The Temporary Refuge Initiative: A Close Look at Australia's Attempt to Reshape International Refugee Law

Savitri Taylor* and Jodie Boyd†

Abstract

There is currently a widespread practice of states providing protection to asylum seekers on a temporary, rather than a permanent, basis. Although the practice has a long history, the international law governing it is unclear. Drawing on archival material, including Australian Government files that have not previously been studied, this article takes a close look at the first attempt to institutionalise the practice in international law: Australia's temporary refuge initiative that began in 1979.

I Introduction

Over the last fifty years, the international refugee protection framework, established by the 1951 *Convention relating to the Status of Refugees* ('*Refugee Convention*')[1] and its 1967 *Protocol relating to the Status of Refugees* ('*Refugee Protocol*'),[2] has faced severe challenges. Frequent mass exoduses of asylum seekers fleeing from large-scale conflicts or other unsustainable conditions in their home countries have prompted a significant number of receiving states to narrow their interpretation of their international protection obligations and to implement increasingly restrictive asylum policies. The binding provision of non-refoulement within the *Refugee Convention* prohibits states from returning refugees to danger.[3] However, as numerous commentators have noted, the continuing reality of situations of mass exodus has driven a fundamental shift within the international refugee protection

* Associate Professor, Law School, La Trobe University, Victoria, Australia. Email: s.taylor@latrobe.edu.au; ORCID iD: 0000-0003-3114-3453. This work was supported by the Australian Research Council's Discovery Projects funding scheme under grant DP160101434. The authors gratefully acknowledge helpful feedback from Dr Klaus Neumann.

† Research Fellow, Law School, La Trobe University, Victoria, Australia. Email: J.Boyd@latrobe.edu.au; ORCID iD: 0000-0001-9419-8270.

1 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force for Australia and generally on 22 April 1954) ('*Refugee Convention*').

2 *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force generally on 4 October 1967 and for Australia on 13 December 1973) ('*Refugee Protocol*').

3 Discussed below in Part IIIA of this article.

framework; namely, the provision by states of protection to refugees on a temporary, rather than a permanent, basis. As Bradley points out,

> [m]any countries, in particular in the Global North, that previously extended citizenship to recognized refugees now offer only temporary protection, even when the possibility of voluntary repatriation in conditions of safety and dignity is nowhere on the horizon.[4]

Despite a long history, the practice of temporary refuge or protection is acknowledged as having no clear standing in international law. Writing in 2017, Ineli-Ciger suggested that while the 'principle of non-refoulement is generally accepted as the core principle that temporary protection is built upon ... this is not the whole picture'.[5] She notes the observation made at the 'UN High Commissioner for Refugees (UNHCR) Roundtable assembled in 2012 [that the] legal foundation of temporary protection even today remains largely undefined or unsettled'.[6] Ineli-Ciger notes further that '[s]ince an authoritative international instrument governing many aspects of temporary protection does not exist, states enjoy broad discretion with regard to shaping different aspects of their temporary protection policies.'[7] In other words, the lack of a firm legal mechanism or framework within international refugee law around the provision of temporary protection has enabled conditions to develop wherein refugees can be subject to so-called protection that offers no minimum standards of treatment and no commitment to, or timely provision of, a permanent or durable solution.

In 2014, the UNHCR issued *Guidelines on Temporary Protection and Stay Arrangements*[8] as something of a belated rearguard action against temporary protection conditions that have emerged and that, as Fitzpatrick's earlier body of work demonstrated, are in no way a recent phenomenon.[9] Indeed, as early as 1986, Fitzpatrick posited the emergence of temporary refuge as a customary norm within international refugee law and noted a contemporary concern (that remains today), which inhibited the adoption of a binding legal mechanism; namely, that codification of the concept of temporary refuge could operate 'to deprive eligible refugees of access to durable solutions'.[10]

---

4 Megan Bradley, *Resolving Refugee Situations: Seeking Solutions Worthy of the Name* (World Refugee Council Research Paper No 9, March 2019) 4–5 <https://www.worldrefugeecouncil.org/publications/resolving-refugee-situations-seeking-solutions-worthy-name>.

5 Meltem Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill Nijhoff, 2017) 48, 48.

6 Ibid.

7 Ibid 42–3.

8 United Nations ('UN') High Commissioner for Refugees ('UNHCR'), *Guidelines on Temporary Protection or Stay Arrangements* (February 2014) paras 3, 11 <https://www.refworld.org/docid/52fba2404.html>. Discussed below in Part V of this article.

9 Deborah Perluss and Joan F Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26(3) *Virginia Journal of International Law* 551; Joan Fitzpatrick, 'Flight from Asylum: Trends toward Temporary "Refuge" and Local Responses to Forced Migrations' (1994) 35(1) *Virginia Journal of International Law* 13 ('Flight from Asylum'); Joan Fitzpatrick, 'The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection' (1998) 13(3) *Georgetown Immigration Law Journal* 343; Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94(2) *American Journal of International Law* 279; Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights during States of Emergency* (University of Pennsylvania Press, 1994).

10 Description of the 1986 journal article in Fitzpatrick, 'Flight from Asylum' (n 9) 16 n 15. For the original 1986 article, see Perluss and Hartman (n 9).

This article gives attention to the first effort to codify or institutionalise temporary refuge within the international refugee law system: Australia's sustained, although ultimately resisted, temporary refuge initiative at the United Nations ('UN'). That initiative began in 1979, almost 45 years prior to the UNHCR's publication of its non-binding *Guidelines on Temporary Protection or Stay Arrangements* in 2014. This article draws on the documentary archive produced by the Australian Government entities most closely involved with the initiative; namely, the Federal Cabinet, the Department of Foreign Affairs and the Department of Immigration. Within the relatively recent debate about the 'turn to history',[11] the use of historical archival material to excavate the foundations of international law has been proposed as a means by which the field's dominant normative and progressivist narratives may be, if not disrupted, then at least admitted as more complex and historically contingent than they have sometimes been allowed.[12] As Arvidsson and McKenna noted recently, reaching beyond 'the doctrinally sanctioned sources of international law' does more than extend the range of sources available to international legal scholars.[13] By going 'beyond the customs, doctrines, treaties, and so forth that have traditionally formed the boundaries of international law',[14] and in looking further to both the historical sources that underpin the creation of doctrinal sources, and the methodological approaches attendant to their analysis, the 'critical potentialities' of international law are also extended.[15]

Drawing on the Australian Government archive relating to its temporary refuge initiative is productive, not only in offering broader historical context or background to temporary protection practices in international refugee law, but also in enabling access to the conflict, contestation, dead-ends and discontinuities that are as integral to understanding the development of the international system of refugee protection as the final expression in the doctrinal materials of international refugee law. Accessing the archive, even accepting that it is selective, partial and incomplete,[16] encourages an acknowledgement of the 'embeddedness of law in

---

[11] Orford has noted:

> Of course, international law has always had a deep engagement with the past. Past texts and concepts are constantly retrieved and taken up as a resource in international legal argumentation and scholarship. Thus the 'turn to history' trope marks a turn to history as method, rather than a turn to history in terms of engaging with the past rather than the present.

See Anne Orford, 'International Law and the Limits of History' in Wouter Werner, Marieke de Hoon and Alexis Galán (eds), *The Law of International Lawyers* (Cambridge University Press, 2017) 297, 297.

[12] Key recent works include Matilda Arvidsson and Miriam Bak McKenna, 'The Turn to History in International Law and the Sources Doctrine: Critical Approaches and Methodological Imaginaries' (2020) 33(1) *Leiden Journal of International Law* 37; Rossana Deplano, *Pluralising International Legal Scholarship: The Promise and Perils of Non-Doctrinal Research Methods* (Edward Elgar, 2019); Valentina Vadi, 'International Law and Its Histories: Methodological Risks and Opportunities' (2017) 58(2) *Harvard International Law Journal* 311; Orford (n 11); Martti Koskenniemi, 'Expanding Histories of International Law' (2016) 56(1) *American Journal of Legal History* 104; Anne Orford, 'On International Legal Method' (2013) 1(1) *London Review of International Law* 166; Martii Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View' (2013) 27(2) *Temple International & Comparative Law Journal* 215.

[13] Arvidsson and McKenna (n 12) 39.

[14] Ibid 38. See also 37, 39

[15] Ibid 39.

[16] Australian Government records are archived according to the *Archives Act 1983* (Cth) and specific records authority rules applicable to each government department. Together, these govern which records can be destroyed, periods of retention and conditions of accessibility. Consequently, only a

broader social and political practices' and fosters an ability 'to register fully the conflicts and contestations that have naturally accompanied historical development in international law'.[17] Historians, of course, have utilised archival sources to examine the international system of refugee protection and states' relationships with it. Their goal, often, is to understand developments in domestic refugee politics and policies, as well as the evolution of the international protection regime and its relationship to the domestic, bilateral or transnational contexts of states' interventions and responses.[18]

Contrary to the frequently stated assumption that 'historians are interested in the past for its own sake and want to put it in context, [and] lawyers tend to be "interested in the past for the light it throws on the present"',[19] this article utilises an historical analytic in its examination of government records relating to the temporary refuge initiative in order to indicate two points about the present condition of temporary protection in international refugee law.[20] First, the context of Australia's championing of the institutionalisation of the concept of temporary refuge (namely, fears relating to mass influx of Indo-Chinese 'boat people') is indicative of the integral part that domestic histories can play in the development of international law. Importantly, that context is also indicative of the ways in which the circumstances of historical contingency can have a long-lasting effect on the adoption (or not) of binding or normative mechanisms within international law. Second, in its analysis of the strategy, politics and development of Australia's negotiating postures, this article proposes an understanding of the Australian initiative at the UN as one that, while unsuccessful, worked significantly to expose the key divisions and anxieties relating to the institutionalisation of temporary refuge that remain today. Indeed, it is concluded that in the recent practice of states, the worst fears of those opposing the institutionalisation of temporary refuge (also known as temporary protection) have been realised.

This article is structured as follows. Part II of the article explains the geopolitical context of the initiative: the Indo-Chinese refugee exodus that began in 1975. Part III follows the evolution of relevant key concepts in international refugee

---

fractional number of the total records created by government departments are retained for permanent archive. If archived, these records are subject to further restrictions: access can be refused, for example, if the material was created within 20 or 30 years of a request and, if in the 'open access period' (ss 3(1), 3(7)), releasing that information would damage Australia's security, defence or international relations (s 33(1)(a)), or reveal confidential information provided to the Australian Government by a foreign government or an international organisation (s 33(1)(b)).

17 Arvidsson and McKenna (n 12) 41.

18 Notable recent work by Australian historians includes: Claire Higgins, *Asylum by Boat: Origins of Australia's Refugee Policy* (NewSouth Publishing, 2017); Klaus Neumann, *Across the Seas: Australia's Response to Refugees: A History* (Black Inc, Schwartz Publishing, 2015) ('*Across the Seas*'); Nathalie Huynh Chau Nguyen, 'Memory in the Aftermath of War: Australian Responses to the Vietnamese Refugee Crisis of 1975' (2015) 30(2) *Canadian Journal of Law & Society/Revue Canadienne Droit et Societe* 183; Klaus Neumann, 'Oblivious to the Obvious? Australian Asylum-Seeker Policies and the Use of the Past' in Klaus Neumann and Gwenda Tavan (eds), *Does History Matter?* (ANU Press, 2009) 47 <https://www.jstor.org/stable/j.ctt24h2v9.10>.

19 An assumption discussed by Vadi (n 12) 312–13.

20 '[W]hat seems needed is a better understanding of how we have come to where we are now — a fuller and a more realistic account of the history of international law': Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View' (n 12) 216.

law up to 1979, paying particular attention to the Australian position. Part IV considers in detail the rationale for and development of the temporary refuge concept by Australia and its efforts to promote the concept at the international level. Australia ceased active promotion of temporary refuge as a legal concept after 1984. However, the concept has had an afterlife that is examined in Part V of the article. The conclusion of the article draws out the lessons to be learned about the influence of domestic and international politics on the development of international law.

II The Indo-Chinese Refugee Exodus and Australia's Political Response

War and regime change in three Indo-Chinese countries precipitated extraordinarily large numbers of people fleeing their homes. In April 1975, the Khmer Rouge took the Cambodian capital, Phnom Penh. This was followed in the same month by the fall of Saigon in Vietnam to the forces of the Communist North Vietnamese and Viet Cong. In December 1975, Soviet- and Vietnamese-backed Pathet Lao forces overthrew the Royalist Government in Laos.[21] While a great number of refugees fled to neighbouring countries, many sought asylum further afield — in particular, Vietnamese refugees fleeing by sea ('boat people').[22]

As the refugee exodus from Indo-China escalated and neighbouring South East Asian countries began to turn people away, there was growing disquiet in the broader Australian community about the number of Vietnamese refugees reaching Australia.[23] In an effort to dissuade Indo-Chinese refugees from attempting the sea voyage to Australia, and in an effort to demonstrate that it was taking steps to control and regularise the intake of Indo-Chinese refugees, the incumbent Liberal–National Party Government committed to increasing the prospects of resettlement in Australia for refugees arriving through authorised channels. While the increased prospect of resettlement seems to have dissuaded some Indo-Chinese refugees from attempting the hazardous sea voyage to Australia, unauthorised boat arrivals in Australia continued nevertheless.[24]

As Goodwin-Gill has noted, a key anxiety driving the Australian Government's early responses to increasing numbers of refugee boat arrivals was that 'Australia's geopolitical situation was thought to expose it to large-scale arrivals, with little prospect of international support'.[25] An essential element in its

---

21 David Feith, *Stalemate, Refugees in Asia* (Asian Bureau Australia, 1988) 12.

22 Robinson estimated that from 1975 to mid-1979, 'more than 663,000 Vietnamese were evacuated or fled, 160,000 Laotian refugees crossed into Thailand and around 525,000 Cambodian and ethnic Vietnamese fled the reign of the Khmer Rouge and its aftermath — a total of almost 1.4 million': Claire Higgins, 'Status Determination of Indochinese Boat Arrivals: A "Balancing Act" in Australia' (2017) 30(1) *Journal of Refugee Studies* 89, 91, citing W Courtland Robinson, *Terms of Refuge: The Indochinese Exodus & the International Response* (Zed Books, 1998) 50.

23 Neumann, *Across the Seas* (n 18) 267, 274. For a discussion of popular hostility towards the prospect of Asian immigration to Australia, see Higgins (n 22) 94; see also Gwenda Tavan, *The Long, Slow Death of White Australia* (Scribe, 2005).

24 Neumann, *Across the Seas* (n 18) 274–5.

25 Guy S Goodwin-Gill, 'Non-Refoulement, Temporary Refuge, and the "New" Asylum Seekers' in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff, 2014) 433, 433.

commitment to increasing refugee resettlement numbers rested then, not only on its own policy responses, but also on the ways in which the South East Asian states of first arrival managed the influx of refugees into their own territories. On the Australian Government's re-election in December 1977, the Foreign Affairs and Defence Committee of the Federal Cabinet agreed that for the financial year 1977–78 Australia should accept 6,000 Indo-Chinese refugees for resettlement from South East Asia, representing an increase of 2,000 more than originally planned. A crucial component in this decision was the agreement by the Cabinet Committee that the 'the co-operation of Malaysia, Thailand, Indonesia and Singapore be sought as part of an international effort to handling the Indo-Chinese resettlement'[26] and that talks should be held with the United States ('US') at a 'high policy level' about how to deal with the situation.[27] Cabinet recognised that Australia's capacity to manage the influx of refugees depended, to a very significant degree, on obtaining the cooperation of its neighbours who were on the frontline of mass refugee flows.

The Immigration Minister, Ian MacKellar, expressed a growing concern in late 1978 that the attitudes of member states of the Association of Southeast Asian Nations ('ASEAN')[28] had begun to harden against accepting the intake of further Indo-Chinese refugees.[29] Outflows of Indo-Chinese refugees had been exacerbated by the Vietnamese invasion of Cambodia in late 1978, which successfully overthrew the Chinese-backed Khmer Rouge regime. In retaliation, China engaged in a three-week incursion into Vietnam which, in turn, intensified Vietnamese suspicions of ethnic Chinese who were pushed out of the country in even greater numbers.[30] MacKellar worried that the hardening attitudes of the ASEAN nations would result in a massive increase in boat arrivals in Australia.[31] He also noted that a meeting of 21 countries convened by the Office of the UNHCR in Kuala Lumpur in September 1978 had not achieved 'any significant new offers of help'.[32]

Over the first six months of 1979, some ASEAN nations began to turn away all refugees or threatened to do so as the burdens placed on them became ever heavier.[33] With a focus on easing those burdens, a Meeting on Refugees and Displaced Persons in South East Asia was convened by the UN Secretary General in Geneva (Switzerland) in late July 1979. At this meeting, Australia pledged more money in support of countries of first asylum and the UNHCR and also pledged to

---

26 Cabinet Minute, Foreign Affairs and Defence Committee, *Submission No 2014: Indo-Chinese Refugees — Ongoing Programme — Decision No 4884 (FAD)*, 16 March 1978 (National Archives of Australia ('NAA'): A12909) 1.

27 Ibid 2.

28 ASEAN was established in 1967 with a membership consisting of Indonesia, Malaysia, the Philippines, Singapore and Thailand. The expansion of the membership to the current ten commenced when Brunei joined in 1984. See ASEAN, *About ASEAN* (Web Page) <https://asean.org/asean/about-asean/>.

29 MJR MacKellar, Minister for Immigration, *Submission No 27771 — Review of the Indo-Chinese Refugee Program*, 17 November 1978 (NAA: A12909, 2771).

30 Nancy Viviani, *Australian Government Policy on the Entry of Vietnamese Refugees 1975 to 1982: Record and Responsibility* (Research Paper No 7, Griffith University Centre for the Study of Australian-Asian Relations, August 1982) 2.

31 MacKellar (n 29).

32 Ibid.

33 Viviani (n 30) 15, 23.

increase its refugee intake from 10,500 per year to 14,000 per year.[34] At the same meeting or in the lead up to it, other countries also pledged a large number of resettlement places and/or large amounts of funding to the UNHCR.[35] Further, Vietnam had also been persuaded to participate in the meeting. As well as cooperating with the UNHCR on an orderly departure program agreed upon in May 1979, Vietnam announced prior to the July 1979 meeting that it had taken measures to prevent unauthorised departures.[36] The effectiveness of these ad hoc measures began to be revealed from mid-1979. Boat departures from Vietnam, and hence the number of irregular arrivals in regional countries, including Australia, started trending downwards. Regional countries remained apprehensive, however, that they remained exposed to further large-scale arrivals. Australia's temporary refuge initiative was generated in this context and, as Goodwin-Gill has noted, 'was intended in part but seriously, to forge an institutional link between admission and burden-sharing within the existing refugee protection regime'.[37]

III The Contemporaneous State of Play in International Refugee Law

The mass exodus of Indo-Chinese people seeking refuge revealed that the system of international refugee protection at the time provided insufficient guidance on how receiving states could deal with such events. The key questions raised about the applicable international law can be summarised as follows:

(1) Did the principle of non-refoulement apply in mass influx situations?
(2) In what circumstances, if any, were states under an obligation to admit asylum seekers to their territory?
(3) If a state admitted asylum seekers, what further obligations did it have towards them?
(4) If a state admitted asylum seekers, did other states have an obligation to share the burden?

Section A of this Part explains the contemporaneous state of play in relation to questions (1) and (2) and Section B in relation to questions (3) and (4).

A *Non-Refoulement and Provisional Stay*

Article 33 of the *Refugee Convention* provides:

> 1. No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a

[34] MJR MacKellar, *Submission No 3349: Statement at Geneva Conference on Indo-Chinese Refugees — Attachment A*, 12 July 1979 (NAA: A12909, 3349).
[35] Viviani (n 30) 25.
[36] Ibid 26.
[37] Goodwin-Gill (n 25) 433.

> final judgment of a particularly serious crime, constitutes a danger to the community of that country.

There was initial uncertainty among states as to whether the non-refoulement article (art 33(1)) covered rejection at the frontier, but by the time of the Indo-Chinese exodus this uncertainty had been resolved in favour of the refugee.[38] By contrast, an uncertainty that persisted was whether art 33(1) was applicable in situations where the receiving country faced a mass influx of refugees. As Zieck has shown, the drafting history of the *Refugee Convention* can support an argument of its non-applicability to situations of mass influx. Zieck stated that 'the outcome [in the *Refugee Convention*] is a clear text that does *not* include an exception for mass influxes, but it did not have to, since the drafters arguably considered it to be already covered by the inclusion of the French verb "*refouler*"'.[39] She noted

> it has been suggested that the French verb '*refouler*' was added to article 33(1) to ensure that the duty of non-return would not have a wider meaning than the French expression 'which was agreed not to apply in the event that national security or public order was genuinely threatened by a mass influx'.[40]

A desire for clarity in regard to a mass influx exception to non-refoulement manifested itself in a succession of negotiations and some instruments. For instance, art 3(1) in the 1967 *Declaration on Territorial Asylum*[41] confirms the principle of non-refoulement by providing that

> No person [defined in art 1(1)] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.

The Declaration further states, however, that exception may be made to the principle 'for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons'.[42] All the Declaration requires of a State invoking the exception is that it '*consider* the possibility of granting to the persons concerned, *under such conditions as it may deem appropriate*, an opportunity, whether by way of provisional asylum or otherwise, of going to another State'.[43]

A further effort to clarify states' obligations during instances of mass influx was attempted in 1972. The UNHCR presented a Draft Convention on Territorial Asylum (known as the 'Carnegie Draft') to the UN General Assembly.[44] Article 2 of the Carnegie Draft was similar to art 3(1) of the *Declaration on Territorial Asylum*

---

38 Savitri Taylor and Klaus Neumann, 'Australia and the Abortive Convention on Territorial Asylum: A Case Study of a Cul de Sac in International Refugee and Human Rights Law' (2020) 32(1) *International Journal of Refugee Law* 86, 1023.

39 Marjoleine Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39(1) *Michigan Journal of International Law* 19, 61 (emphasis in original; citations omitted).

40 Ibid 60, quoting James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 357.

41 *Declaration on Territorial Asylum*, GA Res 2312 (XXII), UN Doc A/RES/2312 (XXII) (14 December 1967).

42 Ibid art 3(2).

43 Ibid art 3(3) (emphasis added).

44 This draft is reproduced in Atle Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell International, 1980) 174–6. It is called the Carnegie Draft because the process through which it was produced was initiated by the UNHCR in collaboration with the Carnegie Endowment for International Peace: see Taylor and Neumann (n 38) 89–90.

in that it prohibited rejection at the border or expulsion or compulsory return. Article 2 of the Carnegie Draft went even further than the Declaration by containing no equivalent to the art 3(2) exception in instances of mass influx. Moreover, art 4 of the Carnegie Draft provided:

> A person requesting the benefits of this Convention at the frontier or in the territory of a Contracting State shall be admitted to or permitted to remain in the territory of that State pending a determination of his request, which shall be considered by a specially competent authority and shall, if necessary, be reviewed by higher authority.

This provision of the Carnegie Draft marked new territory in international refugee law by laying the groundwork for states to be legally obliged to admit asylum seekers into their territory, albeit on a temporary basis, effectively proposing to intrude on state sovereignty.

During late April and early May 1975, a Group of Experts composed of representatives from 27 countries, including Australia, met in Geneva to discuss and revise the Carnegie Draft. At the Group of Experts' meeting, there was serious disagreement about the appropriate scope of the non-refoulement provision (art 3) in the proposed Convention.[45] The text of art 3 finally adopted by the Group of Experts[46] regressed from the Carnegie Draft and set out an exception to non-refoulement that was similar to that contained in art 33(2) of the *Refugee Convention*. On the other hand, the Group of Experts did adopt an art 4 that was similar to art 4 of the Carnegie Draft, stipulating an obligation on states to admit asylum seekers pending a determination of their refugee status by a competent authority.

The final step towards finalising a formal treaty on territorial asylum was the Conference of Plenipotentiaries on Territorial Asylum convened by the UN during January and February 1977 in Geneva. While the Committee of the Whole managed to reach agreement on the text of five provisions in the time allotted, none of them was considered by the plenary of the conference.[47] Article 3 on non-refoulement was one of the articles agreed upon by the Committee of the Whole. It regressed from the Group of Experts' draft by adding a mass influx exception to the non-refoulement obligation.

Significantly, the Australian Delegation to the 1977 Conference of Plenipotentiaries on Territorial Asylum was instructed to seek deletion of art 4 of the Group of Experts' draft.[48] The Delegation was also instructed that, if it could not secure deletion of art 4, it was to seek an amendment of the article to ensure that states were 'not legally obliged' to admit asylum seekers even on a provisional basis.[49] As it turned out, Australia's concerns were moot given that the 1977 Conference did not have time to consider art 4 and the conditions of uncertainty regarding states' obligations to admit asylum seekers to their territory remained.

---

45 Taylor and Neumann (n 38) 100.

46 This text is reproduced in Grahl-Madsen (n 44) 194–7.

47 *Cable from Australian Mission to the UN in Geneva to the Department of Foreign Affairs*, 29 January 1977 (NAA: A1838, 938/43 Part 7). The text agreed by the Committee of the Whole is reproduced in Grahl-Madsen (n 44) 208–11.

48 *Conference of Plenipotentiaries on Territorial Asylum*, Geneva, 10 January–4 February 1977, [Brief for the Australian Delegation] n.d. (NAA: A1838, 938/43 Part 7).

49 Ibid.

B *Asylum and International Solidarity*

A lack of clarity in international refugee law also existed with regard to states' obligations towards asylum seekers admitted to their territories and, importantly, the obligations of other states to share the burden of states receiving a large-scale influx of asylum seekers. Recital 4 of the preamble of the *Refugee Convention* draws an explicit relationship between the provision by states of asylum and the need for international cooperation where a country has been unduly burdened by the grant of asylum. In addition to the preambular text, the *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* makes the non-binding recommendation that '[g]overnments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement'.[50]

Further work to clarify states' obligations towards asylum seekers and each other was undertaken in the 1967 *Declaration on Territorial Asylum* and in the 1972 Carnegie Draft Convention on territorial asylum. Article 1(1) of the *Declaration on Territorial Asylum* asserts the right of states to grant asylum, while implicitly rejecting any right of individuals to receive asylum. However, art 2(1) of the Declaration states that the situation of asylum seekers is 'of concern to the international community' and art 2(2) contains a call for other states to 'consider, in a spirit of international solidarity, appropriate measures to lighten the burden' on a State that is experiencing 'difficulty in granting or continuing to grant asylum'.

More ambitiously, art 1(1) of the 1972 Carnegie Draft Convention provided:

> A Contracting State, acting in an international and humanitarian spirit, shall use its best endeavours to grant asylum in its territory, which for the purpose of the present Article includes permission to remain in that territory, to [definition of beneficiary group].

By obliging Contracting States to use their 'best endeavours to grant asylum', the Carnegie Draft went beyond the 1967 Declaration, which frames the granting of asylum as a right, but not an obligation, of states. Further, art 5 of the Carnegie Draft provided:

> Where, in a case of a sudden or mass influx, or for other compelling reasons, a State experiences difficulties in granting or continuing to grant the benefits of this Convention, other Contracting States, in a spirit of international solidarity, shall take appropriate measures individually, jointly, or through the United Nations or other international bodies, to share equitably the burden of that State.

Again, the Carnegie Draft's formulation 'shall take' is stronger than the 1967 Declaration's 'shall consider', and the words 'share equitably' left less to a State's discretion than the Declaration's exhortation to 'lighten' the burden of overburdened states.

---

[50] *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* (25 July 1951) recommendation D <http://www.unhcr.org/en-au/protection/travaux/40a8a7394/final-act-united-nations-conference-plenipotentiaries-status-refugees-stateless.html>.

Indeed, the Secretary of the Australian Government Department of Foreign Affairs, in a letter to the Secretary of the Department of Immigration, made particular note that the main difference between art 2(2) of the *Declaration on Territorial Asylum* and art 5 of the Carnegie Draft was that the latter imposed an obligation to 'share equitably' the burden of any mass influx seeking asylum.[51] The Foreign Affairs Secretary affirmed that

> [n]o Australian government is likely to accede to an arrangement whereby it did not retain complete control over the number and type of persons entering the country. The article is clearly unacceptable in its present form and desirably should be drafted to conform more closely with Article 2 of the Declaration on Territorial Asylum.[52]

He added that Australia could, however, 'undertake to give sympathetic consideration to the problems of refugees in any mass influx situation'.[53] In other words, Australia did not want to be obliged to take an equitable share of the refugee burden. However, it was willing to promise that it would consider doing something to help in particular mass influx situations.

The Group of Experts' version of art 1 provided: 'Each Contracting State, acting in the exercise of its sovereign rights, shall use its best endeavours in a humanitarian spirit to grant asylum in its territory to any person eligible for the benefits of this Convention'.[54] Unlike the Carnegie Draft Convention, the Group of Experts' version did not contain any indication of what was meant by 'asylum'. Further, at the Group of Experts' meeting, there was a divergence between experts from first or 'frontline' asylum states, and those from other states, in their approach to art 5.[55] Experts from first asylum states wanted to strengthen the obligation of other states to assist them in situations of mass influx.[56] However, experts from those other states, including Australia, wanted to amend art 5 to give them greater discretion in the provision of assistance to first asylum states.[57] Article 5 of the text finally adopted by the Group of Experts provided:

> Whenever a Contracting State experiences difficulties in the case of a sudden or mass influx, or for other compelling reasons, in granting, or continuing to grant, the benefits of this Convention, each Contracting State shall, at the request of that State, through the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, or by any other means considered suitable, *take such measures as it deems appropriate*, in conjunction with other States or individually, to share equitably the burden of that State.[58]

---

51 Letter from RE Armstrong (Secretary of the Department of Immigration) to the Secretary of Department of Foreign Affairs, 2 November 1973 (NAA: A432, 1973/5344 Part 1).

52 Ibid.

53 Ibid.

54 The beneficiary definition was set out in a separate article: art 2.

55 *Cable from US Mission in Geneva to the Secretary, US Department of State*, 1 May 1975 <https://wikileaks.org/plusd/cables/1975GENEVA03078_b.html>.

56 *Cable from US Mission in Geneva to the Secretary, US Department of State*, 5 May 1975 <https://wikileaks.org/plusd/cables/1975GENEVA03184_b.html>.

57 Ibid; *Cable from US Mission in Geneva to the Secretary, US Department of State*, 1 May 1975 (n 55).

58 UN General Assembly, *Office of the United Nations High Commissioner for Refugees: Elaboration of a Draft Convention on Territorial Asylum Report of the Secretary-General*, A/10177 (29 August 1975) <https://www.refworld.org/docid/3ae68befc.html> (emphasis added).

Unsurprisingly, the experts from first asylum states were dissatisfied with this text.[59] Australia's expert and, eventually, most significant shaper of Australia's position, the foreign affairs official Gervase Coles, thought the use of the phrase 'as it deems appropriate' was an acceptable compromise and voted in favour of the text. However, the Department of Immigration was unhappy with the retention of 'equitably' and wanted Australia to seek its deletion from future drafts.[60] By this time, the Indo-Chinese exodus had commenced. Yet, despite Coles pointing out 'the possibility that Australia could become increasingly a country of "first" asylum' and would then stand to benefit from art 5,[61] the Department of Immigration's unhappiness persisted.[62] Regardless, the Australian Delegation to the 1977 Conference of Plenipotentiaries on Territorial Asylum was briefed that art 5 of the Group of Experts' draft was acceptable to Australia.[63]

In the eyes of the UNHCR, art 5 was more than just acceptable. In a lecture delivered in August 1976, the High Commissioner for Refugees, Prince Sadruddin Aga Khan, noted that '[t]he idea of international solidarity in this field is not new, as it has been the basis for all international efforts to assist refugee [sic]'.[64] He suggested, however, that the idea needed to be adopted anew and 'adapted to the needs of our time'.[65] Most significantly, he indicated that international solidarity, rethought for the needs of the time in the form of art 5, 'would furnish UNHCR with a legal and contractual foundation on which it would in future be able to base measures that today depend only on persuasion and the invoking of obvious humanitarian concern'.[66]

As noted by the High Commissioner, the principle of solidarity had played a role in the development of refugee law from the time of the League of Nations. However, the concept and language of solidarity came to have even greater power in the context of ongoing decolonisation.[67] The growth in membership of the UN from 60 at the end of 1950 to 147 at the end of 1976 was largely accounted for by newly independent developing countries. The principle of international solidarity was very much part of a 'new morality' of international law promoted by these countries.[68] However, the failure of the 1977 Conference of Plenipotentiaries meant the loss of an opportunity to entrench the principle in international refugee law.

---

59 [GJL Coles], 'Draft Convention on Territorial Asylum' (n.d. [1976]), Attachment to Letter from GJL Coles to DF De Stoop, 18 June 1976 (NAA: A1838, 938/43 Part 4).

60 Letter from WE Bowler (for the Secretary of the Department of Immigration) to the Secretary of Department of Foreign Affairs, 15 July 1975 (NAA: A1838, 938/43 Part 2).

61 'Draft Convention on Territorial Asylum' (n 59).

62 Memorandum from LA Taylor to the Assistant Secretary, Program Control and Development Branch, Department of Immigration, 5 July 1976 (NAA: A446, 1975/76062), in which the point made by Coles is acknowledged.

63 *Conference of Plenipotentiaries on Territorial Asylum* [Brief for the Australian Delegation] (n 48).

64 Prince Sadruddin Aga Khan, 'Legal Problems relating to Refugees and Displaced Persons' (Lecture, Hague Academy of International Law, 6 August 1976) [75] <https://www.unhcr.org/en-lk/admin/hcspeeches/3ae68fc04/lectures-prince-sadruddin-aga-khan-united-nations-high-commissioner-refugees.html>.

65 Ibid.

66 Ibid.

67 Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, 2009) 138–40.

68 Ibid.

Indeed, art 5 of the Group of Experts' draft was one of the articles that the 1977 Conference did not have time to even consider.

IV The Temporary Refuge Initiative

A *The Domestic Impetus*

At the time of the Indo-Chinese refugee exodus, Australia was a party to the *Refugee Convention* and *Refugee Protocol*. However, most of the countries to which the Cambodian, Laotian and Vietnamese refugees fled were not.[69] A case could be made that the prohibition on refoulement had, by that time, become a principle of customary international law binding even on states not parties to those treaties.[70] However, it was a principle that the receiving countries of South East Asia, which viewed the Indo-Chinese arrivals as a security problem and an economic burden, were clearly prepared to violate, unless they had assurance that resettlement (or repatriation) would happen quickly and that external funding for care and maintenance would be forthcoming in the meantime.[71]

From the Australian perspective, the greater the number of refugees turned away from South East Asian countries, the greater the number that could be expected to make their way irregularly to Australia instead. Even if refugees were not turned away by South East Asian countries, inhumane conditions in those countries or despair at being denied a durable solution to their plight were factors likely to prompt irregular onward movement to Australia. It was in Australia's interests, therefore, to argue that the principle of non-refoulement, encompassing non-rejection at the border, applied in situations of mass influx, while also promoting the clear understanding that admission did not require the grant of permanent asylum. Further, it was in Australia's interests to ensure minimum standards of humane treatment of those admitted and the timely provision of durable solutions. The only realistic way of achieving the latter goals was to promote also the principle of equitable burden-sharing.

In August 1979, the Immigration Minister delivered an address in Brisbane to the United Nations Association of Australia in which he called for the development of 'a new system of international instruments' and mechanisms that would be capable

---

69 The Philippines acceded to the *Refugee Convention* and *Refugee Protocol* on 22 July 1981, Japan acceded on 3 October 1981 and 1 January 1982 respectively, and China (excluding Hong Kong Special Administrative Region ('SAR')) acceded on 24 September 1982. However, Cambodia only acceded to the treaties on 15 October 1992, while Hong Kong SAR, Indonesia, Laos, Malaysia, Myanmar, Singapore, Thailand and Vietnam remain non-parties up to the present.

70 It was described as a 'recognized principle' in *EXCOM Conclusion 15 (XXX) of 1979* (see below n 94 and accompanying text), a 'generally recognized principle' in *EXCOM Conclusion 17 (XXXI) of 1980* (UNHCR EXCOM, *Conclusion 17 (XXXI) of 1980 on Problems of Extradition Affecting Refugees*, in *Addendum to the Report of the United Nations High Commissioner for Refugees*, UN GAOR, 35th sess, Agenda Item 4, Supp No 12, UN Doc A/34/12/Add.1 (3 November 1980) [48] and as a 'humanitarian legal principle' in *EXCOM Conclusion 19 (XXXI) of 1980* (UNHCR EXCOM, *Conclusion 19 (XXXI) of 1980 on Temporary Refuge* contained in *Addendum to the Report of the United Nations High Commissioner for Refugees*, UN GAOR, 35th sess, Agenda Item 4, Supp No 12A, UN Doc A/35/12/Add.1 (3 November 1980) [48]).

71 Gilbert Jaeger, 'Refugee Asylum: Policy and Legislative Developments' (1981) 15(1/2) *International Migration Review* 52, 57–8.

of managing mass influx refugee situations with the certainty of international support and guaranteed standards of treatment for refugees.[72] Drawing a link between non-refoulement and an explicit obligation by other countries to share the burdens of the non-rejection of mass influx populations, he proposed the need for

> a graduated set of obligations beginning with the basic survival level of enabling refugees to remain within a country's territory, if necessary in designated and confined areas and at no expense to the Government of the country concerned. The obligations should extend through the present types of protection and non-refoulement in the International Convention and Protocol Relating to the Status of Refugees to the more stringent commitments to resettle refugees and to afford rights to them in the country of resettlement.[73]

In what was perhaps the first salvo of Australia's temporary refuge initiative, the Immigration Minister asserted 'We need separate instruments to deal with these different aspects covering survival, sanctuary, protection, resettlement and civil rights for refugees'.[74]

The Immigration Minister's address prompted Coles to write an influential memorandum to his superiors in the Department of Foreign Affairs.[75] In a move demonstrating the intersection of domestic politics with the evolution of international law, Coles sought to draw attention to 'a number of important and sensitive international political and legal questions' that the Immigration Minister's proposal raised.[76] Coles advocated that the Department of Foreign Affairs ought to become 'closely involved' in the proposal, since it

> is related not so much to Australian immigration policy as to an international refugee policy which is, of course, a major international issue at the moment affecting our relations not only with our neighbours to the north but also with countries in other regions ...[77]

Given the potential ramifications beyond Australia's borders, Coles argued that these matters were outside the remit of the Immigration Minister's portfolio. He argued that 'a whole range of sensitive judgements would have to be made before we could safely conclude that this would be a good international initiative'.[78] He flagged, in particular, his 'grave reservations … about the wisdom of drawing up a "poor man's" regime for the international protection of refugees' worrying that such a system 'may seriously undermine the status of the 1951 Convention and Protocol', which, he said, was already felt by many to offer 'only a minimum protection'.[79] Any new system of instruments dealing with mass influx and minimum standards of treatment, in Coles' view, 'should be looking for more rather than less' than what was offered by the existing instruments.[80]

---

72 MJR MacKellar, [Untitled] (Address, United Nations Association, 11 August 1979, NAA: A1838, 938/43 Part 9).
73 Ibid.
74 Ibid.
75 Memorandum from GJL Coles to RJ Smith, Clarrie Harders, AF Dingle and G Casson, 14 August 1979 (NAA: A1838, 938/43 Part 9).
76 Ibid para 13.
77 Ibid.
78 Ibid para 14.
79 Ibid.
80 Ibid.

Coles also drew attention to the geopolitical/neo-colonial sensitivities that could be provoked by the Immigration Minister's proposal. He noted that

> It is also very doubtful, in my opinion, that States who won't accept the 1951 Convention and Protocol will accept another instrument or instruments. Their main preoccupation at the moment seems to be to preserve their sovereignty intact. They are particularly suspicious of Western 'humanitarian' initiatives in this area, particularly where the Western countries themselves are not directly involved.[81]

Coles' superiors were aware that there was a view gaining strength within the Department of Immigration that it should be responsible for international refugee policy as well as the resettlement of refugees in Australia.[82] In a further instance of the long-range impact on international refugee law of domestic bureaucratic 'turf wars', they decided that the best way of asserting the Department of Foreign Affairs' claim to primary responsibility for international refugee policy was to initiate interdepartmental discussions on the subject under the Department's chairmanship.[83] A series of meetings followed, chaired by the Department of Foreign Affairs' Legal Adviser, Sir Clarrie Harders,[84] during which officials of his Department, the Department of Immigration and the Attorney-General's Department examined the political and legal, international and domestic dimensions of the problem of large-scale influx.[85] The main concern that the officials identified was that observance of the principle of non-refoulement, which they accepted as extending to non-rejection at the frontier, was increasingly becoming associated with the grant of durable asylum.[86] The officials agreed that, particularly in large-scale influx situations, it was unrealistic to expect states to grant durable asylum to all refugees they admitted into their territory.[87] Any such obligation was clearly unacceptable to the South East Asian states dealing with the Indo-Chinese influx and, because of Australia's exposure to that influx, was unacceptable to Australia also.[88] Summing up the interdepartmental meetings Coles noted that:

> The unanimous view … was that on balance it was in Australia's interests to secure the admission of the 'boat' people into the countries of first call on conditions which eased the situation of the admitting State and emphasised the obligation of the international community to assist the countries of first refuge in obtaining satisfactory solutions. It was also the view of these meetings that it was fundamentally in Australia's national interests as a potential country of first refuge to make clear that admission in such situations must be without prejudice to the question whether the admitting State provided thereby a durable or a temporary solution.[89]

---

81 Ibid.

82 Memorandum from WH Bray to Acting Secretary, Department of Foreign Affairs, 27 August 1979 (NAA: A1838, 938/43 Part 9) para 2.

83 Ibid.

84 Sir Clarrie had joined the Department of Foreign Affairs in early July 1979 shortly after retiring as Secretary of the Attorney-General's Department: 'Harders Post', *The Canberra Times* (Canberra, 5 July 1979) 3.

85 Memorandum from GJL Coles to J Hoyle, 10 August 1981 (NAA: A1838, 1490/6/46/1 Part 2), reprising the history of the temporary refuge initiative.

86 Ibid para 5.

87 Ibid.

88 Ibid.

89 Ibid para 6.

It was decided, therefore, that at the next session of the UNHCR's Executive Committee ('EXCOM') Australia should take the initiative to propose 'a set of realistic and helpful principles to guide the conduct of States in large-scale influx situations'.[90]

B *EXCOM Conclusion 15 (XXX) of 1979*

At the meeting of the EXCOM Sub-Committee of the Whole on International Protection of Refugees ('Sub-Committee of the Whole') in 1979, the Australian Delegation tabled a paper dealing with the problems of the large-scale influx of refugees.[91] The paper referred to recent instances of 'refoulement', including rejection at the frontier, and suggested that they had been prompted by fears held by receiving countries that they would be left to bear the burden of the large-scale influxes on their own. In that context, Australia argued that 'temporary refuge' should be developed as a mechanism to link admission of refugees with international solidarity.[92] According to contemporary commentators, the Australian initiative was met with a 'decidedly mixed response'.[93] Nevertheless, EXCOM adopted *Conclusion 15 (XXX) of 1979*, which stated:

> (a) States should use their best endeavours to grant asylum to bona fide asylum-seekers;
>
> (b) Action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the recognized principle of non-refoulement;
>
> …
>
> (f) In cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge. States which because of their geographical situation, or otherwise, are faced with a large-scale influx should as necessary and at the request of the State concerned receive immediate assistance from other States in accordance with the principle of equitable burden-sharing. Such States should consult with the Office of the United Nations High Commissioner for Refugees as soon as possible to ensure that the persons involved are fully protected, are given emergency assistance, and that durable solutions are sought.[94]

The benefit to asylum seekers of forging an instrumental link between non-rejection at the border and a concept of refuge uncoupled from an obligation to provide a permanent or durable solution was almost immediate. Thailand, as the only South East Asian member of EXCOM at the time, announced two days after the adoption of the EXCOM Conclusion that it would henceforth grant 'temporary

---

90 Ibid para 7.

91 Referred to in 'Australia's Views on the International Protection of Refugees: Temporary Refuge and International Solidarity: (Attachment to Letter from Australian Mission to the UN in Geneva to I Jackson)' 12 September 1980, UNHCR Archives, Geneva, 671.1.AUL [Fonds 11, series 2, box 1306] ('Australia's Views on the International Protection of Refugees').

92 As summarised in ibid.

93 David A Martin, 'Large-Scale Migrations of Asylum Seekers' (1982) 76(3) *American Journal of International Law* 598, 605.

94 UNHCR EXCOM, *Conclusion 15 (XXX) of 1979 on Refugees without an Asylum Country*, contained in *Addendum to the Report of the United Nations High Commissioner for Refugees*, UN GAOR, 34th sess, Agenda Item 4, Supp No 12, UN Doc A/34/12/Add.1 (6 November 1979) [72].

refuge' to boat people and to all Kampucheans in Thailand.[95] Thailand's response demonstrated the pragmatic benefit of the temporary refuge concept to the safety of asylum seekers, but also offered a clear indication of how the Australian initiative might be received by other frontline South East Asian nations.

C *An Exploratory Step*

Department of Foreign Affairs officials in consultation with Department of Immigration officials decided that the next step should be to explore the acceptability to the international community of the concept of temporary refuge.[96] The Foreign Affairs Minister, Andrew Peacock, gave his approval for this step in August 1980[97] followed shortly after by Immigration Minister Ian McPhee's approval.[98] Consequently, in the lead up to the EXCOM meeting in October 1980, the Australian Mission to the UN in Geneva made available to the UNHCR a 1980 memorandum entitled 'Australia's Views on the International Protection of Refugees: Temporary Refuge and International Solidarity'.[99] The covering letter emphasised that the views in the memorandum were being advanced in 'an exploratory way' and did not 'necessarily represent the final position of the Australian Government'.[100]

Despite his initial reservations (see above Part IVA), Coles became the primary shaper of Australia's temporary refuge initiative and a strong advocate for it.[101] Indeed, it is likely that he was the principal author of Australia's 1980 memorandum. The memorandum noted that existing international instruments already included the concept of temporary refuge in 'embryonic form', for example, art 3(3) of the 1967 *Declaration on Territorial Asylum*.[102] It argued that in recent international instruments relating to territorial asylum, a distinction had been drawn between the grant of 'asylum' (which it defined as 'the provision of durable plenary protection to a person who is a refugee lawfully in the country of asylum within the meaning of the [*Refugee Convention*]') and temporary admission (which it labelled 'temporary refuge').[103] According to the memorandum, the grant of asylum remained the 'optimum response to a request for protection', but temporary refuge could be granted where 'national security or other overwhelming need to safeguard the population, as in the case of large-scale influx, prevents the grant of asylum'.[104] The memorandum warned that:

---

95 Memorandum from Coles to Hoyle (n 85).

96 Ibid.

97 Memorandum from Stephen Brady, Refugees and Asylum Section, Department of Foreign Affairs, to Unknown, 12 January 1983 (NAA: A9737, 1991/81180 Part 1).

98 Memorandum from Coles to Hoyle (n 85).

99 'Australia's Views on the International Protection of Refugees' (n 91).

100 Letter from Australian Mission to the UN in Geneva to I Jackson, 12 September 1980 (UNHCR Archives, Geneva, 671.1.AUL [Fonds 11, series 2, box 1306]).

101 Mary Crock and Kate Bones, 'Australian Exceptionalism: Temporary Protection and the Rights of Refugees' (2015) 16(2) *Melbourne Journal of International Law* 522, 525.

102 'Australia's Views on the International Protection of Refugees' (n 91).

103 Ibid. The memorandum noted that temporary admission had been given many different labels, including 'first asylum', 'provisional asylum', 'temporary asylum' and 'temporary residence', but argued that the label 'temporary refuge' was to be preferred as conveying the element of protection while avoiding confusion with 'asylum'.

104 Ibid.

> The unqualified acceptance of the principle of non-rejection at the frontier, which could be seen as derogating from the right to refuse asylum, will only be possible in our view if it is linked with temporary refuge, a concept developed as a category of protection different from asylum.[105]

Temporary refuge was, then, a mechanism that avoided refoulement, while also serving as a signal from the receiving country to the rest of the international community that international solidarity was required.[106]

The 1980 memorandum then addressed the status of refugees accorded temporary refuge, placing emphasis on the requirement that any refugee granted temporary refuge 'should not be penalised on account of the entry or presence in the country'.[107] While the memorandum accepted that some restrictions might be imposed on a refugee's freedom of movement within the receiving country, it also gave significant weight to the requirement that refugees given temporary refuge be 'accorded humane treatment and the essential conditions for an existence worthy of a human being'.[108] Coles' authorship is suggested by the similarity of the basic minimum standards specified in the memorandum with those contained in a paper titled 'The International Protection of Refugees and the Concept of Temporary Refuge', which Coles had presented in his own name at the Round Table on Humanitarian Assistance to Indo-China Refugees and Displaced Persons held in May 1980 at the International Institute of Humanitarian Law in San Remo, Italy.[109] In this paper, Coles wrote that the temporary refugee

> should not be treated as a criminal or someone undeserving of human respect and sympathy… [T]here should be no discrimination on grounds of race, religion, political opinion, nationality, or country of origin. He should receive all the help and understanding that his tragic situation demands. His spiritual, moral and material needs should be recognized and met as far as possible. Basic sanitary and health facilities should be provided. Wherever possible, families should be kept together. Facilities for recreation should be provided. He should be allowed to send and receive mail and to receive at least limited amounts of material assistance from friends of relatives.[110]

The 1980 memorandum ended with similar language to the San Remo paper, raising 'the question whether an international instrument should not be prepared to deal with the status of refugees who are in the country of refuge on a basis other than lawfully within the meaning of the 1951 Convention and Protocol'.[111] The memorandum elaborated that such an instrument could provide not only 'humanitarian standards for [refugee] protection', but also, and significantly, it could provide a mechanism to facilitate international solidarity, which would provide for 'immediate assistance to a state burdened beyond the capacity of its resources, and

---

105 Ibid.
106 Ibid.
107 Ibid.
108 Ibid.
109 GJL Coles, 'The International Protection of Refugees and the Concept of Temporary Refuge' in *Round Table on Humanitarian Assistance to Indo-China Refugees and Displaced Persons, San Remo, 28–30 May 1980* (UN Doc HCR/120/16/82, 1982) 103 ('San Remo paper').
110 Ibid 103. The only standard specified in the San Remo paper that was not also specified in the Australian memorandum was the provision of recreation facilities.
111 'Australia's Views on the International Protection of Refugees' (n 91).

on durable solutions, including voluntary repatriation'. Further, the proposed instrument would provide that 'on the matter of admission … a person seeking asylum and who meets the criteria for an asylee shall receive at least temporary refuge'.[112]

The response to the Australian initiative continued to be 'mixed' at the 1980 session of EXCOM.[113] While Thailand 'warmly endorsed' it,[114] a number of Western European countries were resistant.[115] Presciently, they expressed the fear that acceptance of the concept of temporary refuge 'might lead to a weakening of recognized principles relating to asylum and non-refoulement and might sanction a practice by Governments generally to grant temporary refuge rather than durable asylum to refugees'.[116] In Coles' view, however, the 'underlying political concern of these countries was to confine the international obligations in the South East Asian situation to the countries of the immediate region', which, as he noted, included Australia.[117]

D *The 1981 Group of Experts' Meeting*

EXCOM dealt with its internal disagreement by asking the High Commissioner for Refugees, Poul Hartling, to convene 'a representative group of experts to examine temporary refuge in all its aspects within the framework of the problems raised by large-scale influx'.[118] Once again, Coles played a major role in shaping the concept of temporary refuge when he was seconded from the Department of Foreign Affairs to the UNHCR for a few months[119] to do preparatory work for the Group of Experts' meeting. He was subsequently nominated as the Australian representative on the Group of Experts[120] and authored a paper titled 'Temporary Refuge and the Large-Scale Influx of Refugees' for consideration by the 14-member group.[121]

Coles' paper claimed that the responses to the influx of Hungarian refugees into Austria in 1956, the influx of refugees from East Pakistan into India in 1971 and the influx of Indo-Chinese refugees into South East Asian countries in the period

---

112 Ibid.

113 Martin (n 93) 605.

114 JL Menadue, 'Discussion' in Charles A Price (ed), *Refugees, the Challenge of the Future: Proceedings, Academy of the Social Sciences in Australia Fourth Academy Symposium, 3–4 November 1980* (Academy of the Social Sciences in Australia, 1981) 22, 23.

115 Memorandum from Coles to Hoyle (n 85).

116 UNHCR, *Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx (Geneva 21–24 April 1981)*, EC/SCP/16/Add.1 (17 July 1981) <http://www.unhcr.org/en-au/excom/scip/3ae68cd04/report-meeting-expert-group-temporary-refuge-situations-large-scale-influx.html> ('*Addendum to the Report of the 1981 Group of Experts' Meeting*').

117 Memorandum from Coles to Hoyle (n 85).

118 UNHCR EXCOM, *Conclusion 19 (XXXI) of 1980* (n 70).

119 The secondment appears to have continued until 28 February 1981, which was a little longer than originally intended: *Cable from Australian Mission to the UN in Geneva to Department of Foreign Affairs*, 5 February 1981 (NAA: A1838, 1490/6/46/1 Part 2). Coles was again seconded to the UNHCR from late 1981 to sometime in 1985.

120 Submission from RJ Smith to Minister for Foreign Affairs, 23 December 1980 (NAA: A1838, 1490/6/46/1 Part 2).

121 GJL Coles, 'Temporary Refuge and the Large-Scale Influx of Refugees' in UNHCR, *Addendum to the Report of the 1981 Group of Experts' Meeting* (n 116).

1975 to 1980 were illustrative of the fact that Australia was simply proposing formalisation of principles that were already being applied in practice.[122] The paper repeated the key points made in Australia's 1980 memorandum, but extended the list of basic minimum standards of temporary refuge.[123] This longer list of standards was very similar to a list previously included in the Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia.[124] Coles had been a member and the rapporteur of the Working Group, which met in San Remo in January 1981 under the joint auspices of the International Institute of Humanitarian Law and the UNHCR.[125]

Coles' paper for the 1981 Group of Experts' meeting also went further than Australia's 1980 memorandum in its comments on finding durable solutions. After noting that documents such as the Carnegie Draft Convention placed emphasis on the grant of permanent asylum by the State initially approached, Coles questioned whether such an emphasis was appropriate in situations of mass influx. At the same time, he questioned whether admission on a temporary basis should be seen 'exclusively in relation to the opportunity accorded to obtain admission into another country' as was the case in existing international instruments.[126] According to Coles, '[i]n view of the variety and complexity of the circumstances which can surround large-scale influx situations, there should be no general a priori assumption about the best solution in every situation', with the only applicable general principle being that 'the most satisfactory durable solution should be found as soon as possible' whether that be voluntary repatriation, local integration, resettlement or some combination thereof.[127]

At its meeting in April 1981, the Group of Experts adopted a report setting out its conclusions.[128] These conclusions emphasised the scrupulous observance of non-refoulement including non-rejection at the border and the accompanying need for admission on at least a temporary basis. They also set out a list of basic minimum standards of treatment of those temporarily admitted that was clearly patterned on the list set out in Coles' paper for the meeting. Finally, they called for the strengthening and/or creation of mechanisms to enable burden-sharing between states in relation to the provision of immediate assistance and appropriate durable solutions as well as prevention or removal of the causes of mass influx situations. While Australia in its 1980 memorandum and Coles in his paper for the 1981 Group

---

122 Ibid.

123 Ibid.

124 [GJL Coles], *Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia* (Report, March 1981). The Working Group had been established to follow up on the recommendations and conclusions of the Manila Round Table on Current Problems in the International Protection of Refugees and Displaced Persons in Asia, which had met in April 1980. Coles had participated in the April 1980 Round Table and presented a paper: see Gervase Coles, 'Problems of Large-Scale Influx' (Paper, Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons, 14–18 April 1980).

125 The other six members of the working group were international refugee law experts from India, Japan, Pakistan, the Philippines, Thailand and Vietnam.

126 Coles (n 121).

127 Ibid.

128 UNHCR, *Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx (Geneva 21–24 April 1981)*, UN Doc EC/SCP/16 (3 June 1981) <http://www.refworld.org/docid/3ae68cc08.html> ('*Report of the 1981 Group of Experts' Meeting*').

of Experts' meeting had advocated strongly for the adoption and consistent use of the term 'temporary refuge' as a means of clearly distinguishing the concept from that of 'asylum' in the sense of durable solution, the Group of Experts went to great lengths to avoid using the term 'temporary refuge' in their conclusions. According to Martin, a US academic who participated in the meeting, this was precisely because they were 'even more resistant than [EXCOM's] members toward giving any blessing to what might be seen as a firm new legal concept or status clearly separate from full refugee status'.[129]

In retrospect, Coles was scathing about the Group of Experts' meeting observing that many of the participants were not experts in the field of international refugee law or protection policy.[130] Rather, Coles argued that 'the selection of experts … was not dictated by a desire to have an open discussion but as a result of pressure by certain legal circles within UNHCR to down-play the temporary solution'.[131] Supporting his claim that the outcome of the Group of Experts' meeting was predetermined, Coles pointed out that 'the report of the April meeting was drafted before the meeting actually took place by lawyers in the UNHCR who wished to reinforce the link [between admission and durable outcomes]'.[132] Coles was correct about there being opposition to the concept of temporary refuge within the UNHCR. While some such as Goodwin-Gill, then a UNHCR legal adviser based in Australia, were in favour of the concept,[133] others within the UNHCR feared that international protection law might be weakened by it.[134]

Western European countries, which thought at the time that mass movements had no relevance to the European context, also remained resistant to the concept. On the other hand, in the course of arguing for the Australian initiative to be continued, Coles noted that the Australian Embassy in Manila had reported that the Philippines recent accession to the *Refugee Convention* 'was secured on the assurances that admission would not necessarily have as a legal consequence an obligation to provide a durable solution'.[135] He also noted that the Japanese Embassy had confirmed that the Japanese Diet was considering ratification of the *Refugee Convention* on the understanding that it would only have to provide temporary refuge to any boat people it admitted.[136]

Coles' superiors in the Department of Foreign Affairs were convinced by his defence of the temporary refuge initiative. In September 1981, the Department made a submission to its Minister, Tony Street, recommending that the initiative be

---

129 Martin (n 93) 605.
130 Memorandum from Coles to Hoyle (n 85).
131 Ibid para 25.
132 Ibid.
133 GS Goodwin-Gill, 'Non-Refoulement and the Concept of Temporary Refuge in Situations involving Large Numbers of Asylum Seekers: Some Comments on Recent Developments' (1981) in *Guy S Goodwin-Gill Papers*, Bodleian Social Science Library, Oxford (GG): ring binder '3 Non-refoulement, Asylum and Protection: 30 Non-refoulement: General' [box 1, file 2].
134 Letter from Michel Moussalli, Director of International Protection, UNHCR to GS Goodwin-Gill, 26 August 1981, in *Guy S Goodwin-Gill Papers*, Bodleian Social Science Library, Oxford (GG): ring binder '3 Non-refoulement, Asylum and Protection: 30 Non-refoulement: General' [box 1, file 2.]
135 Memorandum from Coles to Hoyle (n 85) para 33.
136 Ibid para 34.

continued and noting that the Department of Immigration agreed.[137] This recommendation was accepted.[138]

E *EXCOM Conclusion 22 (XXXII) of 1981*

In its statement at the October 1981 meeting of the Sub-Committee of the Whole, the Australian Delegation to EXCOM drew attention to the report of the Round Table on Problems arising from the Large Numbers of Asylum Seekers.[139] The Round Table was convened in June 1981 in San Remo by the International Institute of Humanitarian Law and the UNHCR. Coles had been among the 29 foreign affairs officials, academics and non-government organisation representatives who participated in the June 1981 Round Table[140] and had written a 48-page background paper for it in his private capacity.[141] As recommended by Coles,[142] the Australian Delegation to EXCOM described the Round Table report as a 'valuable contribution' and urged that it be considered alongside the *Report of the 1981 Group of Experts' Meeting*.[143] According to the Australian Delegation, both reports explicitly or implicitly accepted that: (i) a state that admitted refugees did not thereby incur an unqualified obligation to provide them with a durable solution; (ii) in certain cases the admitting state could provide protection on a temporary basis only, pending a durable solution being found; and (iii) the principle of solidarity had a role to play in achieving durable solutions in such cases.[144]

In the light of this observation, the Australian Delegation expressed dissatisfaction with the choice made by the Group of Experts to use the term 'asylum on a temporary basis' in its *Report of the 1981 Group of Experts' Meeting* and reiterated its preference for the term 'temporary refuge', which had been used in *EXCOM Conclusion 15 (XXX) of 1979* and in the *June 1981 Round Table Report*.[145] The Australian Delegation's statement also took direct aim at an observation of 'some experts' recorded in the *Report of the 1981 Group of Experts' Meeting* that, in the past, states in Europe and Africa 'had granted asylum in their territories in

---

137 Submission from JH Brooks to Minister for Foreign Affairs, 7 September 1981 (NAA: A1838, 1490/6/46/1 Part 2) 2.

138 Memorandum from Brady to Unknown (n 97).

139 Australian Delegation to UNHCR EXCOM, 'Statement by Australian Delegation' (Statement, Meeting of the Sub-Committee of the Whole, 8–12 October 1981) GG: ring binder '3 Non-refoulement, Asylum and Protection: 30 Non-refoulement: General' [box 1, file 2]. The *June 1981 Round Table Report* is reproduced in International Institute of Humanitarian Law and UNHCR, *Contributions to International Refugee Law: Joint Activities of the International Institute of Humanitarian Law and the United Nations High Commission for Refugees 1973–2000* (2001) 13 <http://iihl.org/wp-content/uploads/2019/05/Refugee-a-continuing-challenge.pdf>.

140 A list of participants is annexed to the *Report on the Round Table on the Problems arising from Large Numbers of Asylum Seekers* (Report, June 1981) GG: ring binder '3 Non-refoulement, Asylum and Protection: 30 Non-refoulement: General' [box 1, file 2].

141 The paper states '[t]he views contained in this paper are those of the author and are not necessarily those of any other body'. GJL Coles, *Problems arising from Large Numbers of Asylum-Seekers: A Study of Protection Aspects* (International Institute of Humanitarian Law, 1981) [introductory note].

142 *Cable from Coles to Department of Foreign Affairs*, 16 September 1981 (NAA: A432, E1977/6390 Part 9).

143 Australian Delegation to UNHCR EXCOM (n 139).

144 Ibid.

145 Ibid.

cases of large-scale influx, without making use of any other concepts'.[146] The Delegation noted that Australia was 'a major country of resettlement where one of these regions is concerned'.[147] Given this position, and Australia's experience over the last thirty years' as a country that 'has been approached regularly by certain countries … to accept refugees who are being held in refugee camps for resettlement on the basis that no durable or permanent solution could be provided for them in their country of origin', the Delegation commented that 'the practice of temporary refuge is found on a significant and growing scale in most regions of the world'.[148] Turning to international solidarity, the Australian Delegation expressed the view that the language used by the *Report of the 1981 Group of Experts' Meeting* was 'insufficiently strong'.[149] It preferred instead the *June 1981 Round Table Report*, which it said stated that

> the country of refuge should be regarded as acting on behalf of the international community and was entitled to receive (where necessary) directly or through appropriate organisations active cooperation from other states in the provision of assistance and in the obtaining of durable solutions, whether voluntary repatriation, settlement in the country of refuge or resettlement elsewhere.[150]

Ultimately, the Sub-Committee of the Whole adopted a very slightly modified form of the Group of Experts' conclusions as its own conclusions.[151] EXCOM in turn adopted the Sub-Committee of the Whole's conclusions as its own.[152] Despite Australia's exhortations, *EXCOM Conclusion 22 (XXXII)* did not use the term 'temporary refuge' or adopt the strong wording of the *June 1981 Round Table Report* in relation to international cooperation. On the other hand, it did avoid the use of terms such as 'asylum on a temporary basis' and did add a couple of sentences about the desirability of international cooperation.[153] Moreover, Coles regarded the inclusion in the EXCOM Conclusion of the basic minimum standards of treatment of persons granted temporary refuge as 'a watershed in the development of international legal thinking in regard to the refugee problem'.[154] As the originator of the minimum standards, Coles was not, of course, an impartial observer, but contemporaries agreed that these standards represented an important advance.[155]

---

146 UNHCR, *Report of the 1981 Group of Experts' Meeting* (n 128) [8]. Unsurprisingly, these experts were from Europe and Africa: Martin (n 93) 605–6.

147 Australian Delegation to UNHCR EXCOM (n 139).

148 Ibid.

149 Ibid.

150 Ibid 20.

151 UNHCR EXCOM, *Report on the Meeting of the Sub-Committee of the Whole on International Protection (6th Meeting)*, UN Doc A/AC.96/599 (12 October 1981).

152 UNHCR EXCOM, *Conclusion 22 (XXXII) of 1981 on Protection of Asylum-Seekers in Situations of Large-Scale Influx* (21 October 1981) <https://www.unhcr.org/en-au/excom/exconc/3ae68c6e10/protection-asylum-seekers-situations-large-scale-influx.html>.

153 Martin (n 93) 607.

154 GJL Coles, 'Some Reflections on the Protection of Refugees from Armed Conflict Situations' (1984) 7 *In Defense of the Alien* 78, 99.

155 Martin (n 93) 606; Roda Mushkat, 'Human Rights under Temporary Refuge' (1984) 62(3) *Revue de Droit International de Sciences Diplomatiques et Politiques* 169, 175. Similarly, in correspondence with Guy S Goodwin-Gill, Michel Moussalli said 'Thanks to this Australian initiative we now have what I consider one of the best conclusions ever achieved by our Sub-Committee on Protection': Letter from Michel Moussalli to Guy S Goodwin-Gill, 22 December 1981, GG: ring binder '3 Non-refoulement, Asylum and Protection: 30 Non-refoulement: General' [box 1, file 2].

F *The Resisters Prevail*

In September 1982, almost 12 months after the adoption of *EXCOM Conclusion 22 (XXXII)*, the Department of Foreign Affairs sent a cable to the Australian missions to the UN in Geneva and New York, seeking their comments on a provisional plan for achieving acceptance of temporary refuge as an 'operative concept in public international law'.[156] The best case scenario envisaged by the Department was a UN General Assembly resolution on the initiative in 1983 and the possible move 'towards a declaration and perhaps, later a convention'.[157] The Australian Mission to the UN in New York responded to the cable suggesting that the Department was being too ambitious in its plans.[158] The Mission also expressed the view that any work on a declaration or convention on temporary refuge could more effectively proceed through EXCOM machinery rather than the Third Committee of the UN General Assembly and should only be brought to the UN General Assembly if and when finalised in Geneva.[159]

For reasons not illuminated by the extant archival record, Australia did not get temporary refuge listed as an item on the agenda of EXCOM sub-committee or plenary meetings in 1982.[160] However, during general debate at the plenary meeting, the Australian representative suggested that the EXCOM Secretariat should conduct further study with a view to elaborating on *EXCOM Conclusion 22 (XXXII)* and developing the practical arrangements to which it referred, and should report back to the 34th session of EXCOM.[161] Australia also raised the issue of temporary refuge during the discussion on the UNHCR in the Third Committee of the UN General Assembly at its 37th session in 1982.[162]

Australia did not manage to get the term 'temporary refuge' into the language of UN General Assembly *Resolution 37/195* on the *Report of the United Nations High Commissioner for Refugees*,[163] which it regarded as a serious setback.[164] However, Australia was reasonably satisfied that the issue was kept alive by the Resolution,[165] which: requested the High Commissioner to continue 'examining the problems associated with providing refuge on a temporary basis to asylum seekers in situations of large-scale influx with a view to finding durable solutions' (para 4); noted the major contribution of countries 'giving asylum to, or otherwise accepting on a temporary basis, and assisting large numbers of refugees and displaced persons'

---

156 *Cable from Department of Foreign Affairs to Australian Missions to the UN in Geneva and New York*, 3 September 1982 (NAA: A432, E1977/6390 Part 11).

157 Ibid.

158 *Cable from Australian Mission to the UN in New York to Department of Foreign Affairs*, 3 September 1982 (NAA: A432, E1977/6390 Part 11).

159 Ibid.

160 Letter from J Jusczcyk to Keith Baker, 20 April 1983 (NAA: A9737, 1991/81180 Part 1).

161 UNHCR EXCOM, *Summary Record of the 343rd meeting*, 33rd session, UN doc A/AC.96/SR.343 (14 October 1982).

162 UNHCR EXCOM, *Summary Record of 43rd meeting*, UN GAOR, 3rd Comm, 37th session, UN Doc A/C.3/37/SR.43 (16 November 1982) paras 9–14.

163 *Report of the United Nations High Commissioner for Refugees*, GA Res 37/195, UN GAOR, 35th sess, 111th plen mtg, Agenda Item 90A, UN Doc A/RES/37/195 (18 December 1982) ('*Resolution 37/195*').

164 'West Brief', August 1983 (NAA: A9737, 1991/81180 Part 1).

165 Ibid.

(para 5); and stressed 'the importance of maintaining relief efforts and the resettlement momentum for boat and land cases in South-East Asia, where large numbers of refugees and displaced persons have been admitted on a temporary basis' (para 8).[166] Australia's efforts bore some fruit when, by 1983, some opponents of the temporary refuge concept had come around to support the Australian perspective.[167] Despite these small advances, some within the UNHCR, such as Ivor Jackson, the Deputy Director of the UNHCR's Protection Division, and many European countries, such as Belgium, the Netherlands, Norway and Sweden, still regarded the concept as one that undermined the existing obligations of states.[168] At the same time, ASEAN countries were wary of the concept to the extent that it imposed minimum standards of protection on them.[169]

At the 34th session of EXCOM in October 1983, Australia's representatives persisted in advancing the concept of temporary refuge, referring to the need for 'further examination of the concept' in light of the 'all too evident gaps in the legal regime for international protection'.[170] Shortly after, the Australian Mission to the UN in New York reported back to the Department of Foreign Affairs that a number of delegations at the 38th Session of the UN General Assembly were resistant to Australia's efforts to include a specific reference to the concept of temporary refuge in the resolution on the report of the UNHCR.[171] The Department responded that it attached 'considerable importance' to the incorporation of such a reference.[172] In the end, and a far cry from the Department's goal of having the concept of temporary refuge accepted as an operative legal concept in international law, the UN General Assembly Resolution instead expressed 'its deep appreciation for the valuable material and humanitarian response of receiving countries, in particular of many developing countries that give asylum to or accept on a temporary basis large numbers of refugees'.[173]

Australia made one final effort to promote the institutionalisation of temporary refuge in international law in 1984. In its statement on the agenda item on international protection at the 35th session of EXCOM, Australia again drew attention to the pragmatic reality that many states were already providing temporary protection to refugees in mass-influx situations, without the benefit of clear

---

166 *Resolution 37/195*, UN Doc A/RES/37/195 (n 163) paras 4–5, 8.

167 For example, Paul Weis, the influential Chairperson of the Ad Hoc Committee on the Legal Aspects of Territorial Asylum and Refugees of the Council of Europe, who had previously been opposed to consideration of mass flows and temporary refuge, had pleasantly surprised Australia's High Commissioner in Malta by stating that a European convention on asylum would need to cover 'temporary stay pending resolution of the asylum seeker's situation': *Cable from G Cotsell to Department of Foreign Affairs*, 26 April 1983 (NAA: A9737, 1991/81180 Part 1).

168 Ibid; 'West Brief' (n 164).

169 'West Brief' (n 164).

170 UNHCR EXCOM, *Summary Record of the 354th meeting*, 34th session, UN doc A/AC.96/SR.354 (12 October 1983) para 47. See also UNHCR EXCOM, *Summary Record of the 359th meeting*, 34th session, UN doc A/AC.96/SR.359 (17 October 1983) para 75.

171 *Cable from Australian Mission to the UN in New York to Department of Foreign Affairs*, 17 November 1983 (NAA: A9737, 1991/81180 Part 1).

172 *Cable from Department of Foreign Affairs to Australian Mission to the UN in New York*, 18 November 1983 (NAA: A9737, 1991/81180 Part 1).

173 *Report of the United Nations High Commissioner for Refugees*, GA Res 38/121, UN GAOR, 38th sess, 100th plen mtg, UN Doc A/RES/38/121 (16 December 1983) para 6.

standards of treatment or the material support that formalised international solidarity could provide. Appealing to his fellow delegates, the Australian representative at EXCOM asked them to abandon their view of 'temporary refuge as a development only to be resisted' and to instead recognise the 'advantage in accepting it as a reality in certain situations and in building upon such acceptance to establish the basic rights asylum seekers should enjoy'.[174] The Australian representative also took the opportunity to remind the Committee that 'Australia has been promoting further examination of the practice of granting temporary refuge in this sense'.[175] In rebuttal, Michel Moussalli, the UNHCR's Director of International Protection, responded pointedly that

> [i]t had been suggested that it would be preferable to acknowledge, rather than resist, temporary refuge. Temporary refuge was a sad fact … but it would perhaps be a mistake to institutionalize it and allow it to develop into a concept that would weaken asylum …[176]

Ironically, Coles' original concerns expressed in 1979 that MacKellar's proposal would work only to undermine the 1951 Convention and result in a '"poor man's" regime for the international protection of refugees' ultimately won the day.[177]

V The Afterlife of Temporary Refuge

From the mid to late 1980s, the concept of temporary refuge became a matter only for academic debate. Perluss and Hartman, for instance, relied on state practice and alleged *opinio juris*, such as the EXCOM Conclusions discussed above, to argue that a customary norm of temporary refuge had emerged.[178] In response, Hailbronner accused them of 'wishful legal thinking'.[179] However, the breakup of the Socialist Federal Republic of Yugoslavia in the 1990s caused the UNHCR and European states to revisit the concept.[180] The conflicts prompted by Croatia's and Slovenia's unilateral declarations of independence in June 1991 displaced approximately 1.8 million people.[181] The resulting mass-influx refugee crisis in Europe led to a significant shift in the widespread practice of European countries of granting permanent asylum to recognised refugees. In place of this practice, European

---

174 UNHCR EXCOM, *Report of the 35th session of the Executive Committee of the High Commissioner's Programme* contained in *Addendum to the Report of the United Nations High Commissioner for Refugees*, UN GAOR, 39th sess, Agenda Item 6, Supp No 12A, UN Doc A/39/12/Add.1 (5 November 1984) para 78.

175 Statement by the Australian representative, Charles Mott, to UNHCR EXCOM re agenda item #6, International Protection, 12 October 1984 (NAA: A1838, 1689/2/3/3 Part 4).

176 UNHCR EXCOM, *Summary Record of the 374th meeting*, 35th session, UN doc A/AC.96/SR.374 (23 October 1984) para 83.

177 Memorandum from Coles to Smith et al (n 75).

178 Perluss and Hartman (n 9).

179 Kay Hailbronner, 'Nonrefoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' in David A Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Springer, 1988) 123.

180 The Socialist Federal Republic of Yugoslavia was made up of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia (including the province of Kosovo) and Slovenia.

181 Maria O'Sullivan, *Refugee Law and Durability of Protection: Temporary Residence and Cessation of Status* (Routledge, 2019) 21.

countries moved instead toward the granting of so-called 'temporary protection' to displaced populations.[182]

The UNHCR's 1994 *Note on International Protection* described 'temporary protection' as a variation on the practice of granting 'temporary refuge' used to deal with situations of large-scale influx in 'other parts of the world'.[183] The Note also acknowledged that the UNHCR had 'first formally recommended' such a practice in the context of the Yugoslav refugee crisis.[184] Unlike the countries of South East Asia during the period of the Indo-Chinese refugee crisis, most European countries in the 1990s were parties to the *Refugee Convention* and *Refugee Protocol*. The Note advanced three justifications for the UNHCR's stance. First, the procedures in place in European countries for individualised determination of refugee status were unable to cope with a mass influx situation.[185] Second, those fleeing the Yugoslav conflict were in need of international protection even if they were not 'refugees' within the meaning of the *Refugee Convention* and *Refugee Protocol*.[186] Finally, provision of the full panoply of *Refugee Convention* rights was not necessary, given that the expectation was that refugees would be able to repatriate safely within a fairly short period.[187] In relation to the final justification, the UNHCR pointed out that, in fact, '[t]he benefits provided under the various articles of the Convention have different levels of applicability depending on the nature of the refugee's sojourn or residence in the country'.[188] This allowed scope for 'reorienting programmes for refugees admitted on a temporary basis towards their eventual return when conditions permit, rather than towards full integration in the asylum country'.[189]

According to the UNHCR, the basic elements of temporary protection included:

- admission to safety in the country of refuge;
- respect for basic human rights, with treatment in accordance with internationally recognized humanitarian standards such as those outlined in Conclusion 22 (XXXII) of the Executive Committee;[190]
- protection against refoulement;
- repatriation when conditions in the country of origin allow.[191]

These were the same elements that Australia had specified in relation to temporary refuge except that Australia left open the possibility of durable solutions other than repatriation depending on the situation. Moreover, as Australia had emphasised in relation to temporary refuge, the UNHCR emphasised that '[t]emporary protection should be one component in a comprehensive approach' which included burden-

---

182 Ibid 21–2.

183 UNHCR, *Note on International Protection*, UN Doc A/AC.96/830 (7 September 1994) <https://www.refworld.org/docid/3f0a935f2.html> para 46.

184 Ibid para 41.

185 Ibid para 46.

186 Ibid para 47.

187 Ibid para 49.

188 Ibid para 29.

189 Ibid.

190 However, the UNHCR added that, in the context of the Yugoslav refugee crisis, '[t]here was general agreement on the need for progressive improvements in standards beyond the minimum in Conclusion 22 (XXXII) when the period of temporary protection is prolonged': ibid para 49.

191 Ibid para 48.

sharing and international solidarity with directly affected countries and the addressing of root causes.[192]

While the Department of Foreign Affairs in 1982 thought that securing a convention on temporary refuge was a possible best case scenario, the UNHCR in 1994 conceded that states were disinclined 'to incur further legal obligations in this domain'.[193] Instead, it suggested that a declaration of guiding principles on temporary protection was 'not only desirable but perhaps even a feasible option'.[194] It was overly optimistic. Over the period 1996–98, the UNHCR held informal consultations on the provision of international protection to all who need it. Temporary protection and burden-sharing were discussed in the course of these consultations.[195] Over the period 2000–02, the UNHCR held its Global Consultations on International Protection. Temporary protection was discussed in the Third Track of the Global Consultations in the context of discussing the protection of refugees in situations of mass influx.[196] However, neither set of consultations resulted in a consensus view about temporary protection.[197] Ten years later, the UNHCR tried again, holding Roundtables on Temporary Protection in 2012 and 2013 with the aim of identifying 'the scope and minimum standards of temporary protection/stay'.[198] The UNHCR then drew on these Roundtable discussions as well as an Expert Meeting on International Cooperation to Share Burdens and Responsibilities held in 2011 and lessons learned from past arrangements to compile its 2014 *Guidelines on Temporary Protection or Stay Arrangements*.[199] The Guidelines are intended to 'guide and assist Governments in the development of Temporary Protection or Stay Arrangements'.[200] According to the Guidelines, a Temporary Protection or Stay Arrangement is 'an appropriate multilateral response to humanitarian crises, including large-scale influxes, and complex or mixed population movements'.[201] Purporting to build on *EXCOM Conclusion 22 (XXXII) of 1981* 'in line with subsequent developments in international human rights law', the Guidelines specify minimum standards of treatment in the context of a temporary protection or stay arrangement.[202] However, the Guidelines emphasise that '[i]n cases of extended stay, or where transition to

---

192 Ibid para 51.
193 Ibid para 53.
194 Ibid para 54.
195 UNHCR, *Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It*, UN Doc EC/48/SC/CRP.32 (25 May 1998) <https://www.unhcr.org/excom/standcom/3ae68cff4/progress-report-informal-consultations-provision-international-protection.html> paras 1–2.
196 UNHCR, *Global Consultations on International Protection/Third Track: Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, UN Doc EC/GC/01/4 (19 February 2001) <https://www.refworld.org/docid/3bfa83504.html>. The Third Track of the Global Consultations consisted of discussions between the UNHCR and the UNHCR EXCOM about protection issues beyond the *Refugee Convention*: Tom Clark and James C Simeon, 'UNHCR International Protection Policies 2000–2013: From Cross-Road to Gaps and Responses' (2014) 33(3) *Refugee Survey Quarterly* 1, 5–6.
197 Alice Edwards, 'Temporary Protection, Derogation and the *1951 Refugee Convention*' (2012) 13(2) *Melbourne Journal of International Law* 595.
198 UNHCR (n 8) para 2.
199 Ibid.
200 Ibid para 1.
201 Ibid annex.
202 Ibid para 16.

solutions is delayed, the standards of treatment would need to be gradually improved.'[203] Moreover, they emphasise that a Temporary Protection or Stay Arrangement is 'complementary to and building on the international refugee protection regime' and should not be used 'to undermine existing international obligations'.[204]

While the Guidelines document is to be commended, it is a far cry from a treaty binding on states or even a declaration politically endorsed by states. In fact, the actual practice of states has realised the worst fears of those opposing the institutionalisation of temporary refuge. States now resort to the grant of temporary refuge not only to deal with the kind of mass influx situation that prompted Australia to promote the concept, but as everyday practice divorced from efforts to find durable solutions for affected individuals.[205] Indeed, Australia is one of the countries that has experimented with temporary protection domestically, implementing a 'temporary protection' regime in which no durable solution is available to unauthorised arrivals besides repatriation.[206] Under this regime, unauthorised arrivals who are found to be in need of Australia's protection are only eligible for the grant of a three-year Temporary Protection Visa or five-year Safe Haven Enterprise Visa.[207] The vast majority of Temporary Protection Visa and Safe Haven Enterprise Visa holders will need to reapply for protection every three/five years and to repatriate if and when found not to be in need of protection.[208] Similarly, Europe's response to the refugee crisis in the 1990s 'set the scene for the contemporary use of time-limited residence permits in the EU'.[209]

VI Conclusion

Australia's promotion of the concept of temporary refuge was a turnaround from the position it had taken on the provisional stay article in the Group of Experts' 1975 draft convention on territorial asylum and is an example of circumstances altering cases. At the time of the 1977 Conference of Plenipotentiaries on Territorial Asylum, the Australian Government Department of Immigration had not yet formed the view that irregular mass movement of asylum seekers to Australian shores was a real prospect. After it had formed this view, however, the calculation of Australian self-interest changed. Provision of temporary refuge by its neighbours to the north could be expected to insulate Australia from onward movement of asylum seekers and this became a more important consideration than preserving its own discretion to refuse admission.

---

203 Ibid para 17.

204 Ibid annex.

205 O'Sullivan (n 181) 24.

206 For a detailed discussion of the evolution of temporary protection schemes in Australia starting with the introduction of Refugee Temporary Entry Permits in December 1989, see Crock and Bones (n 101).

207 Other protection visa applicants are eligible for the grant of a permanent protection visa.

208 The Safe Haven Enterprise Visa seems to offer pathways to permanent residence, but very few, if any, Safe Haven Enterprise Visa holders are likely to meet all the requirements for permanent residence.

209 O'Sullivan (n 181) 24.

Australia's championing of the principle of equitable burden-sharing is another example of circumstances altering cases. At the time of the 1977 Conference of Plenipotentiaries on Territorial Asylum, Australia thought it far more likely that it would be called upon to assist other countries than that it would be needing assistance from other countries. Its perceived self-interest was therefore against a strong solidarity obligation. A few years later it was not so sanguine and its position changed accordingly.

European countries too changed their principles to match their circumstances. At the time Australia was promoting the concept of temporary refuge, European countries were confident that they would never be at the receiving end of a mass influx situation. While this remained the case, they resisted the institutionalisation of a concept that they perceived as having the potential to undermine the principle of non-refoulement and/or to place pressure on them to share the burden of mass influx faced by countries in other regions. However, in the 1990s, when the same European countries were faced with a mass influx of their own, they embraced the concept of temporary refuge, albeit under another name.

In retrospect, it is a pity that Australia's push to secure a declaration or treaty on temporary refuge did not succeed, because success might actually have set the limits that the UNHCR is now attempting to set. While Australia failed to achieve its goal of institutionalising temporary refuge in international law, it did nevertheless lay some of the groundwork that informs and shapes present-day initiatives in response to large-scale mass-influxes of refugees. In particular, an enduring legacy of the Australian initiative was the articulation of minimum standards of treatment that became established in *EXCOM Conclusion 22 (XXXII) of 1981* and that, in turn, set the foundation for subsequent developments in international protection law.