

Roundtable on Temporary Protection

19-20 July 2012

International Institute of Humanitarian Law, San Remo, Italy

DISCUSSION PAPER

I. BACKGROUND

1. The concept of temporary protection is widely used at international and national levels, yet there is no internationally accepted definition of the same, agreement on its minimum content, or on the situations or persons to which it could apply. Temporary protection has been studied by the international community on at least three previous occasions, including in 1981,¹ 1996-7² and in 2001.³ The last of these called for “better harmonisation of approaches within which acceptable standards of treatment should be integrated.”⁴ No consensus has however been reached on the situations in which temporary protection could be applied or its minimum content.
2. The Executive Committee of the High Commissioner’s Programme (ExCom) has also adopted several Conclusions on temporary protection, most notably Conclusion No. 22 in 1981, which set out some minimum standards.⁵ Most recently it was referred to in the High Commissioner’s Dialogue on “protection gaps” in 2010 and it also featured within the context of the 60th anniversary commemorations events dealing with, variously, international cooperation, and climate change and displacement.⁶ In relation to international cooperation, a

¹ Executive Committee Conclusion (ExCom) No. 22 (XXXII) (1981), ‘Protection of Asylum-Seekers in Situation of Large-Scale Influx’, 1981; UNHCR, ‘Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx, Geneva, 21-24 April 1981’, 3 June 1981, EC/SCP/16, para. 7, <http://www.unhcr.org/refworld/docid/3ae68cc08.html>.

² UNHCR, ‘Progress Report on Informal Consultations on The Provisions of International Protection to All Who Need It’, 28 May 1996, EX/46/SC/CRP.34, <http://www.unhcr.org/3ae68d0018.html>; UNHCR, ‘Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It’, 30 May 1997, EC/47/SC/CRP.27, <http://www.unhcr.org/3ae68cfc0.html>.

³ UNHCR, ‘Protection of Refugees in Mass Influx Situations: Overall Protection Framework’, Global Consultations on International Protection/ Third Track, 1st Meeting, 19 February 2001, EC/GC/01/4; UNHCR, ‘Chairperson’s Report of Roundtable 2: “International Cooperation to Protect Masses in Flight”, 13 December 2001, 2, <http://www.unhcr.org/3c1f1aab4.html>.; UNHCR, ‘Lisbon Roundtable, Summary Conclusions – Cessation of Refuge Status’, 3-4 May 2001, para. 20, <http://www.unhcr.org/3baf306d4.html>.

⁴ UNHCR, ‘Protection of Refugees in Mass Influx Situations: Overall Protection Framework’, *ibid.*, paras. 13 and 19.

⁵ ExCom Conclusions Nos. 5 (XXVII) (1977), paras. (b), (c); 11 (XXIX) (1978), para. (d); 14 (XXX) (1979); 15 (XXX) (1979), paras. (c), (d); 19 (XXXI) (1980), paras. (a) – (h); 21 (XXXII) (1981), para. (i); 22 (XXXII) (1981); 23 (XXXII) (1981), para. (3); 68 (XLIII) (1992), para. (u); 71 (XLIV) (1993), para. (m); 74 (XLV) (1994), paras. (r) – (u); 100 (LV) (2004); 103 (LVI) (2005), para. (l).

⁶ UNHCR, ‘High Commissioner’s Dialogue on Protection Challenges, 2010, Closing Remarks’,

call was made for more guidance on temporary protection as a tool of international cooperation/burden-sharing.⁷ The purpose of this paper is to inform the discussions at the Roundtable on Temporary Protection, to be held on 19-20 July 2012, and should be read in conjunction with the concept note underpinning the roundtable.⁸

II. DEFINITIONS OF TEMPORARY PROTECTION

3. UNHCR has described temporary protection as:

*[...] a means, in situations of mass outflow, for providing refuge to groups or categories of people recognized to be in need of international protection, without recourse, at least initially, to individual refugee status determination. It includes respect for basic human rights but, since it is conceived as an emergency protection measure of hopefully short duration, a more limited range of rights and benefits offered in the initial stage than would customarily be accorded to refugees granted asylum under the 1951 Convention and the 1967 Protocol.*⁹

Or as:

*... best conceptualised as a practical device for meeting urgent protection needs in situations of mass influx. Its value in ensuring protection from refoulement and basic minimum treatment in accordance with human rights without overburdening individual status determination procedures has been demonstrated.*¹⁰

4. Outside the context of mass influx, temporary protection has also been flagged as a possible response to other situations, such as to persons fleeing or unable to return to their countries of origin owing to war, generalized violence and other humanitarian crises or threats to their lives. It may also be applicable in situations that are fluid or transitional, for example at the beginning of a conflict or in the post-conflict context; or in situations necessitating humanitarian evacuation, maritime protection/rescue at sea, and responses to natural disasters or other emergency situations.¹¹ The applicability of temporary protection in such situations deserves further reflection.

<http://www.unhcr.org/4d0732389.html>; UNHCR, 'Summary of Deliberations on Climate Change and Displacement', April 2011, Expert Meeting held 22-25 February 2011, Bellagio, Italy, paras. 9 and 16, <http://www.unhcr.org/refworld/docid/4d9f22b32.html>; UNHCR, 'Summary Conclusions on International Cooperation to Share Burdens and Responsibilities', 28 June 2011, Expert Meeting held on Amman, Jordan, 27-28 June 2011, Subheading II, para. 9, "Operational Toolbox": "Further guidance on temporary protection" is needed, <http://www.unhcr.org/refworld/docid/4e9fed232.html>.

⁷ UNHCR, 'Expert Meeting on International Cooperation to Share Burdens and Responsibilities', *ibid*.

⁸ See, UNHCR, Concept Note, Roundtable on Temporary Protection, San Remo, Italy, 19-20 July 2012.

⁹ UNHCR, *Note on International Protection*, UN Doc. A/AC.96/830 (1994), para. 47, <http://www.unhcr.org/refworld/docid/3f0a935f2.html>.

¹⁰ UNHCR, 'Protection of Refugees in Mass Influx Situations: Overall Protection Framework', Global Consultations on International Protection/ Third Track, 1st Meeting, 19 February 2001, EC/GC/01/4, para. 13, <http://www.unhcr.org/3ae68f3c24.html>.

¹¹ In relation to the latter, see UNHCR, Expert Meeting on Climate Change and Displacement, Summary of Deliberations on Climate Change and Displacement, February 2011, Bellagio, Italy, 22-25 <http://www.unhcr.org/4da2b5e19.html>.

III. TEMPORARY PROTECTION IN PRACTICE

5. The concept of temporary protection in its **various forms** (i.e. temporary admission, temporary refuge, temporary asylum) has a reasonably long history, dating at least since 1953.¹² Prominent cases where some form of temporary protection was granted include those fleeing the Hungarian Revolution of 1958 into Austria; the 10 million Bengalis moving from East Pakistan into India in 1971; Central America's refugee crises of the 1970s and 80s; as well as the Indo-Chinese crisis of the same period when temporary admission was permitted with the promise of onward resettlement. Its application in the 1990s in the context of the approximately 700,000 refugees escaping the conflicts in the former Yugoslavia who were received in Europe led to the creation of a regulatory framework in Europe on temporary protection in mass influx situations, albeit one that has yet to be activated.¹³ Temporary protection also helped secure the humanitarian evacuation of thousands of Kosovo Albanian refugees to Europe, Australia and elsewhere, who were, for the most part, quickly repatriated at the end of the hostilities.¹⁴ Hospitality in the Middle East could also be classed as a "form of temporary protection", although there is reluctance by some governments to describe it as such;¹⁵ likewise the *Casablanca Protocol for the Treatment of Palestinians in Arab States* provides for temporary protection.¹⁶
6. UNHCR, for its part, has called for temporary protection in many situations, including most recently in the context of the 2003 exodus from Iraq,¹⁷ the conflict in Lebanon in 2006,¹⁸ as well as in response to the events surrounding the "Arab Spring" and the large-scale mixed movements of persons departing Libya,¹⁹ and the population movements out of Syria and into

¹² The High Commissioner for the first time took note of forms of temporary protection in his second Annual Report to the General Assembly in 1953, referring to Chinese refugees being "temporarily admitted" to Hong Kong, and to the Benelux States granting temporary residence permits to refugees entering the countries clandestinely, coming directly from their States of origin, *see*: UNHCR, 'Report of the United Nations High Commissioner for Refugees', 1 January 1954, A/2394, paras. 51 and 81, <http://www.unhcr.org/refworld/docid/3ae68c968.html>; in his Annual Report for 1954 the High Commissioner referred to the possibility to temporarily admit refugee seamen in a Contracting State, *see*: UNHCR, 'Report of the United Nations High Commissioner for Refugees', 1 January 1955, A/2648, para. 82, <http://www.unhcr.org/refworld/docid/3ae68c420.html>.

¹³ Council of the European Union, *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof*, 7 August 2001, OJ L.212-223 7.8.2001, 2001/55/EC, <http://www.unhcr.org/refworld/docid/3ddcee2e4.html>.

¹⁴ UNHCR, 'Global Report 1999, Kosovo Emergency', 346, <http://www.unhcr.org/4a0d20356.html>; UNHCR, 'Report of the United Nations High Commissioner for Refugees 1999', 2000, A/55/12, paras. 88 and 89, <http://www.unhcr.org/refworld/docid/3b00f4d40.html>.

¹⁵ It should be noted that there is some dispute that the "temporary protection" or stay granted to Iraqis actually amounts to temporary *protection*. Nonetheless the phrase is used here to refer to the range of State practices that grant time-limited stay to individuals in need of international protection. The preferred terminology used by some States in the region has been that of "guest".

¹⁶ League of Arab States, *Protocol for the Treatment of Palestinians in Arab States* ("Casablanca Protocol"), 11 September 1965, <http://www.unhcr.org/refworld/docid/460a2b252.html>.

¹⁷ UNHCR, *Guidelines Relating to the Eligibility of Iraqi Asylum-Seekers*, 3 October 2005, para. 22, <http://www.unhcr.org/refworld/docid/4354e3594.html>.

¹⁸ UNHCR, *Considerations on the Protection Needs of Persons Displaced Due to the Conflict in Lebanon and on Potential Responses*, 3 August 2006, para. 5, <http://www.unhcr.org/refworld/docid/44d707c44.html>.

¹⁹ UNHCR, *Protection considerations with regard to people fleeing from Libya - UNHCR's recommendations*, 25 February 2011, 2, <http://www.unhcr.org/refworld/docid/4d6b48858.html>; *Update No. 1*, 29 March 2011, <http://www.unhcr.org/4d67fab26.html>.

neighbouring countries.²⁰ Temporary protection is thus an accepted “tool” in the international protection “toolbox”, responding to a range of evolving situations on the ground, and serving a range of purposes.

7. The **purposes of temporary protection are multiple**, depending on the context. Temporary protection kept borders open in South-East Asia in the 1980s pending resettlement to third countries within a context of burden-sharing and durable solutions. Likewise, it was used as a “safety valve” in relation to the Kosovo crisis, securing admission for the large majority of refugees into Macedonia while evacuating some outside the region on a temporary basis. The same could be said of the recent events in Libya and Syria. It has regularly been an emergency protection or humanitarian response in situations of mass influx where individual status determination was impracticable or inapplicable.²¹ Finally, it has also been used to grant protection to a broader category of persons not necessarily covered by Convention obligations, or not perceived to be covered by the 1951 Convention. These categories have regularly included persons fleeing generalized violence, as well as to persons fleeing or who cannot be returned to their countries of origin as a consequence of natural disasters.
8. Temporary protection is seen as being particularly attractive to some governments because it is return-oriented and it is not seen as a long-term commitment. Further, it has been used to respond effectively to a standstill on admission, especially in large-scale movements, and can lead to respect for the principle of *non-refoulement*, coupled with burden-sharing arrangements, in particular third country resettlement.

IV. SCOPE OF APPLICATION

9. While noting the overlap between them, the following list reflects a range of situations and beneficiaries to which temporary protection could apply:
 - (a) **Asylum-seekers** who are part of a **mass influx, at least in its initial stages**, subject to their later access to refugee status either on a *prima facie* basis or when conditions settle so that normal refugee status determination can start or resume.²²

²⁰ UNHCR, *Note on International Protection*, EC/63/SC/CRP.11, June 2012, para. 4, acknowledging the temporary protection arrangements in place in Iraq, Lebanon, Jordan and Turkey, with Turkey having based protection promised on the standards in ExCom Conclusion No. 22 (1981).

²¹ Individual status determination is not always *practicable* (e.g. in mass influx situations it can overburden determination systems) or *applicable* (e.g. owing to the character of the refugee movements, in the context of non-States parties to the 1951 Convention or other refugee instruments, or where persons would generally not be considered to fall within the Convention, such as persons fleeing natural disasters). On the latter, see UNHCR, Expert Meeting on Climate Change and Displacement, Summary of Deliberations on Climate Change and Displacement, 22-25 February 2011, Bellagio, Italy, <http://www.unhcr.org/4da2b5e19.html>. As the label “refugee” implies the fracturing of ties with one’s home country, it will not be appropriate in all situations. Some persons in need of international protection, for example, do not seek refugee status, nor desire to be referred to as “refugees”.

²² Temporary protection is frequently used in the context of mass influx. As Erika Feller, Assistant High Commissioner for Protection, has stated: “The sheer size of the outflow is one [problem of implementation of the Convention]. It can make individualised identification of refugee status and the grant of all the rights envisaged in the Convention purely impractical, at least in the first instance. Another is that the daunting task of creating a measure of physical security for refugees, as well as for the humanitarian staff, can in practice become the overriding protection objective, necessarily rendering longer term, if even reachable, other aspects of protection envisaged in the Convention. *Prima facie* recognition has become, in effect, one tool employed to circumvent some of the obvious difficulties in applying the more individual-oriented and integration-focused provisions of the Convention, beyond its fundamental protections.” See, Statement by Erika Feller, Assistant High Commissioner (Protection), UNHCR ‘The Refugee Convention at 60:

- (b) **Asylum-seekers within mixed flows**, including in respect of **rescue-at-sea** operations where ambiguity around processing delays disembarkation.²³
- (c) **Asylum-seekers or migrants within the context of humanitarian evacuation**, those awaiting **emergency resettlement; or in the case of migrants, their evacuation home or onward movement/admission into third countries.**
- (d) **Groups of persons in need of international protection**, such as persons fleeing **generalized violence or serious disturbances to public order where the Convention (or a regional instrument) may not necessarily be applicable** [also could be mass influx situations]. These persons are closest to the 1951 Convention definition, solely lacking – in a given situation - the criteria of individualized persecution on account of one of the Convention grounds. The emphasis is on “groups of persons” because individuals would be covered by international human rights obligations of *non-refoulement* (see para. 29).
- (e) **Fluid or transitional contexts at the beginning, final stages or post-conflict contexts.** At the initial stages of a conflict, for example, the appropriate response or its duration may not yet be able to be determined; likewise there may be little known or insufficient information about the profile of the individuals in flight. Beneficiaries could also include persons who leave situations which constitute the aftermath, but not the continuation, of refugee-producing situations, where the transitional period is nevertheless still uncertain.²⁴ At the final stages of a conflict or in the post-conflict context, temporary protection might be used to apply to persons who continue to leave the country of origin even though repatriation operations have commenced, or where there continue to be sporadic fighting in particular areas necessitating a short-term response to persons from those locations.
- (f) **Natural disasters/sudden onset environmental events/human-made disasters (e.g. nuclear accidents)** or those who cannot return (in the short-term) owing to such events, where their flight is unrelated to Convention grounds.²⁵ Although subject to the scale and intensity of the sudden-onset disaster and its consequences, it is acknowledged that such events may present an immediate threat to survival and dignity of those in the affected areas, and that temporary protection could be appropriate for this group, at least as an initial emergency response. Slow-onset environmental events, on the other hand (e.g. where land or resources are degraded over time to the point that they can no longer sustain

Still fit for its Purpose?’ Protection Tools for Protection Needs, Workshop on Refugees and the Refugee Convention 60 Years On: Protection and Identity Prato, 2 May 2011, <http://www.unhcr.org/4ddb679b9.pdf>.

²³ UNHCR, Expert Meeting on International Cooperation to Share Burdens and Responsibilities, Summary Conclusions, Amman, Jordan, 27 and 28 June 2011, paras. 1 – 9 (Operational Toolbox), Annex I para. 5, <http://www.unhcr.org/4ea0105f99.html> and UNHCR, Expert Meeting on Refugees and Asylum-Seekers in Distress at Sea - How Best to Respond?, 8-10 November 2011, Djibouti, paras. 7 – 16, <http://www.unhcr.org/4ede2ae99.html>.

²⁴ Statement by Erika Feller, Assistant High Commissioner (Protection), UNHCR ‘The Refugee Convention at 60: Still fit for its Purpose?’, Protection Tools for Protection Needs, Workshop on Refugees and the Refugee Convention 60 Years On: Protection and Identity Prato, 2 May 2011, <http://www.unhcr.org/4ddb679b9.pdf>.

²⁵ At the same time, it is recognised that persons whose flight is due in part to the deliberate denial of assistance by the government on account of one of the Convention grounds could fall within the 1951 Convention definition of a “refugee”, yet the large scale of the movement may prohibit individual processing. See, UNHCR, ‘Summary of Deliberations on Climate Change and Displacement’, April 2011, para. 8, <http://www.unhcr.org/refworld/docid/4d9f22b32.html>.

local communities), suggest the need for longer-term solutions and also that temporary protection would not generally be suitable to such situations.

(g) **“Survival migrants” or persons leaving their countries of origin owing to severe socio-economic deprivation coupled with political instability** (e.g. the causes of flight are multiple, including the economic situation (market collapse, high inflation) coupled with poor political and economic governance, conflict, drought).²⁶

(h) **“Stranded migrants”** or those who cannot be returned to their country of origin in the short-term, such as while waiting for documentation to be obtained, or where there is a lack of cooperation by their own governments in facilitating their return. Temporary protection would not, however, be appropriate if there is no reasonable prospect of return.

10. The last three categories could also be described as reflecting drivers of movement **other than persecution, conflict and violence**.²⁷

11. Temporary protection is considered **generally inappropriate** in situations that have their roots in long-standing conflicts or events, and where return to the country of origin (or transition to other solutions) is not likely in the short-term. ²⁸ Its continuing suitability as a protection tool in a particular situation calls for **constant monitoring**.²⁹

V. STANDARDS OF TREATMENT

12. In elaborating the minimum content of temporary protection, it is clear that fundamental principles of dignity and humanity must be respected. Relying on ExCom Conclusion No. 22 (1981), with some changes to reflect developments at international law, minimum rights would include:

- Admission, including a legal status;
- The prohibition on *refoulement*, including the prohibition against collective expulsion;
- The prohibition on discrimination;
- Non-penalization for unauthorized entry;
- The prohibition on arbitrary detention and freedom of movement;
- The right to be treated humanely and in dignity, including provision of basic necessities including food, shelter and basic sanitary and health facilities;
- Family unity to be respected and all possible assistance to be given for the tracing of relatives and the sending and receiving of mail should be allowed;
- The right to identity documentation;

²⁶ UNHCR, ‘High Commissioner’s Dialogue on Protection Challenges, 2010, Closing Remarks’, <http://www.unhcr.org/4d0732389.html>.

²⁷ Statement by Erika Feller, Assistant High Commissioner (Protection), UNHCR ‘The Refugee Convention at 60: Still fit for its Purpose?’ Protection Tools for Protection Needs, Workshop on Refugees and the Refugee Convention 60 Years On: Protection and Identity Prato, 2 May 2011, <http://www.unhcr.org/4ddb679b9.pdf>.

²⁸ UNHCR, Expert Meeting on International Cooperation to Share Burdens and Responsibilities, Summary Conclusions, Amman, Jordan, 27 and 28 June 2011, paras. 1 – 9 (Operational Toolbox), Annex I para. 5, <http://www.unhcr.org/4ea0105f99.html>.

²⁹ *Ibid.*

- Special protection for minors and unaccompanied/separated children and others with special needs (e.g. persons with disabilities);
 - Appropriate arrangements for the registration of births, deaths and marriages;
 - Access to education;
 - To be considered as persons before the law, enjoying free access to courts of law and other competent administrative authorities;
 - The location of beneficiaries to be determined by their safety and well-being as well as the security needs of the receiving States. As far as possible, they should be located a reasonable distance from the frontier of the country of origin;
 - All necessary facilities to enable them to obtain a satisfactory durable solution be provided.
13. Other rights, which ideally would be guaranteed, but could be possibly limited in initial stages include:
- Right to work;
 - Access to Higher Education / vocational training;
 - Right to association;
 - Access to travel documents.
14. Beneficiaries of temporary protection would be subject to the duties and laws of the receiving State.
15. Rights should improve over time.

VI. THE DURATION AND ENDING OF TEMPORARY PROTECTION

16. There are a number of ways in which the limits of temporary protection could be established. The **first** could be to fix an **initial set timeframe**, which may be **extended over time** (e.g. the EU Temporary Protection Directive provides for an initial stay of one year renewable up to the maximum of three years, and for a further two years based on a Council decision; or it could involve an initial admission for as few as one or three months, depending on the situation, followed by extensions of further three month periods until the 12 month mark, afterwards extensions of one year until maximum of three (or five) years). A **second option** is simply not to prescribe a minimum length of stay but to leave this to the **discretion of States, judged according to the situation at hand** (e.g. the Libya crisis did not necessarily call for a one year stay as many persons were quickly evacuated home or returned soon after the hostilities ended). **Maximum limits** should however be set to ensure that persons can transition to other solutions. These limits could range from three to five years.³⁰
17. On the ending of temporary protection, there are two possibilities – **expiration and/or termination**. **Expiration** envisages that upon the expiry of the predetermined period of stay, temporary protection would end; **termination**, on the other hand, would link the ending of

³⁰ Five years is the time at which UNHCR classifies refugee situations as “protracted” and thus any longer than this would not be compatible with the durable solutions agenda of the Organization: UNHCR, ‘Protracted Refugee Situations’, EC/54/SC/CRP.14, June 2004, paras. 3 and 5, <http://www.unhcr.org/40c982172.html>, which defines a “protracted refugee situation” as one in which a refugee population of 25,000 or more has been living in exile for five years or longer in a developing country. This does not include Palestinian refugees. For more on protracted refugee situations, see <http://www.unhcr.org/pages/4a12a4016.html>.

temporary protection to the fulfilment of objective criteria in the country of origin. In relation to the latter, a “maximalist approach” would be to adopt the same standards as those envisaged in the “ceased circumstances” clauses of the 1951 Convention, although this could be seen as unnecessarily tying temporary protection to 1951 Convention standards, thereby undermining one of its main advantages.³¹ A “minimalist approach” may only require a change in conditions allowing for a return in dignity and safety³² or transition to other arrangements and solutions (*see* VII). The latter may need to involve some independent decision-making arrangement or body to make this determination (*cf.* EU TP Directive, in which the decision is made by the Council on a proposal from the Commission), in particular where termination is planned prior to the expiration of the predetermined period of stay. Where the decision on termination is an administrative decision, beneficiaries of temporary protection should be able to seek judicial review³³ of the decision in question. Where the persons fall under UNHCR’s mandate, UNHCR should be consulted and could play a facilitator role. UNHCR could also have a role in advising States when conditions in the country of origin are such that temporary protection is no longer required (not unlike its present role in relation to the cessation of refugee status in group situations under 1951 Convention).

18. In either of the above, even though it is generally accepted that temporary protection is of short duration, a person cannot – as a matter of international law – be returned to an unsafe place, nor should return be pursued if it cannot be carried out safely and in dignity (e.g. if the person would need to travel through unsafe territory). A fixed end of temporary protection cannot take account of these factors, which may not apply to the group as a whole, while objective criteria may be better placed to do so. An open-ended status is also not advisable, as one of the key incentives to granting temporary protection is that it is time limited, such that it not be seen by States as leading to permanent migration or asylum and consequently lose its appeal. At the same time, there will be situations in which transition to other statuses will be needed (*see* VII). A **dual approach** may be advisable such that maximum limits are set yet any early termination would require justification on objective criteria, subject to independent review. Reaching maximum limits however does not necessarily infer return; it may also mean transition to other statuses or solutions. The prohibition on *refoulement* must be respected at all times.

VII. TRANSITION TO SOLUTIONS

19. If at the end of the maximum period for temporary protection the “trigger event” or causal situation in the country of origin has not been resolved, decisions will need to be made regarding how to transition beneficiaries of temporary protection to **alternative, longer-term statuses**; or to otherwise identify **durable solutions** (including in other countries). Such

³¹ UNHCR, ‘Summary Conclusions: Cessation of Refugee Status’, Lisbon Expert Meeting, June 2003, para. 20, <http://www.unhcr.org/refworld/docid/470a33bcd.html>; UN High Commissioner for Refugees, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)*, 10 February 2003, HCR/GIP/03/03, available at: <http://www.unhcr.org/refworld/docid/3e50de6b4.html>.

³² UNHCR, ‘Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It’, 30 May 1997, EC/47/SC/CRP.27, Section II, para. 4(n), criteria (i)-(v), <http://www.unhcr.org/3ae68cfc0.html>.

³³ Judicial review in this sense refers to the common law right to challenge the decision made by an administrative body on the grounds of natural justice and procedural fairness. Of course, access to all other legal avenues to remain should be available, subject to regulation by national laws.

discussions will need to involve possibilities for **third country resettlement**, but could also consider access to **migration options** (either in the host country or abroad).³⁴

20. Decisions to return beneficiaries of temporary protection must be governed by international law, including the prohibition on *refoulement*, and respect conditions of safety and dignity. Return in safety includes both physical as well as legal safety; while return in dignity requires that returnees are treated with full respect and full acceptance by their national authorities, including the restoration of rights.³⁵ Ideally return would be voluntary and returnees would benefit from reintegration packages and programmes to ensure sustainable return. Any deportations would need to respect international human rights standards, including the prohibition against collective expulsion and the observance of due process guarantees.

VIII. INTERNATIONAL COOPERATION AND RESPONSIBILITY SHARING

21. International cooperation is an underlying principle of international law, stemming from the UN Charter, and it is also given particular emphasis in the 1951 Convention and other instruments.³⁶ International cooperation can take many forms. Past examples of where temporary protection has been secured have relied on international solidarity in the form of material, technical or financial assistance, as well as the physical relocation of asylum-seekers or refugees.³⁷
22. Temporary protection has played a role as part of comprehensive approaches to particular situations, such as the Comprehensive Plan of Action in South-East Asia and in the former Yugoslavia.
23. The EU TP Directive makes international cooperation within the European Union an element related to the operationalization of the Directive in mass influx situations, yet the exact commitment of each Member State is not set out expressly. Also the intra-regional burden-sharing components of the Directive have been identified as one of the reasons why the Directive has not yet been activated.³⁸ Ensuring that principles of international cooperation and responsibility sharing underpin any temporary protection arrangement would be important, but whether they should be framed in obligatory terms or as elements of the framework is another matter. Extra-regional obligations relating to burden-sharing, for example, would be difficult to impose as a matter of international law on non-parties to the relevant instrument.

³⁴ See, Katy Long, *Extending Protection? Labour Migration and Durable Solutions for Refugees*, UNHCR, New Issues in Refugee Research, Research Paper No. 176 (2009), <http://www.unhcr.org/4ad334a46.html>.

³⁵ UNHCR, *Handbook - Voluntary Repatriation: International Protection*, para. 2.4, 1 January 1996, <http://www.unhcr.org/publ/PUBL/3bfe68d32.pdf> (currently under revision). See, also, ExCom Conclusions on voluntary repatriation, Nos. 73 (XLIV) (1993), 96 (LIV) (2003), 99 (LV) (2004), 101 (LV) (2004), and 102 (LVI) (2005).

³⁶ UNHCR, Expert Meeting on International Cooperation to Share Burdens and Responsibilities, Summary Conclusions, Amman, Jordan, 27 and 28 June 2011, <http://www.unhcr.org/4ea0105f99.html>.

³⁷ UNHCR, Expert Meeting on International Cooperation to Share Burdens and Responsibilities, Summary Conclusions, Amman, Jordan, 27 and 28 June 2011, paras. 1 – 9 (Operational Toolbox), para. 3, <http://www.unhcr.org/4ea0105f99.html>.

³⁸ Bruno Nascimbene and Alessia Di Pascale, 'The "Arab Spring" and the Extraordinary Influx of People who Arrived in Italy from North Africa' (2011) 13 *European Journal of Migration and Law* 341.

24. More material on international cooperation and responsibility sharing is set out in UNHCR, Expert Meeting on International Cooperation to Share Burdens and Responsibilities, Summary Conclusions, Amman, Jordan, 27 and 28 June 2011, <http://www.unhcr.org/4ea0105f99.html>.

IX. THE RELATIONSHIP OF TEMPORARY PROTECTION TO THE 1951 CONVENTION AND OTHER STATUSES

25. In **non-State parties** to the 1951 Convention (or relevant regional refugee instrument), or in situations not covered by those instruments, temporary protection may be granted as a matter of sovereign discretion and as an exercise of executive power. There is thus no conflict between the two forms of statuses (e.g. refugee status versus temporary protection). Even in these non-Convention States, they are nonetheless subject to broader international humanitarian and human rights obligations, including the customary international law norm of *non-refoulement*. Temporary protection could thus be seen as a way of giving effect to these broader obligations. Temporary protection could, therefore, be particularly suited to regions – such as parts of Asia or the Middle East – in which few States are party to the relevant instruments.³⁹
26. For **States parties to the 1951 Convention** (or relevant regional refugee instrument), the situation is different. Any suspension of rights in the 1951 Convention as they apply to refugees needs to be justified. There are at least four possible explanations to **reconcile the co-existence between temporary protection and the Convention**: **first**, that the 1951 Convention does not apply to the situation or persons at hand (e.g. because the persons are not refugees within the definition of the 1951 Convention such as those fleeing sudden onset environmental events); **second**, that temporary suspension or derogation of the Convention is permitted because of the impact of the movement on the stability and security of the receiving State, at least in its initial stages (particularly relevant in mass influx and other emergency situations);⁴⁰ **third**, that because of the fluidity of the situation it is not clear whether the Convention applies or ought to be suspended, and thus is a “wait and see” situation, provided any delay in the Convention’s application is made in good faith; or **fourth**, individual refugee status determination would be impracticable or overly burdensome (e.g. large-scale movements), and taking account of the profiles of the individuals, including both those who are likely to be Convention refugees as well as those belonging to the broader group, a group protection response is deemed most appropriate to maximise protection to the largest number in need of it.
27. Temporary protection needs to be distinguished from refugee status granted on a *prima facie* basis. **Prima facie recognition** is not a subsidiary category of refugee status, but rather an evidentiary/procedural shortcut to recognition, granting all rights guaranteed by the 1951

³⁹ It should be noted, however, that six countries are in fact parties to the 1951 Convention in the Middle East and North Africa (Algeria, Egypt, Israel, Morocco, Tunisia, Yemen); in South East Asia, three countries are party to the relevant instruments (Cambodia, the Philippines, Timor-Leste).

⁴⁰ Article 9 of the 1951 Convention authorizes a Contracting State to take provisional measures, “in time of war or other grave and exceptional circumstances”, which “...it considers to be essential to the national security in the case of a particular person, pending a determination ... that that person is in fact a refugee and that the continuance of such measures is necessary... in the interests of national security.” On the interpretation of Article 9, see Ulrike Davy, “Article 8”, in Andreas Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011), 781. There are important exceptions to the derogation provision, in particular the prohibition on applying such measures solely on the basis of the nationality of the person (Article 8, 1951 Convention).

Convention or the applicable regional refugee instrument (most notably the 1969 *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*). Where it is possible to negotiate for *prima facie* status to be granted, this should be the preferred State response.

28. Temporary protection also needs to be distinguished from “complementary forms of protection” under international human rights law, which have their legal basis rooted in human rights obligations of *non-refoulement*.⁴¹ To date, human rights jurisprudence has mostly limited a State’s *non-refoulement* obligations to persons who face a serious risk of torture or other forms of inhuman or degrading treatment upon return, threats to life, non-guarantee of fair trial rights in respect of extradition and, in a limited number of cases, on family unity or privacy grounds. Such forms of protection are not normally emergency or provisional in nature, are applied on an individual case basis,⁴² and to persons already in the territory (and do not therefore deal with issues such as admission). Access to these forms of protection as a matter of international human rights law would remain available in the context of temporary protection schemes, but they may not be relevant to all of the situations described at IV.

X. THE WAY FORWARD AND NEXT STEPS

29. Should UNHCR aim for general guidelines on temporary protection, promote a protocol to the 1951 Convention, or develop regional instruments in the Middle East and/or South East Asia? Or should UNHCR draft a template/framework for regional temporary protection arrangements or simply influence domestic legislation?

Division of International Protection
7 July 2012

⁴¹ McAdam argues that the word “complementary” in its broadest application “signif[ies] protection that falls outside the dominant international refugee instrument[s]”: Jane Mcadam, *Complementary Protection In International Refugee Law* (Oxford University Press 2007), 2.

⁴² Ruma Mandal, ‘Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)’, Legal and Protection Policy Research Series, PPLA/2005/02, June 2005, 3, <http://www.unhcr.org/refworld/pdfid/435e198d4.pdf>.

WHAT TEMPORARY PROTECTION *IS NOT*, WHAT TEMPORARY
PROTECTION *SHOULD NOT* BE AND WHAT TEMPORARY PROTECTION
COULD BE

Temporary protection *is not*...

- a protection scheme replacing the 1951 Convention or obligations arising thereunder (except in crisis/mass influx situations in the initial phases);
- a protection scheme replacing regional refugee instruments or obligations arising thereunder, including when *prima facie* or more favorable protection is available and/or applicable;
- suitable if the situation causing external displacement becomes prolonged.

Temporary protection *should not* be used...

- to undermine existing international obligations;
- to discourage people from seeking asylum under the 1951 Convention and/or regional refugee instrument, or to encourage their premature return;
- to delay or to save costs in relation to individual refugee status determination procedures (except in mass influx situations);
- to politicize the particular situation at issue.

Temporary protection *could be used to address various situations to achieve the maximum of protection and burden-sharing* such as

- mass influx or other humanitarian crises or emergencies involving the external movement of persons, including in mixed flows or rescue at sea situations, where individual refugee status determination would be impracticable or inapplicable;
- groups of persons not covered by the 1951 Convention and/or regional refugee instruments in need of protection pending their return home and/or their transition to other solutions;⁴³
- movements in fluid or transitional contexts at the beginning, final stages or post-conflict contexts;
- movements related to natural disasters, sudden-onset environmental events or human-made disasters.

⁴³ The emphasis here is on groups of persons in flight, as otherwise international human rights law principles of *non-refoulement* would apply.