CHAPTER 18

Non-Refoulement, Temporary Refuge, and the ‘New’ Asylum Seekers

Guy S. Goodwin-Gill

In 1986, I published an article with a title very similar to this chapter, but here I have added the phrase ‘temporary refuge’, and placed the word ‘new’ between quotation marks.\(^1\) The asylum seekers are not new after all, but neither were they in 1986; on the contrary, they had always been there, certainly since that day in July 1951 when States imagined that they could confine the refugee definition by reference to time and space.\(^2\)

The 1986 article also emerged in a particular historical context. I was then a staff member of the office of the United Nations High Commissioner for Refugees (\textsc{unhcr}) and had recently spent five years in Australia during the Indo-China refugee crisis. I was peripherally involved in the Australian initiative to develop the notion of temporary refuge,\(^3\) and I had found myself in opposition to the old school, for whom the only sort of refuge was permanent asylum. This was the Cold War, after all, and although most refugees had political capital, not everything was cut and dried. The Indo-China crisis drove people to flee in their tens of thousands, which immediately generated debate about ‘status’, and then about admission and treatment and solutions, in a region where few States were party to the 1951 Convention relating the Status of Refugees (Refugee Convention) and the 1967 Protocol. Australia’s geopolitical situation was thought to expose it to large-scale arrivals, with little prospect of international support, and its temporary refuge initiative was intended, in part but seriously, to forge an institutional link between admission and burden-sharing within the existing refugee protection regime.

The \textsc{unhcr} Executive Committee first called for ‘at least temporary refuge’ in cases of large-scale influx in 1979. Australia followed up and called for an expert group to consider all aspects of this issue in 1980, and in 1981 the

---


\(^2\) On the original time and geographical limitations to the definition in the 1951 Convention relating to the Status of Refugees, see G.S. Goodwin-Gill and J. McAdam, \textit{The Refugee in International Law} (3rd edn OUP 2007) 35–37.

\(^3\) Ibid, 286–296, 335–339.
Executive Committee adopted its seminal Conclusion No 22 (XXXII) (1981) on the protection of asylum seekers in situations of large-scale influx.4 This Conclusion can rightly be called ‘seminal’, because it recognised that such movements include not only Convention refugees, but also those who seek refuge owing to external aggression, occupation, foreign domination or events seriously disturbing public order; because it declared that such asylum seekers, ‘should always’ be admitted, ‘at least on a temporary basis’, without discrimination, and provided with protection; because it affirmed that, ‘[i]n all cases the fundamental principle of non-refoulement – including non-rejection at the frontier – must be scrupulously observed’; and because of the protection standards which the Executive Committee then set out, together with its conclusions on solidarity and burden-sharing.

This statement of principles cannot be divorced from its historical, political and international legal context, but neither should it be undervalued for the contribution which it then made to the evolution of international protection. Indo-China was the driver, but Cartagena was just two years off, State practice in Africa was coalescing around Article I (2) of the 1969 OAU Refugee Convention, and Europe was slowly coming to terms with the obligations that might, after all, be due to the de facto refugee.5 Not surprisingly, however, there was opposition from several quarters to the notion of a duty to grant ‘at least’ temporary refuge to refugees outside treaty-defined categories. Despite historical precedent, it was objected from within UNHCR that ‘codifying’ temporary refuge might endanger basic protection principles, and a number of States tended to the same position, although they were often more motivated simply to resist any extension of their international obligations.

This chapter limits itself to reviewing the customary international law foundations for the protection of those in flight. Other, often quite related issues, will not be dealt with here, including the practical application of Convention obligations over time, or the challenges raised by internal displacement. The factual scenario providing the background to this contribution is the flight of people seeking refuge from armed conflict, massive violations of human rights, or indiscriminate violence. But although they commonly move in large numbers and may therefore give rise to actual or apprehended emergencies, the principles, rules and obligations discussed are no less applicable to the individual in need of protection.6 Whether he or she is able to invoke an individual,

5 Goodwin-Gill and McAdam, The Refugee in International Law (n 2) 290–296.
6 Ibid, 290.