Australia and the Abortive Convention on Territorial Asylum: A Case Study of a Cul de Sac in International Refugee and Human Rights Law

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Abstract

Focusing on the period from the adoption of the 1967 Declaration on Territorial Asylum to S. Taylor and K. 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 86-112 DOI: 10.1093/ijrl/eeaa006 the 1977 Conference of Plenipotentiaries on Territorial Asylum in Geneva, this article charts attempts to arrive at an international treaty on territorial asylum. Charting the trajectory of the drafting process, it shows how the ambition of international lawyers and the UNHCR to go beyond Article 14 of the Universal Declaration of Human Rights and the 1967 Declaration was eventually thwarted. As Australia played a significant role at the 1977 conference, particular attention is paid to the development of its position. The article argues that the discussions over the proposed convention on territorial asylum were symptomatic of states' unwillingness to countenance a right *to* asylum, and their concomitant willingness to extend the principle of *non-refoulement*.

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INTRODUCTION

An early draft of the 1948 Universal Declaration of Human Rights (UDHR) prepared by the United Nations (UN) Commission on Human Rights included two articles of relevance to asylum. Draft article 11(2), which became article 13(2) in the final version,[1] read: 'Everyone has the right to leave any country, including his own.' This was immediately followed by draft article 12(1): 'Everyone has the right *to seek and be granted*, in other countries, asylum from persecution.'[2] However, by the time the UN General Assembly voted on the UDHR on 10 December 1948, draft article 12(1) had become article 14(1): 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.'[3]

As the UDHR fell well short of formulating an individual right to asylum, in the early 1950s international lawyers who had argued for such a right in 1947 and 1948 renewed their efforts to press for an international instrument that enshrined the right to asylum in international law. The discussions in UN fora about a right to asylum continued throughout the 1950s and first half of the 1960s, and eventually led to the 1967 Declaration on Territorial Asylum.[4] Another push for a binding international legal agreement began in the early 1970s. It culminated in the Conference of Plenipotentiaries on Territorial Asylum, which was convened by the United Nations from 10 January to 4 February 1977 in Geneva.

Ninety-two governments were represented at the 1977 conference. Agreement on a convention could not be reached. The failure of the 1977 conference marks the end of attempts at the UN level to enshrine the right to asylum in international law. A close look at the proceedings of the 1977 conference, however, reveals that, at best, the convention would have guaranteed only the right of states to grant asylum, rather than the right of an individual

[1] Article 13(2) provides: 'Everyone has the right to leave any country, including his own, and to return to his country.'
[2] Emphasis added. This article had a qualifier: 'Prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations do not constitute persecution.': United Nations Economic and Social Council, 'Report of the third session of the Commission on Human Rights, Lake Success, 28 May to 18 June 1948', Annex A: Draft International Declaration of Human Rights, UN doc E/800 (28 June 1948).
[3] Universal Declaration of Human Rights, UNGA res 3/217 A (10 December 1948). Emphasis added. Article 14(1) is qualified by article 14(2): 'This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.'
[4] P Weis, 'The United Nations Declaration on Territorial Asylum' (1969) 7 Canadian Yearbook of International Law 92; S Aga Khan, 'Asylum – Article 14 of the Universal Declaration of Human Rights' (1967) 8 Journal of the International Commission of Jurists 27; P Weis, 'Territorial Asylum' (1966) 6 Indian Journal of International Law 173; S Taylor and K Neumann, 'Australia and the 1967 Declaration on Territorial Asylum: A Case Study of the Making of International Refugee and Human Rights Law' (2018) 30 International Journal of Refugee Law 8.

persecuted in their own country to be granted asylum in another country. Even if the conference had been successful (that is, if it had agreed on the text for a convention), it would most likely have failed to overcome the shortcomings of article 14 of the UDHR and of the 1967 Declaration.

From a 21st century perspective, the attempt to enshrine the right to asylum in an international treaty appears to have been doomed from the outset because of the inherent contradiction between the right to asylum and the sovereign right of states to make decisions about the admission and expulsion of non-citizens, which had already scuttled attempts to enshrine the right to asylum in the 1948 UDHR or the 1966 International Covenant on Civil and Political Rights (ICCPR).[5]

In order to gain a better understanding of the strategies and dynamics that informed the preparations for and outcome of the 1977 conference, this article scrutinizes the discussions in the lead-up to, and during the 26 days of, the conference. Drawing on archival records that document the discussions about a convention on territorial asylum,[6] the article pays particular attention to the key role played by Australia.

The article begins by situating the 1977 conference in the context of international discussions about a possible treaty on territorial asylum from the adoption of the 1967 Declaration on Territorial Asylum to the 1977 conference. It then explains why Australia's domestic political context prompted it to become a highly engaged player during the 1977 conference. Next, the article analyzes how the discussion about a right to/of asylum evolved by focusing on four contentious issues in turn: the grant of asylum, the beneficiary definition, *non-refoulement*, and provisional stay in the territory of the state where an asylum request has been lodged. It then discusses why the 1977 conference failed and why there was no follow-up to it. The concluding section argues that what played out during the negotiations for a convention on territorial asylum was an accommodation between human rights and sovereignty which has continued to play out to the present day.

[5] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[6] These include, among others, files created by Australian government agencies (particularly, the Department of Foreign Affairs), which are held by the National Archives of Australia, archival records of the Office of the United Nations High Commissioner for Refugees, and the papers of Paul Weis, one of the key contributors to the discussions about a convention on territorial asylum, and Guy S Goodwin-Gill, which are held by the Bodleian Social Science Library, Oxford.

INTERNATIONAL DISCUSSIONS ABOUT A POSSIBLE TREATY ON TERRITORIAL ASYLUM IN THE LEAD-UP TO THE 1977 CONFERENCE

Early efforts to draft a treaty on territorial asylum began in 1964, when the International Law Association (ILA) established a Committee on the Legal Aspects of the Problem of Asylum. Its draft conventions on diplomatic and territorial asylum were adopted in August 1968 at the ILA's 53rd conference in Buenos Aires, and then forwarded for comment to the UN Secretary-General directly and also to the Office of the United Nations High Commissioner for Refugees (UNHCR). The UN's Office of Legal Affairs responded to the ILA on behalf of the Secretary-General declining to comment on the basis that doing so could pre-empt the proposed work of the International Law Commission (ILC) on the topic of asylum.[7] The UNHCR's response to the ILA offered some comment on the ILA drafts, but also drew attention to the ILC's agenda.[8]

While the ILA Committee continued to work on its draft conventions, the Carnegie Endowment for International Peace, in collaboration with the UNHCR, invited 19 prominent legal experts from a range of countries (not including Australia) to participate in a colloquium in Bellagio.[9] At the colloquium in April 1971, attended by 16 of the invitees,[10] the Chairman expressed the hope that it would lay the groundwork for a binding instrument on asylum. At the time of the Bellagio meeting, the hope seemed reasonable because the overall trajectory of international human rights law appeared to be one of progress.[11] Moreover, the process leading to the adoption of the 1967 Protocol relating to the Status of Refugees (Refugee

[7] B Sloan to JBS Edwards (16 May 1969) Paul Weis Archive (hereafter: PWA), Bodleian Social Science Library, Oxford: PW/PR/HCR/BSN/15. By UNGA res 14/1400 (21 November 1959), the UN General Assembly asked the ILC to undertake codification of the principles of international law relating to the right of asylum at its convenience. At its 12th session, in 1960, the ILC noted the General Assembly's request but did not do anything further until 1977, when it decided that there was no need to give active consideration to the topic in the immediate future: The Work of the International Law Commission, vol 1 (6th edn, UN 2012) 37.
[8] E Jahn to Secretary-General International Law Association (2 September 1969) PWA: PW/PR/HCR/BSN/15.
[9] Most of the invitees were diplomats and lawyers with the ability to influence the shaping of the positions taken by their governments on matters of international law, such as ambassadors to the United Nations and foreign ministry legal advisers, and members of the ILC.
[10] Paul Weis and Ivor Jackson of the UNHCR also participated along with two employees of the Carnegie Endowment. Paul Weis and another participant were also members of the above-mentioned ILA Committee.
[11] While it was true that an article on asylum did not make a successful transition from the UDHR into the ICCPR, the 1948 UDHR had been followed by the adoption in 1966 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) and the 1963 Declaration on the Elimination of All Forms of Racial Discrimination had been followed by the adoption in 1965 of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

Protocol)[12] had been initiated in 1965 by a similar colloquium in Bellagio convened by the Carnegie Endowment. In fact, many of those who participated in the April 1971 colloquium had also participated in the 1965 colloquium.[13] The colloquium held in 1971 commenced work on a draft convention on territorial asylum which was completed by a working group at a further meeting in Geneva in January 1972.[14] As well as the Bellagio draft, the working group had before it the ILA's draft Convention on Territorial Asylum.[15]

The completed Carnegie draft was considered that year by the Third Committee of the General Assembly, which asked the High Commissioner to consult with governments about the possibility of the UN adopting a convention on territorial asylum.[16] In September 1974, the High Commissioner reported that he had received responses from 90 governments, representing two-thirds of the UN members at the time, of which 75 were positive.[17]

At its 29th session in 1974, the General Assembly decided to consider whether to hold a conference of plenipotentiaries on territorial asylum at its next session.[18] In the meantime, it requested the Secretary-General, acting in consultation with the UNHCR, to convene a group of governmental experts to review the Carnegie draft.[19] One of the reasons for convening such a group was that European states, in particular, did not want to set a precedent of holding a diplomatic conference to consider a draft prepared by a non-governmental group.[20] From 28 April to 9 May 1975, a Group of Experts composed of representatives from 27 countries, including Australia, met in Geneva to discuss and revise the Carnegie draft.

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[12] Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
[13] 'Draft Record of Colloquium on Territorial Asylum and the Protection of Political Refugees in Public International Law Held at Villa Serbelloni, Bellagio, 13th to 19th April, 1971' (n.d. [1971]) PWA: PW/PR/SHCR/CNF/5. For more about the 1965 meeting see I Glynn, 'The Genesis and Development of Article 1 of the 1951 Refugee Convention' (2012) 25(1) Journal of Refugee Studies 134, 142–43.
[14] The working group consisted of Paul Weis and seven others, who had been present at the Bellagio meeting, Atle Grahl Madsen, who had been invited to join the endeavour in September 1971, and a UNHCR consultant.
[15] 'Record of the Meeting of the Study and Drafting Group on Territorial Asylum Held at the European Centre of the Carnegie Endowment Geneva, 12-15 January, 1972' (24 January 1972) PWA: PW/PR/SHCR/CNF/6.
[16] L Holborn, *Refugees, a Problem of Our Time: The Work of the United Nations High Commissioner for Refugees, 1951-1972* (Scarecrow Press 1975) 233.
[17] UNHCR, 'Note on International Protection Addendum 1: Draft Convention on Territorial Asylum', UN doc A/AC.96/508/Add.1 (26 September 1974) para 8.
[18] UNGA res 29/3272 (10 December 1974).
[19] ibid.
[20] GJL Coles, 'Recent and Future Developments in International Refugee Law' (Seminar on Problems in the International Protection of Refugees, Sydney, August 1980).

Despite strong opposition from the Soviet and Ukrainian representatives,[21] a consolidated text of the revised articles (Group of Experts' draft) was prepared by the meeting secretariat and included as an appendix to the Group of Experts' report. In a resolution adopted on 9 December 1975, the General Assembly requested the Secretary-General, acting in consultation with the UNHCR, to convene a conference of plenipotentiaries in 1977 for the purpose of considering and adopting a convention on territorial asylum and in the meantime to submit the Group of Experts' report to UN members for their comments.[22]

Progressive international lawyers were not satisfied with the Group of Experts' draft.[23] In June 1976, the Nansen Symposium was held at the initiative of a private committee.[24] According to Felix Schnyder, the Swiss diplomat and former High Commissioner for Refugees, who presided over the symposium,

> [t]he philosophy of the Symposium was quite simple: It is better to have a good Convention, which is not ratified because it would impose too stringent obligations on Contracting States, than to have a bad Convention, which is not ratified because its provisions are too weak to be meaningful. It is even better to have a Convention striking such a viable balance between humanitarian considerations and the legitimate interests of States, as to win accession by an important number of States.[25]

The 36 invited scholars and government officials participating in their private capacities in the Nansen Symposium came from 18 countries.[26] The invitees included the Australian diplomat Gervase Coles, who had also been the Australian representative at the Group of Experts' meeting.[27] He went on to become the deputy leader of Australia's delegation to the conference of plenipotentiaries.[28] Within the Department of Foreign Affairs, he put forward

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[21] [GJL Coles], 'Draft Convention on Territorial Asylum' (n.d. [1976]), attachment to GJL Coles to DF De Stoop (18 June 1976) NAA: A1838, 938/43 Part 4.
[22] UNGA res 30/3456 (9 December 1975).
[23] Coles (n 20).
[24] A Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell International 1980) 9–10.
[25] F Schnyder, 'Foreword' in G Melander and A Grahl-Madsen (eds) *Towards an Asylum Convention: Report of the Nansen Symposium* (International University Exchange Fund 1976).
[26] 'Report of the Nansen Symposium on Territorial Asylum, Geneva 27-30 June 1976', Appendix 1 in Grahl-Madsen (n 24).
[27] While the symposium was the result of a private initiative, the Australian government rightly perceived it to play an important role in the lead-up to a conference of plenipotentiaries. Hence when Coles received his invitation, he was given permission to participate on the understanding that he would be able to feed the Department of Foreign Affairs' 'major considerations and concerns' into the discussion; see High Commission London to Dept of Foreign Affairs (14 June 1976) NAA: A432, 1973/5344 Part 1.
[28] The delegation was led by Keith Brennan, Australia's Ambassador to Switzerland, who played a prominent role in other international treaty negotiations at the time (PGF Henderson, 'Brennan, Keith Gabriel (1915–1985)' (2007) Australian Dictionary of Biography, http://adb.anu.edu.au/biography/brennan-keith-gabriel-12252/text21983). The third member of the delegation was Brian Burdekin, the Third Secretary to the Australian Mission to the UN Office in Geneva; he later became Australia's first Federal Human Rights Commissioner.

his own views with vigour and these had considerable influence on the formulation of the Australian position. Coles later pursued an influential career as an UNHCR official. In the narrative that follows, his records are a key source.

The 1967 Declaration on Territorial Asylum had been the result of an initiative undertaken by international lawyers who were acting on behalf of their respective governments, and its text was the outcome of negotiations in committees comprised of government representatives. The UNHCR had supported the initiative, but had not played a major part in it. By contrast, the 1977 conference was the endpoint of a process largely driven by the UNHCR and international law experts acting in a private capacity. The 1972 Carnegie draft, like the Bellagio draft and the ILA draft which fed into it, had been prepared independently of any government input. It was only in 1975, when the Group of Experts was convened under the auspices of the UN, that governments became involved in the drafting process. Furthermore, although the 1977 conference of plenipotentiaries decided to use the 1975 Group of Experts' draft as the basis for discussion, the report of the Nansen Symposium and a draft convention authored by a Working Group on Territorial Asylum (formed by the Geneva Special Committee of International Non-Governmental Organisations on Human Rights) also informed the deliberations in January and February 1977 in Geneva.

THE AUSTRALIAN POLITICAL CONTEXT UP TO 1977

Foreign Policy

Under the Labor prime ministers John Curtin (1941–45) and Ben Chifley (1945–49), Australia had pursued an internationalist foreign policy. This policy was largely driven by attorney-general and foreign minister H V Evatt. Not least due to Evatt's input, Australia played a prominent role in the early years of the UN and contributed to the discussions about the UDHR. In 1949, the conservative Liberal Party–Country Party coalition won the federal election. For the next 23 years, Australia was ruled by conservative governments. After 1949, Australia continued to play a significant role in international organizations, including the UNHCR, but it was less prominent in international discussions about human rights than it had been before the 1949 change of government.[29] That changed when the Labor Party, led by Gough Whitlam, was elected to government in December 1972. During his first 11 months as

[29] It should be noted, however, that in comparison to the 1940s and the 1970s, the 1950s, in particular, were a decade when international human rights diplomacy came to a relative standstill (see, for example, SLB Jensen, *The Making of International Human Rights* (Cambridge University Press 2016) 18-47.

prime minister, Whitlam also served as foreign minister; thereafter, he retained an active part in shaping Australia's foreign policy. Under Whitlam, Australia once again sought to influence international discussions about human rights. During Whitlam's tenure (1972-75), the Australian government signed the ICCPR,[30] ratified the ICERD, acceded to the 1954 Convention Relating to the Status of Stateless Persons[31] and the 1961 Convention on the Reduction of Statelessness,[32] signed and ratified the ICESCR, and acceded to the 1967 Refugee Protocol.

The Whitlam government's internationalist agenda remained in place under his successor as prime minister, the conservative Liberal Party's Malcolm Fraser. Like Whitlam, Fraser was also committed to expanding the international human rights regime. While Fraser was more easily prepared to delegate the responsibility for foreign affairs to his foreign minister, Andrew Peacock, Peacock, too, championed Australia's role in expanding the international human rights regime, and thus resembled his Labor predecessors more so than previous conservative foreign ministers.

One foreign policy initiative had particular ramifications for Australia's approach to the proposed treaty on territorial asylum: its diplomatic asylum initiative. The initiative was announced in June 1974 by the then foreign minister, Senator Don Willesee, who proposed an international treaty on the topic of diplomatic asylum.[33] His proposal came nine months after the coup against the Allende government in Chile, after which thousands of people sought and were granted asylum in 25 embassies in Santiago.[34] In 1974, by way of a first step to advance its initiative, Australia secured the inclusion of an item on diplomatic asylum on the agenda of the 29th session of the General Assembly. The Department of Foreign Affairs

[30] Australia ratified the ICCPR on 13 August 1980.
[31] Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June1960) 360 UNTS 117.
[32] Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.
[33] Don Willesee, speech to the Fourth International Conference of the Australian Institute of International Affairs (AIIA) on 15 June 1974, reproduced in (1974) 54(6) *Australian Foreign Affairs Record* 364, 372. Diplomatic asylum refers to asylum granted by a state on the premises of its overseas diplomatic missions. The purpose of the Australian initiative was to codify into international law the right of a state to grant diplomatic asylum. For a detailed discussion of the initiative see S Taylor, 'Australia's Diplomatic Asylum Initiative at the United Nations: Comparing International Law Rhetoric with Foreign Policy Practice' (2019) 73(4) Australian Journal of International Affairs 376.
[34] Australia's formal comment on diplomatic asylum in UNGA, *Question of Diplomatic Asylum: Report of the Secretary General,* UN doc A/10139 (Part I) (2 September 1975). At the time, Australia did not grant asylum to anybody seeking refuge at its embassy in Santiago; see K Neumann, *Across the Seas: Australia's Response to Refugees: A History* (Black Inc 2015) 216-219.

took the view that it would be inconsistent with Australia's diplomatic asylum initiative not to be seen to be actively supporting the adoption of a convention on territorial asylum.[35] Moreover, the Department took the view that it was important for Australia to be fully involved in the drafting process of any treaty on territorial asylum because any developments in that area would have implications for the cognate area of diplomatic asylum.[36] The diplomatic asylum item was also on the agenda of the 30th session of the General Assembly in 1975, when the UN resolved to give further consideration to the topic 'at a future session of the General Assembly'.[37] This decision effectively spelt the end of discussions about diplomatic asylum at the UN. Nevertheless, even after Peacock had become foreign minister, and as late as November 1979, Australia continued to consider how the initiative could be advanced.[38]

Domestic Asylum Policy in Australia

In October 1956, in anticipation of asylum requests from participants in the 1956 Olympic Games in Melbourne, the Australian government had for the first time formulated a policy on asylum seekers. On 16 October, Cabinet decided that 'political asylum and refuge should be available in appropriate instances'.[39] The categories of non-citizens that Cabinet had in mind included 'Olympic Games visitors, members of visiting trade and other delegations, members of diplomatic and consular missions in Australia, certain other defectors and Asian leaders'.[40] However until the mid-1970s the number of people seeking asylum in Australia was small. Among others, they included members of Eastern European delegations to the 1956 Olympics, a handful of diplomats and their dependants (most famously Vladimir and Evdokia Petrov in 1954), a few Eastern European crew who deserted their ship while it docked in an Australian port, a Chinese illegal immigrant, and three Portuguese sailors who deserted a naval frigate in Darwin.[41]

[35] Dept of Foreign Affairs, 'Territorial Asylum: Present and Future Policy' (November 1974), attachment to JAD Piper to Minister (22 November 1974) NAA: A1838, 938/43 Part 2.
[36] Dept of Foreign Affairs to Australian Mission New York (13 March 1975) NAA: A1838, 1606/49 Part 2.
[37] UNGA res 30/3497 (15 December 1975).
[38] A Peacock, Commonwealth Parliamentary Debates, Representatives (22 November 1979). However, by the end of 1981 the Department of Foreign Affairs was describing the initiative as one which had come to nothing: 'Australia's Asylum Practices', Department of Foreign Affairs, *Backgrounder*, 16 December 1981.
[39] Cabinet minute, decision no 487 (16 October 1956) NAA: A4926, 398.
[40] ibid.
[41] Neumann (n 34) 143–47, 163–70, 174.

In 1962, Australia also agreed on a policy in relation to people from former Dutch New Guinea seeking asylum in the Australian Territory of Papua and New Guinea, and between 1963 and 1973 (when Papua New Guinea became self-governing), Australia accommodated hundreds of asylum seekers from Indonesian-controlled West Irian (Irian Jaya) in its territory on temporary permissive residence permits.[42] The position taken by Australia during the negotiation of the 1967 Declaration on Territorial Asylum was considerably influenced by the Department of Territories' concerns about the possible implications of such a declaration for its management of the situation.[43] However, during the period of Australia's engagement with the proposed convention on territorial asylum, neither the Department, nor the concerns, existed because Papua New Guinea was by then self-governing.

In November 1974, the Department of Foreign Affairs recommended to its minister that, in light of Australia's championing in the UN of the right to grant diplomatic asylum, the Australian government would equally wish to grant territorial asylum in deserving cases.[44] The Department's submission also recommended that, until such time as a convention on territorial asylum was adopted and implementing legislation enacted, Australia 'should apply the spirit of the UN Declaration on Territorial Asylum'.[45] Mirroring the words of the Carnegie draft, the submission stated that: 'Australia should use its best endeavours to grant asylum in its territory, including permission to remain in that territory', to applicants whose circumstances accorded with those specified in the Declaration.[46]

On 30 April 1975, the fall of Saigon triggered an exodus from South Vietnam. By May 1975, the Australian government anticipated asylum requests from Vietnamese arriving in Australia by boat. On 28 May 1975, the Department of Foreign Affairs told its minister that '[r]ecent events in Indo-China have made this subject particularly relevant for Australia', but that for the sake of consistency with the stance taken by Australia in the UN on asylum issues in the recent past, 'it would seem very desirable that we should be guided where our own practice is concerned by the humanitarian principles which have already been embodied in international

[42] In 1969, Australia was also faced with the asylum requests of eight West Papuan men who had sailed a raft to one of Australia's Torres Strait islands, but persuaded them to agree to being transferred to Papua and New Guinea: K Neumann, 'Been there, done that' in D Lusher and N Haslam (eds) *Yearning to Breathe Free: Seeking Asylum in Australia* (Federation Press 2007), 21-34.
[43] Taylor and Neumann (n 4).
[44] Department of Foreign Affairs, 'Territorial Asylum: Present and Future Policy' (November 1974), attachment to JAD Piper to Minister (22 November 1974) NAA: A1838, 938/43 Part 2.
[45] ibid.
[46] ibid.

instruments, such as the 1967 United Nations Declaration on Territorial Asylum.'[47] At the same time, however, prime minister Whitlam decided that any Vietnamese arriving in Australia by boat would be kept in custody to facilitate their removal from Australia.[48]

On 31 July 1975, Senator Willesee, in his capacity as foreign minister, enlisted the assistance of the Minister for Labour and Immigration in the formulation of policy guidelines on territorial asylum, acknowledging that any such policy would have implications of direct concern to the immigration portfolio.[49] Willesee attached his department's November 1974 submission to the letter and stated that he supported its recommendations. However, he also made it clear that Australia's status as a country of immigration meant that the government's 'humanitarian aims' needed to be qualified:

> I am very conscious that it would be undesirable for a generous approach on our part to territorial asylum to be seen as offering a back door into Australia, by which normal migrant entry requirements could be circumvented. It would be important that procedures adopted for dealing with asylum applications should provide adequate safeguards against such a situation.[50]

The Department of Immigration responded by suggesting ways in which governmental discretion in relation to admission could be preserved.[51]

The first boat carrying Vietnamese refugees arrived in Darwin, in Australia's north, in April 1976. It attracted little attention either from the media or from government.[52] The final preparations for the 1977 Geneva Conference coincided with the arrival of more Vietnamese 'boat people'. In 1976, Australia recorded a total of 111 boat arrivals from Indochina, and by December 1976, concerns were voiced in the media. For example, on 22 December the Melbourne tabloid *The Sun* warned of a 'tide of human flotsam' lapping the shores of northern Australia and speculated about an invasion of Australia's far north 'by hundreds, thousands and even tens of thousands of Asian refugees'.[53] By the early 1980s, Australian foreign affairs officials, too, believed that a mass refugee influx into Australia was a real

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[47] H Gilchrist to Minister (28 May 1975) NAA: A1838, 938/43 Part 2.
[48] K Neumann, 'Oblivious to the Obvious? Australian Asylum Seeker Policies and the Use of the Past' in K Neumann and G Tavan (eds), *Does History Matter? Making and Debating Citizenship, Immigration and Refugee Policy in Australia and New Zealand* (ANU E Press 2009), 47-64.
[49] D Willesee to J McClelland (31 July 1975) NAA: A446, 1975/76062.
[50] ibid.
[51] SJ Dempsey to Secretary, Department of Foreign Affairs (16 January 1976) NAA: A1838, 938/43 Part 2.
[52] The five men aboard the boat were granted one-month temporary entry permits the day after arrival and were later granted permanent residence: Neumann (n 34) 251.
[53] Quoted in N Viviani, *The Long Journey: Vietnamese Migration and Settlement in Australia* (Melbourne University Press 1984) 70.

possibility.[54] However, up to and including 1977, their view was that landlocked countries in Europe, such as Austria, faced a much greater problem with respect to territorial asylum claims than Australia.[55] The cases that Australia's diplomats considered to be particularly relevant for the discussions about a convention on asylum concerned not so much Indochinese 'boat people', but rather individuals who had sought political asylum in Australia, such as the Malaysian student activist Hishamuddin Rais whose request for asylum was declined by Australia's foreign minister while the Geneva conference was in progress.[56]

To sum up, by contrast to the period during which the 1967 Declaration on Territorial Asylum was being negotiated, the period during which the proposed convention was on the international agenda was one in which the Territory of Papua and New Guinea was no longer a factor and internationalist foreign policy considerations were at least as important as domestic immigration policy considerations in determining Australia's negotiating position. The only reason why Australia did not oppose the Declaration was that doing so would have placed it outside the WEOG fold and in the company of the Eastern Bloc.[57] During negotiations for the proposed convention, however, Australia had a genuine commitment to advancing human rights as long as that could be accomplished without too great a sacrifice of its ability to control the admission of non-citizens to its territory.

THE EVOLVING CONTENT OF THE PROPOSED CONVENTION

Grant of Asylum

The 1967 Declaration referenced article 14 of the UDHR and did not impose any further obligations on nation-states with regard to the right of individuals to be granted asylum. In fact, article 1(1) of the Declaration was concerned even more explicitly than article 14 of the UDHR with a right of states to grant asylum, rather than with the right of individuals to be granted asylum.[58]

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[54] S Brady, 'Australia's temporary refuge initiative: Do we persist?' (12 January 1983) NAA: A9737, 1991/81180 Part 1; [extract of briefing provided by Department of Foreign Affairs to Minister for Immigration, Stewart West] (August 1983) NAA: A9737, 1991/81180 Part 1.

[55] 'Conference on Territorial Asylum', Department of Foreign Affairs, *Backgrounder,* 18 February 1977; DF De Stoop to G Coles (19 September 1977) NAA: A1838, 938/43 Part 8.

[56] Department of Foreign Affairs to Australian High Commission Kuala Lumpur (18 January 1977) NAA: A1838, 938/43 Part 7; Department of Foreign Affairs to Australian High Commission Kuala Lumpur (8 February 1977) NAA: A446, 1976/86555.

[57] Taylor and Neumann (n 4).

[58] Declaration on Territorial Asylum, UNGA res 22/2312 (14 December 1967).

The Carnegie draft went well beyond both the UDHR and the 1967 Declaration. Article 1(1) provided that '[a] Contracting State, acting in an international and humanitarian spirit, shall use its best endeavours to grant asylum in its territory' and expressly stated that this included 'permission to remain' in the Contracting State's territory. Article 1(3) provided: 'Asylum shall not be refused by a Contracting State solely on the ground that it could be sought from another State.'

At the Group of Experts' meeting, a minority of participants argued that, unless it advanced international law by specifying that asylum was a right of the individual, there was no point in adopting a new treaty.[59] However, the majority was not prepared to go beyond codification of the existing position in international law. In fact, they successfully argued for the insertion of the principle that the grant of asylum is a sovereign right, and resisted a proposal to substitute the relatively stronger formulation 'shall adopt necessary measures' for 'shall use its best endeavours'.[60] The Group of Experts' version of article 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.'[61]

Unlike the Carnegie draft, the Group of Experts' version did not contain any indication of what was meant by 'asylum' or contain an equivalent to the Carnegie draft's article 1(3). Participants at the Nansen Symposium took the view that 'asylum' must at least entail permission to remain in the territory of the Contracting State for as long as the need for protection persisted, and that article 1 ought to say so expressly.[62] The NGO Working Group lobbied for the conference of plenipotentiaries to include in its convention text an individual right to be granted asylum and a provision similar to article 1(3) of the Carnegie draft.[63] The UNHCR lobbied separately for much the same inclusions.[64]

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[59] UNGA, *Office of the United Nations High Commissioner for Refugees: Elaboration of a draft Convention on Territorial Asylum: Report of the Secretary General*, UN doc A/10177 (29 August 1975) para 30; for Coles' comments, see G Coles to DF De Stoop (18 June 1976) NAA: A1838, 938/43 Part 4.
[60] UNGA (n 55) paras 30 and 32.
[61] The beneficiary definition was set out in a separate article.
[62] 'Report of the Nansen Symposium on Territorial Asylum, Geneva 27-30 June 1976', Appendix 1 in Grahl-Madsen (n 24).
[63] '[Draft] Memorandum Submitted by Non-Governmental Organizations on the Draft Convention on Territorial Asylum' (n.d. [1976]), enclosed in N MacDermot to Members of the Geneva NGO Special Committee on Human Rights (30 August 1976) PWA: PW/PR/UNUK/3.
[64] United Nations High Commissioner for Refugees, Aide-Mémoire (11 November 1976), attachment to G Rizzo to M Bouchier (6 December 1976) NAA: A1838, 938/43 Part 6.

The Department of Foreign Affairs instructed the Australian delegation to the 1977 conference that, unlike the Group of Experts' formulation of article 1, the proposal by the NGO Working Group to impose an obligation to grant asylum subject to narrow exceptions was unacceptable because it would deprive Australia of the prerogative to decide its own immigration policies and practices.[65]

At the 1977 conference, the Australian delegation argued in favour of the Group of Experts' formulation of article 1 or a variation in which the phrase 'acting in the exercise of its sovereignty' was substituted for 'acting in the exercise of its sovereign rights'.[66] Australia voted against an amendment proposed by the Federal Republic of Germany (FRG), which would have imposed 'an unqualified obligation on states to grant asylum',[67] but also against amendments focused on preserving sovereign rights, which would have resulted in article 1 simply confirming that states had a right to grant asylum.[68] Moreover, Australia voted against a Jordanian proposal to replace 'shall use its best endeavours' with 'shall endeavour',[69] which was adopted by a narrow margin.[70] The Australian delegation and many others took the view that the amendment gave the state party a greater degree of discretion than the previous formulation and thus represented a disappointing weakening of the provision.[71] Finally,

[65] 'Conference of Plenipotentiaries on Territorial Asylum, Geneva, 10 January - 4 February 1977' [brief for the Australian delegation] (n.d. [1976]), attachment to MGM Bourchier to Minister (20 December 1976) NAA: A1838, 938/43 Part 6. The brief was prepared in consultation with the Department of Immigration and the Attorney-General's Department.
[66] Conference of Plenipotentiaries on Territorial Asylum (Committee of the Whole), 'Summary Record of the Second Meeting', UN doc A/CONF.78/C.1/SR.2 (18 January 1977) paras 57-58. The variation had been proposed by Coles at the Group of Experts' meeting: ibid para 58.
[67] 'Report of the Australian Delegation to the Conference of Plenipotentiaries on Territorial Asylum, Geneva, 10 January – 4 February 1977' (n.d. [1977]) NAA: A1838, 938/43 Part 8. When introducing its amendment, the FRG's representative said it took the position that it did because the German Constitution included a right of asylum and because its foreign policy was based on the protection of human rights: Conference of Plenipotentiaries on Territorial Asylum (Committee of the Whole), 'Summary Record of the Second Meeting', UN doc A/CONF.78/C.1/SR.2 (18 January 1977). Austria, Colombia, Costa Rica, France and Italy also supported a duty to grant asylum: P Weis, 'The Draft United Nations Convention on Territorial Asylum' (1979) 50 British Yearbook of International Law 151.
[68] 'Report of the Australian Delegation to the Conference of Plenipotentiaries on Territorial Asylum, Geneva, 10 January – 4 February 1977' (n.d. [1977]) NAA: A1838, 938/43 Part 8.
[69] ibid.
[70] The Group of Experts' text as amended by the Jordanian amendment was then put to the vote and adopted. It appears that some delegations mistakenly believed that they were voting for the original Group of Experts' text: Weis (n 67). However, an attempt to reopen the vote was unsuccessful: ibid.
[71] 'Report of the Australian Delegation to the Conference of Plenipotentiaries on Territorial Asylum, Geneva, 10 January – 4 February 1977' (n.d. [1977]) NAA: A1838, 938/43 Part 8.

Australia was in the majority which voted in favour of a Danish proposal to add a weaker version of article 1(3) of the Carnegie draft as a second paragraph.[72]

The text of article 1, which was referred to the Drafting Committee by the Committee of the Whole, read:

> Each Contracting state, acting in the exercise of its sovereign rights, shall endeavour in a humanitarian spirit to grant asylum in its territory to any person eligible for the benefits of this Convention. Asylum should not be refused by a Contracting State solely on the ground that it could be sought from another State. Where it appears that a person before requesting asylum from a Contracting state has established a connexion or already has close links with another State, the Contracting State may, if it appears fair and reasonable, require him first to request asylum from that State.[73]

The Drafting Committee replaced the term 'sovereign rights' with the more orthodox term 'sovereignty',[74] but otherwise left the article unchanged.[75] Article 1 was the only article which advanced to the stage of being provisionally adopted by the Drafting Committee.

Beneficiary Definition

As well as dealing with the grant of asylum, article 1 of the Carnegie draft defined the intended beneficiaries of asylum. The content of the definition was similar, though not identical, to articles 1A(2) and 1F of the 1951 Convention relating to the Status of Refugees[76] (as modified by the 1967 Refugee Protocol). As noted above, article 1 of the Group of Experts' text provided for the grant of asylum to 'any person eligible for the benefits of this Convention'. A separate article 2 then provided:

> 1. A person shall be eligible for the benefits for this Convention if he, owing to a well-founded fear of:
> (a) Persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, including the struggle against colonialism and apartheid; or
> (b) Prosecution or punishment for 'acts directly related to the persecution as set forth in (a) is unable or unwilling to return to the country of his nationality, or, if he has no nationality, the country of' his former habitual residence.
> 2. The provisions of paragraph 1 of this article shall not apply to any person with respect to whom there are serious reasons for considering that he has committed:
> (a) A crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes; or
> (b) A serious common offence under the laws and regulations of the Contracting State granting asylum;
> (c) Acts contrary to the purposes and principles of the United Nations.

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[72] ibid.
[73] Report of the United Nations Conference on Territorial Asylum, UN doc A/CONF.78/12 (21 April 1977) para 20.
[74] The Committee of the Whole, in fact, asked the Drafting Committee to consider this option because some representatives argued that 'sovereign rights' could be misconstrued as being more limited than 'sovereignty'.
[75] Weis (n 67).
[76] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

The participants at the Nansen Symposium noted that the scope of the definition and the nature of the obligations imposed by the convention were intertwined considerations. The more onerous the obligations, the more precisely the inclusionary and exclusionary elements of the definition would need to be formulated. Conversely, the less onerous the obligations, the less consequential the definition would be.[77] As the nature of the obligations was itself the subject of negotiation, the different elements of the definition, including their precise wording, were the subject of much contestation up to and during the conference of plenipotentiaries.

The text referred by the Committee of the Whole to the Drafting Committee contained detailed inclusion and exclusion criteria. Article 2(1), containing the inclusion criteria, commenced: 'Each Contracting State may grant the benefits of this Convention to a person seeking asylum, if…'. According to Coles, other WEOG countries were extremely disappointed with this.[78] It was a change from the article 2 text produced by the Group of Experts which had commenced: 'A person shall be eligible for the benefits of this Convention if…'. The intent of those supporting the change in wording was to reinforce that the convention related to the rights of states rather than the rights of individuals.

Non-Refoulement

Article 3(1) of the 1967 Declaration on Territorial Asylum provided: 'No person referred to in article 1, paragraph 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.' This was qualified by article 3(2) which provided that states could make an exception 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.' Where article 3(2) was invoked, however, article 3(3) required the State doing so to 'consider the possibility' of giving the person(s) affected 'an opportunity… of going to another State.' Since the orthodox interpretation of article 33(1) of the Refugee Convention at

[77] A Grahl-Madsen and G Melander, 'Towards an Asylum Convention' in Melander and Grahl-Madsen (n 25) 6.
[78] GJL Coles to DF De Stoop (16 February 1977) NAA: A1838, 938/43 Part 8.

that time was that it did not prevent rejection at the frontier,[79] article 3 of the Declaration was considered an advance in the thinking of states.[80]

Article 2 of the Carnegie draft was similar to article 3(1) of the 1967 Declaration, but went further by containing no equivalent to its article 3(2). When invited by the High Commissioner for Refugees to comment on the Carnegie draft, Australia suggested that '[i]t would be easier to achieve acceptance' of the text of article 2, if the wording 'a Contracting State shall use its best endeavours' was used.[81]

At the Group of Experts' meeting, there was disagreement about the appropriate scope of the *non-refoulement* provision. The text finally adopted by vote read as follows:

> Article 3. *Non-refoulement*
> 1. No person entitled to the benefits of this Convention who is in the territory of a Contracting State shall be subjected by such Contracting State to measures such as return or· expulsion which would compel him to return to a territory where his life or freedom would be threatened. Moreover, a Contracting State shall use its best endeavours to ensure that no person is rejected at its frontiers if there are well-founded reasons for believing that such rejection would subject him to persecution, prosecution or punishment for any of the reasons stated in article 2 [beneficiary definition].
> 2. The benefit of the present provision, however, may not be claimed by a person whom there are reasons for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community in that country.
> 3. Where a Contracting State decides that an exception should be made on the basis of the preceding paragraph, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity of going to another State.

Article 3(2) represented a step back from the Carnegie draft in setting out an exception to *non-refoulement* which was similar to that contained in article 33(2) of the Refugee Convention.[82] In the lead-up to the conference of plenipotentiaries, the UNHCR asked states

[79] T Gammeltoft-Hansen, 'International Refugee Law and Refugee Policy: The Case of Deterrence Policies' (2014) 27(4) Journal of Refugee Studies 574, 585. By the time Guy S Goodwin Gill wrote the first edition of his seminal textbook *The Refugee in International Law* (Clarendon Press 1983), the orthodox interpretation of article 33 had evolved to embrace non-rejection at the frontier: ibid.
[80] [GJL Coles] to Legal Adviser (n.d. [1979]) NAA: A1838, 938/43 Part 9.
[81] UNHCR, 'Note on International Protection Addendum 1: Draft Convention on Territorial Asylum', UN doc A/AC.96/508/Add.1 (26 September 1974) Annex: Draft Articles.
[82] The Department of Immigration was for a considerable while under the misapprehension that article 3 of the Group of Experts' Draft contained no equivalent to article 33(2) of the Refugee Convention and expressed its desire that this omission be rectified in any treaty on the subject: WE Bowler to Secretary, Dept of Foreign Affairs (15 July 1975) NAA: A1838, 938/43 Part 2; CW McPherson to Secretary, Dept of Foreign Affairs (5 May 1976) NAA: A1838, 938/43 Part 3. The misunderstanding was cleared up at an interdepartmental meeting in August 1976: DF De Stoop, 'Record of Conversation … on 9 July 1976' (n.d.) NAA: A1838, 938/43 Part 3.

to consider whether the inclusion of the article 3(2) exception was justifiable.[83] Participants at the Nansen Symposium were similarly unenthusiastic about the exception.[84]

Article 3 also represented a step back from the 1967 Declaration and the Carnegie draft in providing that a state need only 'use its best endeavours to ensure' non-rejection at the frontier. However, it seems that the change in formulation was adopted after a tied vote.[85] The UNHCR was anxious to secure a deletion of the 'best endeavours' formulation at the 1977 Conference and sought Australia's support.[86] After attending the Nansen Symposium at the end of June 1976, Coles reported back to the Department of Foreign Affairs that participants were 'almost unanimous' in their wish to treat rejection at the frontier on the same footing as expulsion as was the case in the Carnegie draft.[87] He observed: 'I suggest that the principle of non-rejection at the frontier is a humanitarian one and will not pose us great problems in Australia. It only really applies to a common land border situation, which does not exist in Australia, with the exception of ships flying the flag of the State from which the refugee is fleeing'.[88]

The Department of Immigration was not convinced. It refused to countenance deletion of the phrase 'use its best endeavours' explaining:

> It is considered essential that Australia be able to exercise discretion within the spirit of the proposed Convention in the matter of allowing or denying entry to people claiming to have a wellfounded fear of persecution for various reasons, in the national interest.
> The Australian experience has been that neutral countries are not prepared to accept 'undesirables' as deportees and this makes it impossible for Australia to accept without qualification the non-refoulement provision which could pose significant difficulties notwithstanding that we do not have alternative land borders.[89]

Early drafts of the brief to Australia's 1977 conference delegation reflected the position taken by the Department of Immigration.[90] However, on 1 December 1976, the Department of

[83] UNHCR, 'Note on the Draft Convention on Territorial Asylum to be considered at the Conference of Plenipotentiaries from 10 Jan to 4 Feb 1977' attachment to UNHCR to Dept of Foreign Affairs, Legal and Treaties Division (6 December 1976) NAA A1838, 938/43 Part 6.
[84] 'Report of the Nansen Symposium on Territorial Asylum, Geneva 27-30 June 1976', Appendix 1 in Grahl-Madsen (n 24).
[85] GJL Coles to AL Vincent (8 July 1976) NAA: A1838, 938/43 Part 4.
[86] [GJL Coles] to Dept of Foreign Affairs (3 December 1976) NAA: A1838, 938/38 Part 6.
[87] GJL Coles to AL Vincent (8 July 1976) NAA: A1838, 938/43 Part 4.
[88] ibid.
[89] CW McPherson to Secretary, Dept of Foreign Affairs (2 August 1976) NAA: A1838, 938/43 Part 4.
[90] 'Conference of Plenipotentiaries on Territorial Asylum, Geneva, 10 January - 4 February 1977' [brief for the Australian delegation] (n.d.) NAA A1838, 938/43 Part 3 & Part 6.

Foreign Affairs made a last attempt to persuade the Department of Immigration to go along with its preferred position by arguing that, due to its geographical location, Australia would not be much affected and, to the extent that it was, article 3(2) was a sufficient safeguard.[91] The Department of Immigration gave way. In the final version of the brief, the delegation was instructed to seek deletion of the words 'use its best endeavours to' in article 3(1), provided that article 3(2) remained in the treaty text.[92]

At the 1977 conference, Australia, the FRG, Nigeria, and the United States (US) separately put forward amendments to article 3(1) directed at ensuring that people presenting at the frontier would have the same right to *non-refoulement* as those already in a state's territory. The FRG argued that this was the least that the conference could do if, contrary to the FRG's wishes, it 'could not bring itself to grant the politically persecuted person a legal claim to asylum'.[93] The US noted that there was ambiguity about whether article 33 of the Refugee Convention prohibited rejection at the frontier and argued that clarifying the ambiguity would 'constitute a distinct advance in international law on the subject'.[94] Nigeria noted that the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa[95] had already taken this step, thus making a valuable contribution to the development of international law, and argued that the conference text should not constitute a regression.[96] Australia argued that the approach would be more in keeping with the 'humanitarian objectives' of the proposed treaty, while not affecting the discretion of states under article 1 to refuse asylum.[97] The four delegations subsequently put forward a joint amendment to article 3(1) which was adopted by the Committee of the Whole by 45 votes to 25, with 18 abstentions.[98] According to the Australian delegation, its efforts convinced Nigeria to join the

[91] WH Bray to Secretary, Dept of Immigration (1 December 1976) NAA: A432, 1973/5344 Part 2.
[92] '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. The UNHCR was advocating for the deletion of article 3(2) from the treaty text on humanitarian grounds: UNHCR, 'Note on the Draft Convention on Territorial Asylum to be considered at the Conference of Plenipotentiaries from 10 Jan to 4 Feb 1977' attachment to UNHCR to Dept of Foreign Affairs Legal and Treaties Division (6 December 1976) NAA A1838, 938/43 Part 6.
[93] Conference of Plenipotentiaries on Territorial Asylum (Committee of the Whole), 'Summary Record of the Fourteenth Meeting', UN doc A/Conf.78/C.1/SR.14 (26 January 1977).
[94] ibid.
[95] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.
[96] Conference of Plenipotentiaries on Territorial Asylum (Committee of the Whole), 'Summary record of the Twenty-Fifth Meeting', UN doc A/Conf.78/C.1/SR.25 (4 February 1977).
[97] Conference of Plenipotentiaries on Territorial Asylum (Committee of the Whole), 'Summary record of the Fourteenth Meeting', UN doc A/Conf.78/C.1/SR.14 (26 January 1977) para 43.
[98] 'Report of the Australian Delegation to the Conference of Plenipotentiaries on Territorial Asylum, Geneva, 10 January – 4 February 1977' (n.d. [1977]) NAA: A1838, 938/43 Part 8.

three WEOG countries as co-sponsor of the amendment, which, in turn, was of significant assistance in securing the substantial majority in support of the amendment.[99]

The full article 3 text referred by the Committee of the Whole to the Drafting Committee read as follows:

> Article 3
> 1. No person eligible for the benefits of this Convention in accordance with article 2, paragraph 1, subparagraphs (a) and (b), who is at the frontier seeking asylum or in the territory of a Contracting State shall be subjected by such Contracting State to measures such as rejection at the frontier, return or expulsion, which would compel him to remain in or return to a territory with respect to which he has a well-founded fear of persecution, prosecution or punishment for any of the reasons stated in Article 2.
> 2. The benefit of the present provision, however, may not be claimed by a person whom there are reasons for regarding as a danger to the security of the country in which he is, or who, being still liable to prosecution or punishment for, or having been convicted by a final judgement of, a particularly serious crime, constitutes a danger to the community in that country or in exceptional cases, by a great number of persons whose massive influx may constitute a serious problem to the security of a Contracting State.
> 3. Where a Contracting State decides that an exception should be made on the basis of the preceding paragraph, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity of going to another State.

The Committee of the Whole draft of article 3(1) was an advance on both the Group of Experts' draft and article 33 of the Refugee Convention in not excluding as beneficiaries those who fell within its article 2(2) equivalent of article 1F of the Refugee Convention.[100] On the other hand, article 3(2) regressed from the Group of Experts' draft with the addition of the mass influx exception contained in the 1967 Declaration. Article 3(3) remained unchanged between drafts.

Provisional Stay

Article 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.

When the Group of Experts came to consider this article, it had already decided to treat rejection at a state's frontier differently from expulsion from its territory in the *non-refoulement* provision, with a state only being required to use its 'best endeavours to ensure' non-rejection at the frontier. Article 4 was clearly inconsistent with the new version of the

[99] ibid.
[100] Weis (n 67).

non-refoulement provision in mandating provisional admission. However, the new version of article 3 had been adopted by the narrowest of margins and the ambivalence of the Group of Experts about the issue manifested in the majority voting for a version of article 4 which maintained the inconsistency.[101]

The text adopted by the Group of Experts read as follows: 'A person seeking asylum at the frontier or in the territory of a Contracting State shall be admitted provisionally to or permitted to remain in the territory of that State pending a determination of his request, which shall be considered by a competent authority.' It differed from the Carnegie draft version in omitting the requirement that the determining authority be 'specially' competent, and also in omitting the requirement for review by a higher authority.

At the Group of Experts' meeting, the US had argued very strongly in favour of article 4 being brought into line with article 3 through deletion of the words 'at the frontier or' and 'admitted to or'.[102] Its fear, borne out by experience, was that once an individual was admitted into its territory, albeit provisionally, they would be able to resist expulsion for years through abuse of court processes.[103] In comments sent to Dominique De Stoop of the Department of Foreign Affairs on 18 June 1976, Coles referred to the US experience and said that, as a result, he was 'reluctantly' of the view that at the 1977 conference, Australia should seek to have article 4 brought into line with article 3 of the Group of Experts' draft.[104] He took comfort from his supposition that '[i]n practice … every claim for asylum in a country like Australia will be examined carefully by the competent authorities.'[105] At the end of June 1976, Coles attended the Nansen Symposium. Participants at that symposium were generally of the view that, provided article 3 was amended to mandate non-rejection at the frontier, the concerns of the US and other governments could be addressed by deleting article 4 altogether.[106] Coles came around to supporting this view.[107] Others in the Department of

[101] [GJL Coles], 'Draft Convention on Territorial Asylum' (n.d. [1976]), attachment to GJL Coles to DF De Stoop (18 June 1976) NAA: A1838, 938/43 Part 4.
[102] US delegation to Secretary, Dept of State (7 May 1975) https://wikileaks.org/plusd/cables/1975GENEVA03280_b.html
[103] [GJL Coles], 'Draft Convention on Territorial Asylum' (n.d. [1976]), attachment to GJL Coles to DF De Stoop (18 June 1976) NAA: A1838, 938/43 Part 4.
[104] ibid.
[105] ibid.
[106] 'Report of the Nansen Symposium on Territorial Asylum, Geneva 27-30 June 1976', Appendix 1 in Grahl-Madsen (n 24); GJL Coles to AL Vincent, (8 July 1976) NAA: A1838, 938/43 Part 4.
[107] WH Bray to Dept of Immigration and Ethnic Affairs and Attorney-General's Dept (28 July 1976) NAA: A1838, 938/43 Part 4.

Foreign Affairs were inclined to agree with him, but preferred to keep Australia's options open until the last possible moment.[108]

Australia's Department of Immigration objected to article 4 of the Group of Experts' draft on the basis that it could not agree to being 'categorically obliged' to admit individuals even on a provisional basis.[109] It wanted the 'best endeavours' formulation inserted into article 4 to make it consistent with article 3.[110] Early drafts of the brief to Australia's 1977 conference delegation, which reflected the Department of Immigration's position on article 3, also reflected that department's position on article 4.[111] As previously noted, however, the final version of the brief instructed the delegation to seek the deletion of the 'best endeavours' formulation from article 3. The brief noted that securing such deletion would make article 4 unnecessary. The delegation was instructed, therefore, to seek the deletion of article 4.[112] At the same time it was instructed that, if it could not secure the deletion of article 4, it was to seek an amendment of the article which ensured that states were 'not legally obliged' to admit asylum seekers even on a provisional basis.[113] The delegation was also instructed to oppose any move to have a review requirement restored to article 4 as proposed by the NGO Working Group.[114] In fact, the 1977 Conference did not have time to consider article 4.

Explaining the Outcome of the Conference

Yasuhiko Saito, who had been a participant in the Nansen Symposium and was present as an observer at the 1977 conference, thought that, notwithstanding the success achieved by doing so in relation to the 1967 Protocol, by-passing the United Nations in the initial drafting had turned out to be a mistake.[115] Atle Grahl-Madsen, another observer at the 1977 conference and the Rapporteur of the working group that prepared the Carnegie draft, later admitted that it 'definitely needed refinement', and should not have been put in front of the United Nations in that state.[116] In a similar vein, the US government, in the course of extolling the treaty

[108]ibid.
[109] CW McPherson to Secretary, Dept of Foreign Affairs (5 May 1976) NAA A1838, 938/43 Part 3.
[110] CW McPherson to Secretary, Dept of Foreign Affairs (2 August 1976) NAA: A1838, 938/43 Part 4.
[111] 'Conference of Plenipotentiaries on Territorial Asylum, Geneva, 10 January - 4 February 1977' [brief for the Australian delegation] (n.d.) NAA A1838, 938/43 Parts 3 & 6.
[112] '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.
[113] ibid.
[114] ibid.
[115] Y Saito, 'The UN Conference of Plenipotentiaries on Territorial Asylum: An Appraisal with Special Reference to Japan's Position' (31 May 1977) [draft journal article] PWA:PW/PR/SHCR/CNF/3.
[116] Grahl-Madsen (n 24) 62.

drafting professionalism of the ILC, gave the failure of the 1977 conference on asylum as an example of what happens when such a conference does not have before it a draft which has had 'the benefit of the Commission's ripening processes'.[117] Moreover, the conference itself was not well placed to advance the draft because of the limited time allocated. As both Coles and Saito later observed, four weeks was an inadequate period of time in which to expect a very large number of diverse states to reach agreement on a complex and sensitive subject.[118] The lack of time was exacerbated by the representatives of the USSR and its Eastern European allies using filibustering and other delaying tactics to undermine progress during the conference.[119]

Additionally, Coles thought that the delegations of many countries were inadequately prepared for the 1977 conference resulting in poor quality input at the conference.[120] In part, he attributed this state of affairs to the fact that the Law of the Sea Conference and the Conference on Humanitarian Law in Armed Conflict were being held at the same time as the asylum conference, resulting in the limited legal resources of small and developing countries being overextended.[121] Australia's concern about the burden imposed by the considerable growth in UN treaty-making since the 1960s in fact prompted it to join with six other countries in pressing the General Assembly to conduct a review of the multilateral treaty making process.[122]

In reflecting on the conference later, Coles also noted: 'It was the view of some diplomats that the period of the Conference was not auspicious for the adoption of a satisfactory convention; it was held at the outset of the massive outflow of Indochinese refugees'.[123] It is

[117] United Nations, *Review of the Multilateral Treaty-Making Process* (United Nations Legislative Series, 1985) 106 http://legal.un.org/legislativeseries/documents/untlegs0021.pdf. For a description of the ILC's process see ibid 9.
[118] GJL Coles to DF De Stoop (16 February 1977) NAA: A1838, 938/43 Part 8; Saito (n 115).
[119] FLT Graham-Harrison, '(leader of UK delegation), Report of United Nations Conference on Territorial Asylum' (April 1977), paras 6-8, PWA: PW/PR/UNUK/1; 'Report of the Australian Delegation to the Conference of Plenipotentiaries on Territorial Asylum, Geneva, 10 January – 4 February 1977' (n.d. [1977]) NAA: A1838, 938/43 Part 8.
[120] GJL Coles to Dept of Foreign Affairs (1 September 1977) NAA: A432, 1973/5344 Part 2.
[121] Coles (n 20).
[122] United Nations (n 117) 1 and 42. The review commenced in 1977 and resulted in a 1985 publication titled *Review of the Multilateral Treaty-Making Process*.
[123] Coles (n 20).

certainly the case that Indonesia, Malaysia, and the Philippines were very focused on sovereign rights during the conference because they were dealing with this outflow.[124]

The political scientist Elin Jakobsson suggests that norm formalization is most likely to be successful where the norm proposition 'has clarity', 'makes legitimate and universalistic claims', is positively connected to already well-established norms and is not the subject of a high level of conflict.[125] In the instant case, only the second factor listed favoured success. A right to asylum norm appealed to universal human rights values and derived legitimacy from that. However, it was negatively connected to the norm of state sovereignty. As our discussion of the evolving content of the proposed convention demonstrates, the norm proposition also lacked clarity. There were disputes about definitions and confusion about practical implications, including the relationship between asylum, *non-refoulement,* and provisional stay. The result was a high level of conflict. During the 1977 conference, the representatives of the WEOG countries (except Turkey), the Latin American countries (except communist Cuba and military junta-led Argentina), and many of the African countries worked towards achieving human rights progress.[126] However, the extent of their ambitions differed. Only Austria, Columbia, Costa Rica, the FRG, France, and Italy actually supported the enshrinement in the convention of a duty to grant asylum.[127] At the same time, representatives of the Arab, Asian and communist countries were primarily concerned with ensuring the preservation of sovereign rights both on principle and for various geopolitical reasons.[128]

To the extent that any progress was achieved at the 1977 conference, the Australian delegation played a major role. According to its official report, it 'sought to act as a bridge between the Western and the Third World Groups in order to secure the collaboration necessary to secure a satisfactory outcome on the voting on some of the more important

[124] Saito (n 115). Thailand was the other country greatly affected by the outflow but it only had observer status at the 1977 conference.
[125] E Jakobsson, 'Norm Formalization in International Policy Cooperation: A Framework for Analysis' in S Behrmann and A Kent (eds), *Climate Refugees: Beyond the Legal Impasse* (Routledge 2018) 58-59.
[126] Graham-Harrison (n 119) paras 6-8.
[127] Weis (n 67).
[128] 'Report of the Australian Delegation to the Conference of Plenipotentiaries on Territorial Asylum, Geneva, 10 January – 4 February 1977' (n.d. [1977]) NAA: A1838, 938/43 Part 8; GJL Coles to RJ Smith, Harders, Dingle and Casson (14 August 1979) NAA: A1838, 938/43 part 9; Graham-Harrison (n 119).

questions.'[129] As evidence of the success of its endeavours, the delegation pointed to the fact that 'all amendments proposed by Australia were adopted [by the Committee of the Whole], mostly with good majorities in the voting.'[130] In particular, the delegation reported that its active lobbying of other delegations at the conference was instrumental in securing the adoption of article 3 which was the best humanitarian achievement of the conference.[131] In an informal report, Coles said that the delegation's lobbying succeeded because Third World delegations perceived Australia as an 'honest broker'.[132] He proffered as evidence that:

> The Chairman of the Asian Group, the Bangladesh Permanent Representative in Geneva, made a point in stating at a large luncheon for delegations that it was difficult for the Asians to collaborate too closely with most of the Western countries because of the tensions at the Conference but that both Australia and Canada would be acceptable as they were known as moderating influences.[133]

Coles also noted that the UNHCR was appreciative of the bridging role that Australia had played because it approached the delegation at the end of the conference seeking Australia's membership of a small contact group that it wanted to set up to prepare for the recommended further session.[134] While there is a danger, of course, of self-assessments being self-aggrandizing, the evidence proffered by delegation members in support of their self-assessment suggests that it was well-founded.

Australia was able to play a constructive role at the 1977 conference because its own internally negotiated position was at the mid-point of a spectrum that had progressive mostly Western European countries at one extreme and die-hard state sovereignty defenders at the other. The Australian discussions about a draft convention suggest that those involved in the discussions were not guided by the overarching aim to arrive at a binding international legal instrument that went significantly beyond the text of either the UDHR or the 1967 Declaration. Rather, the Australian response to each draft article was informed by a desire to advance human rights as long as this could be achieved without significantly diminishing its sovereign right to admit and expel non-citizens as it saw fit. Wherever Australian officials opted for a more expansive formulation, which privileged the rights of individuals over the rights of the state, they did so because they did not think that Australia would be much affected.

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[129] 'Report of the Australian Delegation to the Conference of Plenipotentiaries on Territorial Asylum, Geneva, 10 January – 4 February 1977' (n.d. [1977]) p 39 NAA: A1838, 938/43 Part 8.
[130] ibid.
[131] ibid.
[132] GJL Coles to DF De Stoop (16 February 1977) NAA: A1838, 938/43 Part 8.
[133] ibid.
[134] ibid.

A SLOW FADING OF HOPE

The conference reached its scheduled end date of 4 February 1977 without achieving its goal of adopting the full text of a convention on territorial asylum. The Committee of the Whole reached agreement on the text of five provisions,[135] but none of them was adopted by the plenary of the conference.[136] Conference delegates did recommend, however, that a further session of the conference be convened at a later date in order to complete the work.

The WEOG countries, except Australia and New Zealand, were extremely disappointed with the fairly minimal humanitarian gains achieved at the conference and were initially opposed to convening a further session. However, they changed their minds when they gauged that there was a majority in favour of a further session, leaving them in danger of being characterized as the spoilers.[137] Despite supporting the recommendation to convene a further session, most of the WEOG countries took the view that human rights progress could best be achieved if all provisions of the convention text were open to renegotiation.[138] Since they calculated that the likelihood of being able to start from scratch would increase with the passage of time (four or five years at least), they were not in favour of an early resumption of the conference.[139] Prince Sadruddin Aga Khan, the High Commissioner for Refugees, appears to have shared that view.[140] Australia, by contrast, favoured resuming the conference in 1979 and picking up from where the previous session had left off because its humanitarian ambitions had always been more modest.[141] However, Australia was not inclined to separate itself from the rest of WEOG by pressing strongly for an early resumption.

Indefinite deferral of a further conference session turned into the *de facto* abandonment of the endeavour. The belief held in 1977 by those who, like the UNHCR and members of WEOG,

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[135] As well as agreeing on article 1 (grant of asylum), article 2 (application i.e. beneficiary definition) and article 3 (non-refoulement), the Committee of the whole agreed on two proposed new articles on the activities of asylees and family reunion. The family reunion article is discussed in S Taylor, 'Refugee Family Reunion: What Might Have Been' (2018) 43(3) Alternative Law Journal 209.
[136] Australian Permanent Mission Geneva to Dept of Foreign Affairs (29 January 1977) NAA: A1838, 938/43 part 7.
[137] 'Report of the Australian Delegation to the Conference of Plenipotentiaries on Territorial Asylum, Geneva, 10 January – 4 February 1977' (n.d. [1977]) NAA: A1838, 938/43 Part 8.
[138] Graham-Harrison (n 119).
[139] ibid.
[140] ibid; GJL Coles to WH Bray (31 May 1977) NAA: A1838, 938/43 Part 8; E Farnon to Secretary of Foreign Affairs [New Zealand] (24 October 1977), attachment to J Morison-Turnbull to Secretary, Dept of Foreign Affairs (3 November 1977) NAA: A1838, 938/43 Part 8.
[141] DF De Stoop to Hillman (28 September 1977) NAA: A1838, 938/43 Part 8.

were interested in achieving significant human rights progress that a propitious time would come for resuming work on an international convention on territorial asylum was, in retrospect, naïve. Concerns about mass movements of asylum seekers and migrants, which had been present even during the drafting of the 1967 Declaration, increasingly came to factor over international protection in the political calculations of state actors in the 1970s and 1980s.[142]

From 1979, Australia started pursuing a 'temporary refuge' initiative at UNHCR Executive Committee meetings. The initial impetus for the initiative appears to have come from the then Minister for Immigration, Michael MacKellar,[143] and was prompted by the Indochinese exodus which commenced in 1975.[144] At first, Coles had reservations about the initiative.[145] However, he came to be its primary shaper and a strong advocate for it. On 26 March 1981, in a telephone discussion with Guy S Goodwin-Gill, then a UNHCR legal adviser based in Australia, Coles admitted that 'To some extent, the developing concept of temporary refuge constituted an attack on the basic principles which had been put forward in the Carnegie Draft Convention on Territorial Asylum.'[146] However, he explained: 'While there was no difficulty in proposing permanent asylum as the most desirable durable solution in the case of the individual asylum-seeker, large-scale influxes of asylum seekers demanded a difficult approach. The country of first asylum could hardly be required to bear the entire burden.'[147] Goodwin-Gill agreed. In an August 1981 paper distributed within the UNHCR, he observed:

> Traditional or classic notions of asylum may still be relevant to an understanding of the past, and to the future promotion of the rights of the individual in municipal laws of States; but whether these notions are consistent or appropriate enough for application to the political and humanitarian problems of today is more open to doubt.[148]

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[142] I Jackson, 'Some International Protection Issues Arising During the 1970s and 1980s with Particular Reference to the Role of the UNHCR Executive Committee' (2008) 27(1) Refugee Survey Quarterly 30, 34.
[143] MJR MacKellar, 'Address by the Honourable M.J.R. MacKellar, M.P., Minister for Immigration and Ethnic Affairs, to the United Nations Association Brisbane' (11 August 1979) NAA: A1838, 938/43 Part 9; see also GJL Coles to RJ Smith, Harders, Dingle and Casson (14 August 1979) NAA: A1838, 938/43 Part 9. In May 1977, the government had announced a new refugee policy, which tasked the Minister for Immigration with proposing responses to refugee crises: (Neumann n 34) 263.
[144] The Australian initiative intersected with two other international initiatives prompted by the same exodus. The first was the Canadian initiative on massive exoduses which commenced in the UN Commission on Human Rights in 1980 and focused on eliminating root causes. The second was the German initiative on international cooperation to avert new flows of refugees which commenced in the UN General Assembly in 1980. Unlike the Australian initiative, these initiatives focused on countries of origin.
[145] GJL Coles to RJ Smith, Harders, Dingle and Casson (14 August 1979) NAA: A1838, 938/43 Part 9.
[146] As recorded in G Goodwin-Gill, file note (30 March 1981) Guy S Goodwin-Gill papers (hereafter: GG), Bodleian Social Science Library, Oxford: ring binder '3 Non-refoulement, Asylum and Protection: 30 Non-refoulement: General' [box 1, file 2].
[147] ibid.
[148] G S Goodwin-Gill, '*Non-Refoulement* and the Concept of Temporary Refuge in Situations Involving Large Numbers of Asylum Seekers: Some Comments on Recent Developments', (1981) 2 GG: ring binder '3 Non-

However, others within the UNHCR, such as Ivor Jackson, feared that international protection law might be weakened by the concept of temporary refuge.[149] Western European countries, which thought at the time that mass movements had no relevance to the European context, shared these fears and were resistant to the concept.[150] Nevertheless, what must have been clear to all was that the moment for negotiating an international treaty on territorial asylum had passed.[151]

CONCLUSION

It is unlikely that the UNHCR and its inner circle of like-minded international lawyers would have succeeded in their attempts to codify the right to asylum as a human right if only the endeavour had been better planned and timed. In the drafting of the Convention on Territorial Asylum, human rights and sovereignty collided and the best that could be achieved was an accommodation between the two through a finessing of the principle of *non-refoulement*.

What manifested during the drafting process was an inverse relationship between the willingness of states to extend the principle of *non-refoulement* and their willingness to treat asylum as a right of the individual. Article 3 was considered the great success of the 1977 conference because it extended the principle of *non-refoulement* by placing non-rejection at the frontier on the same footing as non-expulsion thus reversing the backward step of the 'best endeavours' formulation introduced into the Group of Experts' draft. However, the success came at a price. Article 1 (grant of asylum), which had already been watered down by the Group of Experts, was watered down even further at the 1977 conference. In commenting

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refoulement, Asylum and Protection: 30 Non-refoulement: General' [box 1, file 2]. The concept of temporary refuge is also discussed in the following publications, among others: D Perluss and J F Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26 Virginia Journal of International Law 551; K Hailbronner, '*Non-refoulement* and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' in D A Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Springer 1988); Guy S Goodwin-Gill, '*Non-refoulement* and the New Asylum Seekers' in D A Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Springer 1988).

[149] Moussali, Director of International Protection, UNHCR Geneva to GS Goodwin-Gill (26 August 1981) GG: ring binder '3 Non-refoulement, Asylum and Protection: 30 Non-refoulement: General' [box 1, file 2]; G Cotsell to Dept of Foreign Affairs (26 April 1983) NAA: A9737, 1991/81180 Part 1.

[150] G Cotsell to Dept of Foreign Affairs (26 April 1983) NAA: A9737, 1991/81180 Part 1; [extract of briefing provided by Department of Foreign Affairs to Minister for Immigration, Stewart West] (August 1983) NAA: A9737, 1991/81180 Part 1.

[151] In a memorandum provided to the UNHCR, Australia stated 'It can be generally agreed that it is most unlikely that the international community will agree in the foreseeable future to the recognition of the right to asylum': 'Australia's Views on the International Protection of Refugees: Temporary Refuge and International Solidarity' attachment to Australian Permanent Mission in Geneva to I Jackson (12 September 1980) UNHCR Archives, Geneva: 671.1.AUL [Fonds 11, series 2, box 1306].

on the Group of Experts' draft, Prince Sadruddin observed that, while states were not prepared to accept an obligation to grant permanent asylum, they had been prepared to assume an unlimited obligation to grant temporary asylum (provisional stay).[152] However, as far as Australia was concerned, the fate of article 4 (provisional stay) was also linked to the fate of article 3.[153] It regarded the deletion or watering down of article 4 as the necessary further price of removing the 'best endeavours' formulation from article 3. Australia's later promotion of the concept of temporary refuge was, in fact, a softening of this position, but one that served its interests since provision of temporary refuge by its neighbours to the north could be expected to insulate Australia from onward movement of asylum seekers.

Regardless of whether a different accommodation between human rights and state sovereignty could have been found during the period in which the proposed convention on territorial asylum was being negotiated, the continuing mass movement of asylum seekers and migrants all across the world from the 1977 conference to the present has served to reinforce the accommodation struck at that conference. In the decades since the conference, the influence of international human rights law has resulted in the principle of *non-refoulement* being given extra-territorial application[154] and in the beneficiary group expanding well beyond the beneficiary group contemplated at the time of adoption of the Refugee Convention or Protocol or during negotiations for a convention on territorial asylum.[155] At the same time, and very much related, however, the delinking of the *non-*

[152] S Aga Khan, 'Legal Problems relating to Refugees and Displaced Persons' (Hague Academy of International Law lectures, 4-6 August 1976) para 74.
[153] This view was shared by the UK delegation and others: Conference of Plenipotentiaries on Territorial Asylum (Committee of the Whole), 'Summary Record of the Twenty-Fourth Meeting', UN doc A/CONF.78/C.1/SR.24 (8 February 1977) para 39 Mr. Graham-Harrison (United Kingdom).
[154] E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*' in E Feller, T Volker and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 87–177.
[155] This expansion has occurred in two ways. First, the beneficiary group defined in article 1A(2) of the Refugee Convention (as modified by its Protocol) has been continually reinterpreted in line with developments in international human rights law to embrace persons who arguably would have been outside the contemplation of the Convention's drafters: see for example, B Burson and D Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill 2016). Second, a *non-refoulement* obligation has come to be imposed in favour of *any person* who faces danger of certain kinds. Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 explicitly prohibits the return of any person to a place where they face a risk of torture. The ICCPR has been interpreted to incorporate an implicit *non-refoulement* obligation protecting all persons within a state party's jurisdiction from being returned to a place where their right to life or their right to be free from cruel, inhuman or degrading treatment may be under threat: UN Human Rights Committee, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 12. The provision of protection under these human rights treaties is often labelled 'complementary protection'. See also V Chetail, 'Are Refugee

refoulement principle from the provision of permanent asylum has become increasingly entrenched, not just in theory but also in state practice.[156]

Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in R Rubio-Marin (ed), *Human Rights and Immigration* (Oxford University Press 2014) 33-38.

[156] Goodwin-Gill (n 148); D Kennedy, *The Dark Sides of Virtue* (Princeton University Press 2004) chapter 7. For example, Australia now grants temporary rather than permanent asylum to beneficiaries of its *non-refoulement* obligation who arrive without prior authorization: M Crock and K Bones, 'Australian Exceptionalism: Temporary Protection and the Rights of Refugees' (2015) 16(2) Melbourne Journal of International Law 522. Denmark is another country which has recently chosen to go down this path: R Kennedy, 'A "European race to the bottom": Human Rights Defenders Criticise Denmark's New Immigration Bill' *Euronews* (22 February 2019) https://www.euronews.com/2019/02/22/a-european-race-to-the-bottom-human-rights-defenders-criticise-denmark-s-new-immigration-b.