

# INTERNATIONAL LAW ASSOCIATION

## LONDON CONFERENCE (2000)

### COMMITTEE ON REFUGEE PROCEDURES

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### THIRD INTERIM REPORT ON TEMPORARY PROTECTION

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#### I. INTRODUCTION

During the past four years, the Committee on Refugee Procedures has focussed its activities on the issue of temporary protection. The second Interim Report of the Committee which was submitted to the 1998 Taiwan Conference after consultation with the members of this Committee took up a series of key issues regarding conceptual aspects of temporary protection. It dealt with such problems as the question of appropriate situations for granting temporary protection and beneficiaries of such protection, the complex relationship between temporary protection and national asylum procedures, the rights of those who are temporarily protected, and the issue of return and other solutions where return is not possible.

The discussion of the report at the Taiwan Conference showed that many of its aspects were not controversial. There seems to be a consensus that tempo-

rary protection should be provided in situations where large numbers of persons arrive because they have to flee generalized violence or civil war and other forms of armed conflict. There is also agreement that temporary protection should make it possible for States to protect such persons without having to go into full-fledged status determination procedures by suspending asylum proceedings for some time; at the same time, it is considered necessary to examine and accommodate, at some point, the claims of those who turn out to be genuine refugees in the sense of 1951 Convention Relating to the Status of Refugees (CSR51). Finally, the members of the Committee agree that temporary protection is a return-oriented concept although, in certain circumstances, it might turn out that return would not become a viable option for prolonged periods of time. There is also agreement that any temporary protection regime has to be framed in a way that is compatible with the CSR51.

A certain disagreement exists regarding the rights that should be granted to those receiving temporary protection. Should these rights gradually improve and finally be assimilated to those of refugees under CSR51 or should they be reduced to a minimum as to make it easier for receiving States to grant temporary protection? There is also a certain disagreement among the members of the Committee as to whether temporary protection should be limited in time.

Finally, some members of the Committee stressed the need to address the issue of burden-sharing among States.

This report first discusses the two outstanding issues of burden-sharing and of rights to be granted to temporarily protected persons (II) and then proposes a draft declaration on temporary protection (III) before addressing the future activities of this Committee (IV).

## II. OUTSTANDING ISSUES

### *1. Burden-Sharing*

It is recognized today that the reception of persons on flight might unduly burden particular States. In this regard, the Executive Committee of the Programme of the UNHCR, in its 1998 Conclusion on Refugee Protection No. 85 (XLIX), e.g., reiterated “that refugee protection is primarily the responsibility of States and that it is best achieved through effective cooperation between all States and UNHCR, as well as other international organizations and pertinent actors, in a spirit of international solidarity and burden-sharing” Similarly, its 1997 General Conclusion on Refugee Protection (Res No. 81/XLVIII) recognized “that countries of asylum carry a heavy burden, including, in particular, developing countries, countries in transition, and countries with limited resources, which, due to their location, host large numbers of refugees and asylum-seekers” and reiterated in this regard “its commitment to uphold the principles of international solidarity and burden-sharing”.

Whereas these and many similar resolutions refer to refugees and asylum-seekers in general, the Executive Committee, in its 1996 Conclusion No. 80 (XLVII) on Comprehensive and Regional Approaches within a Protection

Framework, is directly applicable to the issue of temporary protection. It referred to situations “of large-scale involuntary population displacements”, encouraged “States, in coordination and cooperation with each other, and with international organizations, if applicable, to consider the adoption of protection-based comprehensive approaches to particular problems of displacement” and identified as one of the principal elements of such approaches “measures to reinforce international solidarity and burden-sharing”. Already the 1981 ExCom Conclusion No. 22 (XXXII) on Protection of Asylum-Seekers in Situations of Large-Scale Influx stressed:

“A mass influx may place unduly heavy burdens on certain countries; a satisfactory solution of a problem, international in scope and nature, cannot be achieved without international co-operation. States shall, within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, States which have admitted asylum seekers in large-scale influx situations.”

However, it has not been possible thus far to agree on institutionalized mechanisms of burden-sharing on the universal and even on the regional level. States are very far away from reaching a consensus on these matters<sup>1</sup>. Taking into account not only this large degree of disagreement among States but also the political nature of the search for burden sharing, it seems appropriate for this Committee to call upon States to assist, at their request, States which are confronted with very large numbers of persons in search of protection, but not to propose any specific mechanisms for burden-sharing. In this context, it is also appropriate to recall 1998 ExCom Conclusion No. 85 (XLIX) on International Protection which stressed

“that access to asylum and the meeting by States of their protection obligations should not be dependent on burden-sharing arrangements first being in place, particularly because respect for fundamental human rights and humanitarian principles is an obligation for all members of the international community”.

## *2. Rights to be Granted to Persons under Temporary Protection*

Regarding the question of what rights should be granted to persons benefiting from temporary protection, the following elements have to be taken into account:

- (1) Temporarily protected persons are entitled to human rights guarantees regardless of whether they are Convention refugees or belong to other

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<sup>1</sup> See, e.g., the summary of discussion on burden-sharing in: Executive Committee of the High Commissioner's Programme, Standing Committee, 12th Meeting, Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It, UN Doc EC/48/SC/CRP.32, 25 May 1998, para. 4.

categories of persons in need of international protection, and they cannot be denied these rights just because they are admitted to the country of refuge on a temporary basis only. Many of these rights may be subject to such limitations as are determined by law and are necessary for protecting public safety, order, health, or morals or the fundamental rights and freedoms of others. Such rights may be more limited during the first period of protection, but the principle of proportionality demands an improvement of these rights over time if the duration of temporary protection is prolonged.

- (2) As regards the question of whether and to what extent temporarily protected persons are entitled to certain rights under the 1951 Convention a flexible approach has to be taken which takes into account two variables, namely (i) the possibility for Convention refugees to have access to a refugee status procedure or the absence of such a possibility, and (ii) the duration of temporary protection. The easier it is to apply for refugee status determination and the shorter the duration of temporary protection is, the lower the level of rights granted to the beneficiaries of such protection can be. In contrast, the more difficult access to asylum procedures is and the longer the period of temporary protection lasts, the better the treatment has to be. In any case, the principle of non-refoulement has to be scrupulously observed in any case.

### III. DRAFT DECLARATION ON TEMPORARY PROTECTION

#### *1. Purpose and Content of a Declaration on Temporary Protection*

On the international level, temporary protection is not yet a legal concept but rather a pragmatic answer of States faced with large numbers of persons fleeing situations of war, civil war and generalized violence. There are several ways of conceptualizing temporary protection, and domestic legislation shows that different solutions are possible. It cannot be the purpose of an ILA declaration to propose a specific model of temporary protection. Rather, it should give guidance to States which choose to introduce temporary protection by stressing some general principles which are important, from the perspective of international refugee and human rights law, for making sure that the concepts adopted are compatible with requirements of international law.

The following text is proposed by this Rapporteur as a basis for discussion. It is based on the conclusions of his Second Interim Report on Temporary Protection and takes into account the discussion on this report. In addition, some formulations are inspired by the summary of discussion on temporary protection held within the framework of UNHCR's informal consultations on the provision of international protection to all who need it. These consultations were organized by UNHCR in 1996<sup>2</sup> and brought together a limited number of

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<sup>2</sup> See Executive Committee of the High Commissioner's Programme, Standing Committee, 8th Meeting, Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It, EC/47/SC/CRP.27, 30 May 1997, paras. 4 -5.

Government and academic experts for informal exchanges of views on, inter alia, the issue of temporary protection; many of the conclusions drawn are in line with the views expressed in the previous interim reports of this Committee.

## *2. Proposed Text*

The following text is proposed as a draft declaration on temporary protection  
*THE INTERNATIONAL LAW ASSOCIATION,*

*RECALLING the 1951 Convention Relating to the Status of Refugees, the 1948 Universal Declaration of Human Rights, the 1966 International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights as well as other relevant universal human rights instruments;*

*ALSO RECALLING that instruments for the protection of refugees such as the 1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa and the 1984 Cartagena Declaration on Refugees as well as relevant regional human rights conventions provide guidance on a regional level;*

*NOTING that Article 63(2) of the Treaty Establishing the European Community requires the EU to adopt "minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection;*

*RECOGNIZING that in the case of large-scale influxes, not only refugees within the meaning of the 1951 Convention Relating to the Status of Refugees but also other persons fleeing war, civil war or situations of generalized violence are in need of international protection as long as the dangers stemming from such situations last;*

*CONSIDERING that in cases of mass influx of persons in need of international protection individual refugee status determination may often not be possible or practical and that, therefore, temporary protection offers a pragmatic response to specific protection needs by enhancing the effectiveness of the principle of non-refoulement as well as the protection of those who, whether or not they are refugees within the meaning of the 1951 Convention relating to the Status of Refugees, are forced to flee across international borders;*

*NOTING that among persons in need of temporary protection there may be refugees within the meaning of the 1951 Convention relating to the Status of Refugees and that, therefore, the granting of temporary protection status may not prejudice their entitlements under that Convention*

*DESIRING to provide guidance for States and groups of States which choose to resort to temporary protection on an ad hoc basis or are conceptualizing such*

*protection in a general manner as a measure to respond to exceptional situations of mass influx of persons in search of international protection;*  
**ADOPTS THE FOLLOWING RECOMMENDATIONS:**

#### Section I: General Provisions

1. *Temporary protection should be conceptualized in a manner consistent with the framework of international refugee and human rights law preserving the institution of asylum and ensuring that persons in need of international protection can enjoy such protection with full respect for their fundamental human rights.*
2. *Temporary protection should be understood as an element within the framework of a more comprehensive approach to situations of mass influx, involving concerted efforts on the part of the international community (i) to assist States particularly affected by such an influx in a spirit of international solidarity and burden-sharing, and (ii) to achieve a solution to the conflict or strife in order to enable those who have fled to return in safety and dignity.*
3. *Temporary protection is appropriate for situations where there is a mass influx of persons seeking refuge abroad; at the same time, most of these persons are not refugees within the meaning of the 1951 Convention relating to the Status of Refugees but refugees in the broader sense fleeing from situations of general danger such as war, civil war or situations of generalized violence; and finally, an international process is established which seeks to coordinate the activities of receiving countries in a spirit of solidarity and burden-sharing, and to re-establish the conditions allowing for a safe and dignified return.*

#### Section II: Beneficiaries

4. *Beneficiaries of temporary protection should be persons who may or may not be refugees within the meaning of the 1951 Convention relating to the Status of Refugees but would be covered by a wider notion of refugee. These include, in particular*
  - (a) *persons who have fled the dangers of armed conflict and generalized violence;*
  - (b) *persons who have been or would be exposed to systematic or widespread human rights violations, including those belonging to groups compelled to leave their homes by campaigns of ethnic or religious persecution, but who may not have an individual well-founded fear of persecution within the meaning of the 1951 Convention;*
5. *If it is apparent that the majority of people seeking protection or a specific category among them fall under the 1951 Convention relating to the Status of Refugees, group determination under this instrument should be applied.*

### Section III: Standards for the Treatment of Temporarily Protected Persons

6. *If States resort to the instrument of temporary protection, beneficiaries should be given access to their territory without discrimination. Beneficiaries shall be protected against refoulement as long as the danger which caused their departure lasts in the country of origin.*
7. *States may suspend the examination of requests by temporarily protected persons for refugee status determination. They may coordinate temporary protection with refugee status determination procedures in one of the following ways: (i) Granting temporary protection after a request for refugee status determination has been rejected; (ii) free choice between temporary protection or refugee status determination procedure; (iii) automatic determination of refugee status after a certain period of suspension (e.g. 2-3 years); or (iv) refugee status determination procedures at the end of the stay for those who claim to have a well-founded fear of persecution in case of return to the country of origin. Total exclusion from an individual status determination procedure even at the end of temporary protection would contradict basic principles of present international refugee law.*
8. *Beneficiaries of temporary protection should be provided with a legal status that authorizes them to remain in the country of refuge during the duration of such protection.*
9. *Beneficiaries of temporary protection shall be treated in accordance with human rights standards and, where applicable, the guarantees of the 1951 Convention Relating to the Status of Refugees. States should have due regard to the minimal guarantees set out in ExCom Conclusion No. 22(XXXII). In cases of prolonged stay, the rights of temporarily protected persons should be gradually improved.*
10. *Every receiving State should respect and ensure the following rights of all persons to whom it chooses to accord temporary protection,*
  - *the right to be protected against discrimination;*
  - *the right of everyone to an adequate standard of living including adequate food, clothing and housing;*
  - *the right to adequate education,*
  - *freedom of movement which, to the extent possible, should not be restricted;*
  - *provision of a document authorizing them to remain in the territory of the country concerned during the duration of temporary protection;*
  - *in cases of prolonged separation, the possibility of family reunification with respect to their spouses and their minor and dependent children. Particular attention should be given to vulnerable beneficiaries of temporary protection who, because of personal circumstances, would require the support of close family members;*
  - *access to employment in cases of prolonged stay.*

#### Section IV: Ending Temporary Protection

11. *States should, in coordination with UNHCR and other relevant international organizations and bodies, withdraw temporary protection when the situation in the country of origin has changed so fundamentally that beneficiaries would be able to return to their country of origin in safety and with dignity. The principle of non-refoulement must be scrupulously observed in all circumstances.*
12. *Return in safety and with dignity presupposes the existence of the following elements:*
  - *possibility to return to the country of origin;*
  - *existence of conditions ensuring the physical and legal safety of returnees;*
  - *availability of an adequate infrastructure or of assistance guaranteeing the basic necessities of life, including food, shelter and basic sanitary and health facilities;*
  - *non-discrimination and respect for other fundamental human rights of returnees.*
  - *international monitoring of the safety of return.*
13. *If return to the former habitual place of residence is not possible, temporarily protected persons can only be reasonably expected to return to another part of the country if they will enjoy safety and dignity there.*
14. *If return remains impossible after a prolonged stay of several but not more than five years, States shall review the situation of temporarily protected persons with a view to identifying durable solutions such as resettlement or regular admission to the country of refuge.*

#### FUTURE ACTIVITIES OF THE COMMITTEE ON REFUGEE PROCEDURES IN THE AREA OF TEMPORARY PROTECTION

Discussion of this Draft Declaration at the 2000 London Conference will allow revision of the proposed text of a declaration on temporary protection with a view to its being submitted to the 2002 Delhi Conference for final adoption. The final report on temporary protection will comprise a short commentary on every provision of the proposed declaration.

The Draft Declaration has been met with a positive response from the members of this Committee. The present text reflects many of their proposals. However, there are still certain areas where more discussion is required. They include the following points: There is a proposal to include a reference to burden-sharing in the main body of the declaration. One member would like to emphasise that temporary protection should be granted even in cases where the majority of the group in question consists of refugees in the sense of CSR51 (principles 4 and 5). Some members propose to expand the list of rights in principle 10 while others think that it goes too far. There is also some disagreement on how to phrase the elements of return in safety and with dignity (principle 12). It was proposed to drop the specific deadline of five years in principle 14,

while other members expressed their agreement with the present text. Finally, there were some proposals to change the structure of the declaration. Further discussion among the members of the Committee on these points is needed.

The Committee on Refugee Procedures has, for the moment, refrained from proposing a draft convention on temporary protection. Some members of the Committee are concerned that such a draft convention might encourage international negotiations that could, in today's restrictive international climate, lead to solutions that would weaken rather than strengthen the obligations of States towards refugees and other persons in need of international protection. Other members of the Committee believe that a draft convention would provide a useful reminder to States of their obligations under the 1951 Convention and help to ensure that unacceptable *ad hoc* approaches to temporary protection are not regarded as somehow beyond the scope of international law. Nevertheless, all members of the Committee consider that a draft declaration on temporary protection would serve an important purpose in and of itself.