

Roundtable on Temporary Protection
19-20 July 2012
International Institute of Humanitarian Law
San Remo, Italy

Summary Conclusions on Temporary Protection

On 19 and 20 July 2012, the Office of the United Nations High Commissioner for Refugees (UNHCR) organized a Roundtable on Temporary Protection, held in San Remo, Italy, with the support of the International Institute of Humanitarian Law (IIHL). Participants included 19 experts from 15 countries, drawn from NGOs, academia and regional and international organizations. A discussion paper, produced by UNHCR, informed the discussion.¹ The roundtable aimed to discuss the scope and meaning of temporary protection, and to examine what it is or should be, what it does or should guarantee, and in what situations it could apply.

The following summary does not necessarily represent the individual views of participants or of UNHCR, but reflects broadly the themes, issues and understandings emerging from the discussion.

Background

1. Temporary protection is not a new concept, yet its content, boundaries and legal foundation remain largely undefined or unsettled. In recalling the wide-ranging State practice on temporary protection as well as its use as part of many global and regional responses to humanitarian crises, it was recognized as an important “tool” in the “toolbox” of international protection, and as complementary to that regime.
2. In light of these variations, and against a backdrop of recent events in North Africa and the Middle East and the invocation of temporary protection responses to those events, it was considered time to update the doctrine on temporary protection to contemporary cross-border displacement challenges.
3. Existing doctrine on temporary protection accepts it as an emergency response to the mass movements of asylum-seekers. The value of temporary protection in ensuring protection from *refoulement* and basic minimum treatment in accordance with human rights where individual status determination is impracticable or inapplicable has been acknowledged.² It

¹ UNHCR, “Discussion Paper on Temporary Protection”, 7 July 2012, available at: <http://www.unhcr.org/3e5f78bc4.html>.

² Individual status determination is not always *practicable* (for example, in mass influx situations it can overburden determination systems) or *applicable* (for example, owing to the character of the

has also been used to grant protection to a broader category of persons not necessarily covered by the 1951 Convention.

4. In other words, temporary protection has been a response to humanitarian crises coordinated with and complementary to the 1951 Refugee Convention, predicated on responsibility- and burden-sharing, and manifest through situation or regional specific arrangements. However, there remains confusion over the scope and meaning of the concept, in particular whether and how it could be applied to situations beyond mass influxes.

5. In recognition of the need for a predictable, harmonized yet flexible response to humanitarian crises and complex population movements, it was agreed that it was time to prepare a model framework on minimum standards for temporary protection.

6. Recommendation E of the Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons was indicated as an underlying premise for the development of temporary protection. Recommendation E “[e]xpresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.”³

Regional and national practices

7. The relevance of a common approach to temporary protection was recognized, especially in regions where existing international protection instruments do not apply because of the lack of parties to, or the geographical scope of, those instruments. Temporary protection was also considered relevant where these instruments are complex to apply because of the character of the movements. It was emphasized that temporary protection should not undermine existing international obligations, or regional systems of protection that already address modern cross-border movements.⁴ Any new framework on temporary protection should build on and learn lessons from existing regional protection instruments and arrangements.⁵ Particular focus was given to adapting the framework at national or regional/sub-regional levels, albeit guided by universal principles and minimum standards.

movements, or 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, available at: <http://www.unhcr.org/4da2b5e19.html>. See, in particular, Executive Committee Conclusion (ExCom) No. 22 (XXXII) (1981), “Protection of Asylum-Seekers in Situation of Large-Scale Influx”, 1981. See, also, 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; UNHCR, *Note on International Protection*, para. 47, UN Doc. A/AC.96/830 (1994), available at: <http://www.unhcr.org/refworld/docid/3f0a935f2.html>.

³ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: <http://www.unhcr.org/refworld/docid/40a8a7394.html>.

⁴ See, in particular, *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, available at: <http://www.unhcr.org/refworld/docid/3ae6b36018.html> and the 1984 *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, available at: <http://www.unhcr.org/refworld/docid/3ae6b36ec.html>.

⁵ See, in particular, Asian-African Legal Consultative Organization (AALCO), *Bangkok Principles on the Status and Treatment of Refugees* (“Bangkok Principles”), 31 December 1966, as adopted on 24 June 2001 at the AALCO’s 40th Session, New Delhi, available at: <http://www.unhcr.org/refworld/docid/3de5f2d52.html>; EU, Council Directive 2001/55/EC of 20 July

8. Temporary protection may thus be particularly suited to regions – such as Asia or the Middle East – in which few States are party to the relevant instruments. Even in these non-Convention States/regions, it was acknowledged 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.

9. Lastly, some national temporary protection schemes could also offer guidance. One particular example examined was the Temporary Protection Status (TPS) in the United States, although it was acknowledged that it is a discretionary grant of continued stay, and does not deal with the vital question of admission. Other discussed examples were those national laws which provide for the granting of humanitarian status to people fleeing natural disasters.

Towards elements of a new framework or doctrine on temporary protection

In developing a temporary protection framework or doctrine, the following were considered possible elements, or areas for further discussion:

Scope

10. While acknowledging the generally held view that mass influxes of asylum-seekers can, depending on the situation, warrant temporary forms of protection, it was agreed to frame temporary protection instead around humanitarian crises and complex cross-border population movements. Such situations could include but are not limited to mass influxes including those involving mixed population movements. It was considered that applying temporary protection arrangements to rescue at sea scenarios required further, careful consideration.

11. Types of situations that cause cross-border movements to which temporary protection may provide an initial response included armed conflict or other situations of generalised violence; environmental disaster resulting in a substantial, temporary disruption of living conditions; and other exceptional and temporary conditions necessitating protection and which prevent return in safety and dignity.

12. The framework needs to adopt an humanitarian approach.⁶ It should be an agile and compassionate system to react speedily to a crisis or disaster, while providing a minimum of protection. Clearly, how the boundaries of the framework are crafted would be key to its application and workability. A balance would need to be struck between adopting a broader or narrower definition of beneficiaries. A more generic definition would keep the framework open to cover all gaps (including future gaps) in the current international protection system. A narrower definition which targets particular situations or trigger events would on the other hand ensure predictability as well as sign-on by States.

13. In contrast to the technical and individual nature of the 1951 Convention definition of a refugee, the activation and scope of the new framework should be based on categories, groups or scenarios, allowing for a more flexible determination of when temporary protection applies.

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*](#) (EU TP Directive).

⁶ Migrants caught up in humanitarian crises could, for example, benefit from temporary protection pending transition to other solutions, including evacuation to their countries of origin.

14. How to activate temporary protection, and who or what body would be responsible for doing so, were also discussed. Generally the view was expressed that it should be left to States to determine whether temporary protection would apply to a particular situation, albeit UNHCR should have a “droit de regard” to inform that decision.

Minimum standards of treatment

15. Building on Executive Committee Conclusion No. 22 of 1981 and bringing that Conclusion in line with developments in international human rights law, the framework should entail a list of minimum standards of treatment to be guaranteed. While recognizing that it could be difficult to compile a list of appropriate human rights, in part because it might appear as establishing an unwanted hierarchy of human rights, it was agreed nonetheless that a non-exhaustive list would be the preferred approach. The list would identify States’ obligations and include those rights most relevant to the situation at hand. The list should not become so expansive that it would be duplicative of existing international instruments, be unrealistic, or inadequately tailored to the particular situation at issue as to be unhelpful.

16. Standards of treatment not specifically identified in ExCom Conclusion No. 22 that were considered important to add to any future framework included the provision of a formal legal status, explicit protection from violence, including sexual and gender-based violence, and special protection for particular groups, such as persons with disabilities.

17. Any listing ought to be preceded by an introductory chapeau that recognizes that States shall apply temporary protection with due respect for human rights and fundamental freedoms, while at the same time, reflecting a balance of interests, including the need for flexibility and pragmatism.

18. In all cases, the fundamental principle of *non-refoulement* – including non-rejection at the frontier – must be scrupulously observed and explicitly articulated.

Termination of temporary protection

19. As the name indicates, the protection to be provided is intended to be of temporary duration. However, because it will not always be possible to determine the exact duration of the protection needed, it was considered more useful to define as closely as possible the circumstances when temporary protection would be terminated, rather than to set pre-determined rigid timeframes on its duration. On the other hand, beneficiaries should get protection as long as they need it.

20. It was proposed that temporary protection would terminate when (a) it is determined – on the basis of an objective assessment – that the situation causing the flight has ended, and return is reasonable and can be carried out in safety and dignity, (b) an individual’s status has been transitioned to another status [including, for example, refugee or residency status], (c) the protection responsibilities for the individual have been transferred to another State [for example, in the context of humanitarian evacuation or resettlement], or (d) they find a durable solution. The indicators of reasonableness for return ought to be directly referable to the conditions that led to the need for protection in the first place, the causes of that displacement, the extent to which the causes of displacement have been resolved, and the willingness and ability of the country of origin to extend effective protection to its nationals.

21. Although it was generally considered that protection should terminate on the basis of objective circumstances (as indicated above), it was also considered important that the protection scheme be flexible, solutions-oriented and not become a long-term issue for the hosting State. In this respect, imposing a maximum limit on temporary protection was seen as potentially helpful in some contexts to encourage the granting of such protection, and also

because it would mark the time when transition into more permanent solutions would begin. It was widely agreed that the upper limit of such protection should not exceed three years. At the same time, it was felt that no minimum limits should be set, as it is rarely possible to determine with certainty the length of stay needed in the initial stages of a humanitarian crisis, and further, set minimum periods could discourage the activation of the regime if they are considered too long. States may grant temporary protection on an incremental basis up to the preferred maximum period.

Transition to solutions

22. The need to transition to solutions is a crucial component of any protection response to humanitarian crises or complex population movements. Timely (and early) identification and negotiation of solutions, on a bilateral, regional or multilateral basis as appropriate, tailored to the situation at hand and the applicable legal framework, and in line with principles of international cooperation, are needed. It was considered that consultation and voluntariness are two key principles underpinning any solutions strategy.

23. Rather than focusing on only one form of solution, a comprehensive solutions strategy would be required. While return in dignity and safety would remain the focus of every displacement situation, especially in large-scale influxes, all possibilities need to come into play. This would also involve consideration of the different phases of a humanitarian crisis or complex population movement; for example, the emergency, stabilization, and transition phases, and tailoring solutions to those stages accordingly.

24. Such solutions could include third country resettlement, complementary protection, alternative legal statuses, and orderly departure programmes. In particular, migration solutions (both within the host country and elsewhere) were flagged as deserving of further analysis, balanced against the possible creation of new migration flows or pull factors.

Consultation and coordination

25. It was strongly noted that consultation and coordination on termination and solutions was an essential aspect of any temporary protection arrangement. Drawing on the International Law Commission's Draft Articles on Protection of Persons in the Event of Disaster,⁷ it was suggested that a duty to consult, cooperate and notify be built into any temporary protection instrument. Ideally, consultation would take place between the host country as well as the country of origin, the broader international community, together with UNHCR and other assisting actors as appropriate, including affected populations and persons. Such consultation would cover the termination of temporary protection, the modalities of termination and transition to solutions. In particular, affected populations need to be involved and notified of the termination of temporary protection in a language they understand, the modalities of its implementation and transition to solutions; and they should enjoy the right to challenge the decision to terminate their status.

International Cooperation and Burden Sharing

26. International cooperation is best understood as a principle and methodology and is inherent in temporary protection. As a principle, international cooperation is to be guided by basic pillars of humanity, dignity and international solidarity. There is a collective responsibility regarding humanitarian crises and complex population movements. They often cannot be solved by one State alone. At the same time, however, collective responses do not

⁷ See, International Law Commission, "Fifth report on the protection of persons in the event of disasters", Eduardo Valencia-Ospina, Special Rapporteur, UN doc. A/CN.4/653, available at: http://untreaty.un.org/ilc/guide/6_3.htm.

substitute for the existing obligations of States under international law [for example, *non-refoulement*].

27. It was hoped that any formal activation of temporary protection would seize the attention of the international community to bring about solutions. International cooperation can take many forms, including but not limited to material, technical or financial assistance, as well as the physical relocation of people through, for example, humanitarian evacuation or emergency resettlement. Where cooperative arrangements involve the physical relocation of individuals, they need to take into account the autonomy of the individual and provide for appropriate consultation (see paragraph 25).⁸

28. In terms of financial support, the creation of special funding processes for specific situations could be helpful. Multilateral responses based on international cooperation and complementary to the framework could be developed, including particularly at the regional or sub-regional level involving regional mechanisms and institutions together with the broader international community. Reference was made to multilateral trust funds and special appeals.

29. While it is reasonable that cooperation should first occur at the regional or sub-regional levels, the international dimension should not be overlooked and has an important role to play. The framework could build on regional examples and experience, and encourage their institutionalization for future scenarios. The responsibility of the country of origin also needs to be factored in, including in relation to the responsibility to protect persons within its jurisdiction.

30. There was some discussion of whether international cooperation/burden-sharing should be a formalized component of any temporary protection arrangement, or be a discretionary and voluntary guiding principle. Some participants felt that in order to encourage States to provide temporary protection and for the framework to be activated, the international cooperation components needed to be more than aspirational. On the other hand, others felt that there was some evidence to suggest that the formalization of burden-sharing components in some existing arrangements had led to the non-activation of the scheme.⁹

The role of UNHCR and other relevant international organizations

31. While the provision of temporary protection to persons under their jurisdiction remains with States, UNHCR and other international organisations, as appropriate, can assist with certain practical elements as part of cooperative arrangements.

32. States should consult with UNHCR as soon as possible to ensure that the persons involved are fully protected, are given emergency assistance, and that longer-term solutions are sought.

33. Beneficiaries of temporary protection are entitled to contact UNHCR and UNHCR shall be given access to them. UNHCR shall also be given the possibility of exercising its function of international protection, including its supervisory responsibility.

⁸ UNHCR, Expert Meeting, *Summary Conclusions on International Cooperation to Share Burdens and Responsibilities*, Jordan, Amman, 27-28 June 2011, available at: <http://www.unhcr.org/refworld/docid/4e9fed232.html>.

⁹ Reference was made in particular to the EU TP Directive, *supra* note 5, Chapter VI, Art. 24 – 26.

Relationship between temporary protection and the 1951 Convention and other instruments

34. The aim of temporary protection is to improve existing protection arrangements and to fill gaps in the international protection architecture, especially in countries and regions where existing instruments do not apply. However, in order to ensure that temporary protection does not conflict with existing protection obligations, “savings clauses” would need to be inserted in any framework agreement, serving to clarify the relationship between existing obligations/instruments and temporary protection, as well as the location of temporary protection within the system of international protection. Such clauses could include the following:

“The provisions of the framework on temporary protection are without prejudice to the provisions of any relevant international instrument, including the 1951 Refugee Convention and its 1967 Protocol, or any regional refugee instruments to which the State is a party, and shall not be construed as restricting or derogating from any of those provisions.

In this regard, the framework on temporary protection does not prevent access to refugee status determination or other protection categories as applicable under relevant international and national laws, but it may permit temporary suspension of those regular determination processes.

It is in the very nature of minimum standards that States have the power to introduce or maintain more favourable provisions for persons enjoying humanitarian protection. Nothing in the framework shall be deemed to impair any rights and benefits granted by a State apart from the framework.¹⁰

Without prejudice to the situations and beneficiaries listed in the framework, States may extend temporary protection as provided for in the framework to additional categories of cross-border displaced persons.”

Next steps

35. The participants encouraged UNHCR to draft a model framework on temporary protection, and to pursue it in two regional organizations/processes. The League of Arab States and the Bali Process were expressly mentioned. The drafting of a Protocol to one of the existing treaties, on the other hand, was regarded as premature.

36. The participants also encouraged UNHCR to develop a number of tools relating to comprehensive responses based on practice, custom and law and which respond to situations specifically.

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¹⁰ See, for example, Article 5 of the 1951 Refugee Convention: “Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention”; EU TP Directive, supra note 5, Preamble, paragraph (12): “It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for persons enjoying temporary protection in the event of a mass influx of displaced persons.”