousted seven months later by a military coup. In July 1993, the military

leaders, in the face of international sanctions and pressure, agreed to step down but did not. They remained in power until late 1994, when the United States intervened and restored the Aristide government.

Haitians fleeing political repression, widespread human rights violations, and deteriorating economic conditions had started reaching Florida by boat in the early 1970s. Many sought asylum, though most applications were denied. Others were absorbed into Miami's growing Haitian community.

In 1978, the US government began carrying out the 'Haitian Program', aimed at deterring Haitian asylum seekers and migrants from entering the United States. Critics saw this as a programme to deny Haitians fair hearings and hasten their deportation. Indeed, US courts halted the programme in 1979 and ordered new hearings for rejected Haitian asylum seekers still in the United States.

Haitian boat arrivals increased in 1979 and accelerated dramatically in 1980, the same year that more than 125,000 Cubans arrived in the United States during the 'Mariel boatlift'. Immediately afterwards, many Haitians benefited from pressure on the US government to treat Haitians and Cubans equally and equitably. Haitian arrivals were awarded a special 'entrant' status, permitting them to stay while their status was resolved, but, unlike the Cubans, barring them from applying for permanent residence.

The interdiction programme

In late 1981, the new administration of President Ronald Reagan took a series of steps that paved the way for the interdiction of Haitians on the high seas. The US government agreed with the Haitian authorities in Port-au-Prince that it would return Haitians who left illegally. President Reagan ordered the US Coast Guard to interdict vessels that might be carrying undocumented aliens to the United States. If it determined that the passengers were seeking to enter the United States without documentation from a country with which the United States had an agreement to return illegal migrants, the Coast Guard was to return them to that country. Haiti was the only country with which the United States had such an agreement at the time.

The Reagan administration instructed the Coast Guard not to return people who might be refugees. Yet the procedures that it put in place to identify potential refugees aboard Coast Guard boats were such that it was extremely difficult for anyone to qualify for entry into the United States to apply for asylum.

Following the September 1991 coup that ousted President Aristide, the United States temporarily halted the interdiction programme. The programme was restarted a month later, but this time, instead of returning interdicted Haitians to Haiti, they were taken for 'screening' to the US naval base in Guantánamo, Cuba. According to some US non-governmental organizations and at least one US federal judge, Haitians at the Guantánamo base were kept in

prison-like conditions.^{viii} US government statistics indicate that some 10,500 of the 34,000 Haitians interdicted after the 1991 coup were found to have a credible fear of persecution and were allowed to enter the United States to apply for asylum. Although only a minority actually received asylum, most were ultimately able to remain in the United States legally.

In May 1992, President George Bush again ordered that all interdicted Haitians be returned to Haiti, this time without even the cursory refugee screening that was previously in place. Although Bill Clinton criticized the Bush policy as 'cruel' while running for office, once elected president he continued it. The policy did not deter Haitians from fleeing, however, and in 1992 the Coast Guard interdicted 31,400 Haitians. While this number fell to 2,400 the following year, it shot up again to 25,000 in 1994, before falling to an average of 1,150 over the next five years.

In June 1994, President Clinton instituted a new and short-lived procedure for interdicted Haitians. The United States carried out full refugee determination procedures on board the USNS *Comfort*, anchored off the coast of Jamaica. Those granted refugee status were resettled in the United States; those rejected were returned to Haiti. A record number of those processed on the *Comfort* were granted refugee status. The number of Haitians picked up and awaiting refugee interviews grew so rapidly—the Coast Guard picked up 3,247 on one day in July—that the United States ended the on-board process-

ing. It then sent those still on the *Comfort* and all newly interdicted Haitians to Guantánamo. The US authorities told the Haitians they could remain there as long as it was unsafe for them to return to Haiti, but added that none would be permitted to enter the United States. As a result, the Coast Guard took more than 21,000 Haitians to Guantánamo. Although by the end of the operation most were repatriated, some were allowed to enter the United States.

In September 1994, a US-dominated multinational force arrived in Haiti and the Haitian military junta finally resigned. President Aristide returned to Haiti, followed almost immediately by a majority of the Haitians in Guantánamo who repatriated voluntarily. In December, the US government told the 4,500 Haitians still in Guantánamo that it was safe to return to Haiti. Several hundred returned voluntarily, but 4,000 who refused were returned against their will.

In October 1998, the US Congress passed the Haitian Refugee Immigration Fairness Act, which allowed Haitians, who arrived in the United States before 31 December 1995 and who had applied for asylum before then, to apply for permanent residence. The policy of interdiction at sea remains in force, however, preventing the majority of those leaving Haiti from ever reaching US shores.

Recent developments in US law and practice

At the beginning of the 1990s, the US Immigration and Naturalization Service established a new system to determine asylum claims. The changes were designed to address concerns that asylum determinations were often made by immigration officers un-trained in refugee law and interviewing techniques, who in many cases relied more heavily on foreign policy-related US State Department recommendations than on the applicant's own testimony and relevant legal standards. The reforms included the formation of a specially trained corps of asylum officers, and the establishment of a documentation centre to provide objective information on conditions in countries of origin.

The new procedures, as well as changes in the criteria for adjudicating asylum claims, promised to make the process fairer. For instance, the consistent and credible testimony of an applicant could be considered sufficient proof of fear of persecution, even without documentary corroboration. However, asylum applicants often still lacked legal representation or qualified interpreters.²⁸

Also in 1990, the US Congress amended immigration and nationality legislation to introduce a temporary protected status (TPS). The Attorney General was given the discretion to provide temporary protection to nationals of countries experiencing ongoing conflict or natural disasters. TPS differed from temporary protection as developed in Europe, in that it was not related to situations of mass influx and did not prevent an individual from pursuing an asylum claim (as was the case in some European countries). It gave authorization to find employment, and it precluded deportation. The new status provided at least temporary refuge to people who might otherwise be returned to danger. Some observers expressed concern, however, that it might be used to deny full refugee status to nationals of certain countries or that it would undermine the traditionally permanent nature of US protection. Historically, virtually all those to whom the United States granted asylum or resettlement became eligible for permanent residence, and later for citizenship.

In the early 1990s, anti-immigrant sentiment spread in the United States, driven in part by a weak economy in certain regions and a growing number of undocumented migrants arriving in search of work. At the same time, as in other industrialized countries, the number of asylum applications filed in the United States rose significantly, from 20,000 in 1985 to 148,000 in 1995. These included both valid claims and claims lodged by people looking for alternative immigration channels. Right-wing politicians opposed to large-scale immigration fuelled public fears by blaming immigrants and refugees for a host of economic and social problems.

The anti-immigrant sentiment was reflected in a 1994 debate in California over a measure called 'Proposition 187', which sought to make undocumented migrants ineligible for most social services and to bar their children from public education. Although Proposition 187 dealt with undocumented migrants rather than refugees, it sparked a nationwide debate on immigration in general. The Proposition was passed, though local courts later declared most of its provisions unconstitutional.

Two years later, in 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The Act was primarily aimed at limiting illegal immigration and abuse of the asylum procedure, but in the process it also fundamentally changed the way in which the US government responded to asylum seekers and what rights they were accorded.²⁹ It authorized 'expedited removals', whereby immigration officers can order that an alien arriving without proper documents be removed from the United States 'without further hearing or review'. An exception is made for people who indicate an intention to apply for asylum. In such a case, the immigration officer has to refer the case to an asylum officer. If the asylum officer determines that the person has a 'credible fear' of persecution, the person is then allowed to apply for asylum. Failure to demonstrate such a 'credible fear' before the asylum officer or, upon review, an immigration judge, makes the person subject to deportation. The 1996 law thus created a new legal standard for screening asylum seekers arriving at US borders to determine whether they should be admitted to the asylum procedure.³⁰

The 1996 legislation also barred certain categories of people from the asylum procedure. Advocacy groups were particularly concerned that it barred people with convictions for 'aggravated felonies' from asylum. Even minor offences, committed years earlier, such as shoplifting, could bar an individual from access to protection. UNHCR and other groups urged that the nature of the crime committed and the danger the individual might pose to the community in the country of asylum should always be balanced against the severity of the persecution feared in the country of origin.

The new law also provided that, while asylum seekers were being screened for admittance to the asylum procedure, they would remain in detention. When Immigration and Naturalization Service detention facilities were unable to accommodate the significantly increased number of detainees, many were held in prisons alongside criminal offenders. Finally, the Act amended the definition of a refugee specifically to include individuals fleeing coercive population control programmes.

There were certain exceptions to some of the Act's more drastic provisions, but UNHCR and other organizations warned that the 1996 legislation could result in the refoulement of refugees, particularly if they had committed crimes. Indeed, asylum seekers increasingly had to resort to provisions of the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment which were implemented in US law from 1998. These forbid the return of anyone to a country where there are substantial grounds for believing they would be subjected to torture, and contain no exception for those convicted of crimes. By the end of 1999, Congress was considering legislation to address some of the concerns relating to the 1996 law, particularly with regard to expedited removal and the detention of asylum seekers.

Canadian policies towards refugees

Like the United States, Canada is a country founded on immigration, and the resettlement of refugees is an integral part of Canada's immigration policy. Although

immigration was initially restricted mainly to people of European origin, in 1962 this policy was revised to include nationals of all states. This provided new opportunities for the resettlement of refugees in Canada.

Between the end of the Second World War and the early 1970s, Canada took in significant numbers of refugees, including people resettled from Europe after 1945, Hungarian refugees in 1956–57, and Czech refugees who fled in 1968. In 1972, Canada accepted over 6,000 Ugandan Asians expelled by President Idi Amin and, following the 1973 coup in Chile, Canada resettled a similar number of Chilean refugees. Other refugees were admitted on an *ad hoc*, individual basis during this period. Then, in the two decades after 1975, Canada accepted over 200,000 refugees from Indochina, this being the second largest number after the United States. Together with the earlier refugee movements, these new arrivals made it clear that the former, case-by-case approach to refugee admission had to be replaced by a more systematic one.

A new Immigration Act was passed in 1976. It set out a refugee status determination procedure and for the first time a broader framework for Canada's refugee policy. Like the United States four years later, the Act incorporated the 1951 UN Refugee Convention definition of a refugee. It affirmed Canada's commitment to the 'displaced and the persecuted', and identified refugees as a distinct class of people to be selected and admitted separately from immigrants. The Act provided for new, flexible arrangements for the private sponsorship of refugees to be resettled in Canada. It also allowed the government to designate special classes of refugees apart from Convention refugees, thereby giving Canada the scope to help specific groups on its own terms.

During the 1980s, Canada offered resettlement to an average of 21,000 refugees each year. This included refugees who were government-sponsored, meaning that the state assumed responsibility for the costs associated with their resettlement, as well as people who were sponsored privately by churches and other local organizations. As in the United States, cooperation between government agencies and non-governmental groups is a feature of refugee resettlement in Canada. Between 1989 and 1998, resettlement admissions fell from 35,000 to under 9,000. In 1999, however, they rose to 17,000 because of the humanitarian evacuation programme for refugees from Kosovo.

By the late 1980s, the steady arrival of asylum seekers in Canada made it clear that the in-country refugee status determination process needed to be reformed. It was an onerous procedure with a serious flaw: at no point during the process was the individual asylum seeker given a chance to be heard by the decision-makers. A landmark decision of the Canadian Supreme Court in 1985 ruled that fundamental justice required that the credibility of asylum seekers be determined on the basis of a hearing.³¹ As a result, an Immigration and Refugee Board, including a Convention refugee determination division to hear asylum seekers' claims, was established in 1989.

The new structure was set up partly in response to public pressure, which had mounted in 1986 when 155 Sri Lankan asylum seekers were rescued at sea off the coast of Newfoundland, and in 1987 when a boatload of Sikhs arrived in Nova Scotia. The Canadian government did not want normal immigration channels to be circumvented, and feared abuse of the country's liberal asylum process, particularly as its neighbour to the south tightened its own system.

Since then, the Canadian government has introduced other restrictive measures, but the country has nevertheless often taken the lead in matters of refugee protection. For instance, Canada was the first country to introduce a ‘fast track’ in its asylum procedure for applicants who are clearly in need of protection—a procedure now also adopted with some variations in Australia. Also, in 1993, Canada’s Immigration and Refugee Board published ground-breaking guidelines on women refugee claimants fearing gender-related persecution.

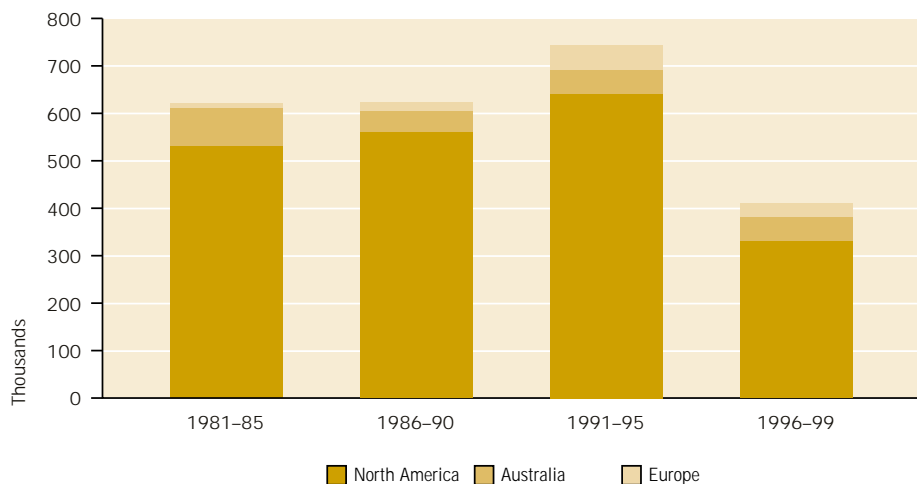
Asylum policies in Australia, New Zealand and Japan

Like the United States and Canada, immigration has been integral to the development of Australia and New Zealand. Both were significant destinations for refugees after the end of the Second World War, and most came from Europe. In the 25 years after 1945, over 350,000 refugees resettled in Australia, not counting thousands of others who arrived under family reunion or other immigration channels. In addition, some 7,000 resettled in New Zealand.

Australia only ended its ‘White Australia’ immigration policy in 1973. Since then, political upheavals in the Asia–Pacific region have made countries in this region the prime source of refugees in both Australia and New Zealand. From 1975, Australia accepted the largest number of Indochinese refugees for resettlement after the United States and Canada. This amounted to over 185,000, of whom well over half

Refugees resettled in industrialized states, 1981–99*

Figure 7.12



* For details of countries included, see Annex 10.

Source: Governments.

were Vietnamese boat people. New Zealand resettled 13,000 during the same period. In addition to those who were resettled, some boat people managed to make the long sea journey between southern Viet Nam and Australia's northern port of Darwin. The first small boat landed in 1976, and dozens more followed. The need for a process to handle asylum applications was evident.

In 1978, for the first time, the Australian government set up a refugee status determination committee to assess applications for refugee status. Throughout the 1980s, the number of applicants remained low. After the events in Tiananmen Square in Beijing in 1989, however, numbers started to rise since many Chinese students already in Australia sought to remain. In 1992, the refugee status determination committee was replaced by a new system, under which a protection unit within the Department of Immigration and Multicultural Affairs made a first instance decision on applications and a refugee review tribunal heard appeals.

Particular controversy has surrounded Australia's policy of mandatory detention of all unauthorized arrivals. No exception is made for asylum seekers. Australia has a universal visa policy, requiring a visa of all foreign travellers other than citizens of New Zealand. Many are detained in the controversial detention centres at Port Headland, Curtin and Woomera, in the remote northwest of the country.

In mid-1999, Australia joined other industrialized states in introducing legislation on temporary protection. New temporary safe haven visas were intended to provide greater flexibility in dealing with large-scale displacement and were granted to several thousand Kosovo Albanians and Timorese that year. Beneficiaries of this temporary safe haven are barred from applying for asylum unless the minister decides otherwise, leaving the duration and quality of protection to ministerial discretion rather than a reviewable procedure. During 1999, there was an increasing number of illegal arrivals by boat in Australia. In response, the government introduced new legislation on the reception and treatment of asylum seekers who arrive illegally in the country. A 'regional cooperation agreement' with Indonesia was also concluded, which provides for the interception, detention and screening of third country nationals transiting Indonesia en route to Australia.

New Zealand is one of just a dozen countries world-wide with an established refugee resettlement programme. Its annual quota of 750 places puts New Zealand's intake, on a per capita basis, on a par with Canada's. Although geography has kept New Zealand relatively shielded from the spontaneous movements of asylum seekers which have put other industrialized countries under such pressure, the number rose steadily throughout the 1990s, reaching nearly 3,000 a year in 1998.

Of the major industrialized countries, Japan, which has been a party to the 1951 UN Refugee Convention since 1981, has received by far the smallest number of asylum applications. The country's ethnic and cultural homogeneity has been sustained by strict controls on population movement and immigration, although over 10,000 Indochinese refugees have been resettled or allowed to remain in Japan since 1975. In the 10 years from 1990 to 1999, only 1,100 people applied for asylum in Japan. A strict time limit for making an application for asylum and an unusually high standard of proof meant that between 1990 and 1997, fewer than four per cent of these were recognized as

refugees under the Convention. In 1998 and 1999, more asylum determinations were made than in the preceding decade, and the acceptance rate rose to over seven per cent in 1999, while an increasing number of rejected asylum seekers were allowed to remain on humanitarian grounds. Outside its borders, the Japanese government's commitment to refugees is reflected in its strong support for UNHCR's programmes.

Preserving the right to seek asylum

The legislative changes to asylum systems in industrialized states in the last two decades have largely been built around the control of irregular migration. Concerns about mass outflows of people from war-torn regions and about trafficking and smuggling of people have also contributed to the introduction of tighter control measures. In most cases these changes, which have been accompanied by a range of new border control measures, have failed to recognize adequately that some people have a real need to seek protection from persecution. Preserving the right to seek asylum in industrialized states which have sophisticated and costly legal systems and border control mechanisms remains a major challenge for the 21st century.

Policies of deterrence have also contributed to a blurring of the already problematic distinction between refugees and economic migrants, and have stigmatized refugees as people trying to circumvent the law. Once refugees reach safety, they are sometimes detained for prolonged periods. This is a serious concern in many countries, especially when separated and unaccompanied children and family groups are held in detention. Equally, in the area of family reunification, practices in a number of countries have made it virtually impossible for family members to be reunited. This has had a negative impact both on their capacity to adjust to their new situations in the short term, and on their longer-term integration prospects. Apart from preserving the right to seek asylum, the challenge is therefore also to ensure that states respect basic human rights principles.

Managing mixed flows of refugees and other migrants is a complex problem to which there are no easy answers. Ultimately, the systems developed by countries in the industrialized world depend on changes in the dynamics of international migration, including the numbers of refugees and other migrants seeking to enter these countries, and the methods used to gain entry. This in turn depends on the measures taken by governments and international organizations to address the causes of refugee flight and other migratory flows. If the disparity between the world's wealthiest and poorest countries continues to grow, as it has done in the last 50 years, and if countries outside the industrialized world are not sufficiently encouraged and supported in providing protection and assistance to refugees in their regions, the numbers of people seeking new lives in the world's wealthiest states will remain high. Regional approaches to migration and asylum, such as those adopted in Europe, have their value, but they may prove to be counter-productive if they undermine global approaches to these issues.

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