

Temporary protection arrangements to fill a gap in the protection regime

Volker Türk

Predictable measures are needed to provide protection for people displaced across borders by disasters, where there is currently a gap.

There is no international instrument today which protects people who are displaced across borders as a consequence of climate change. If, as expected, cross-border displacement in the context of disasters and climate change increases, the gaps that exist in the protection of people displaced in these contexts will become more prominent.

Although human rights law provides an indirect right to be admitted and to stay when the removal of a person back to the country of origin would amount to inhuman treatment, this does not address all displacement situations. While, for example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides some protection for migrant workers, it does not grant them a right to admission or continued stay in the country. Moreover, national law and regional agreements generally do not consistently address transit situations, such as when a migrant's country of origin has been affected by disaster.

Some countries' disaster relief laws allow for the provision of humanitarian assistance for all people during the immediate phase following a disaster regardless of their legal status in the country, although over time such assistance may be restricted to nationals. But a legal gap generally exists with respect to cross-border displacement

in the context of disasters. While there are examples of continued stay and even admission of people displaced across borders in disaster contexts, such measures are largely ad hoc and uncoordinated.

Measures for temporary protection

In the event that persons displaced across borders are allowed to stay in or to enter a new country, it will be important to clarify their rights and responsibilities for the duration of their stay, taking into account the capacity of the receiving state and host communities. The Office of the United Nations High Commissioner for Refugees (UNHCR) believes that temporary protection or stay arrangements may provide the answer to this challenge and developed *Guidelines on Temporary Protection or Stay Arrangements* (TPSAs) in February 2014, following two expert meetings in 2012 and 2013.

The Guidelines aim to assist governments to respond to humanitarian crises and complex or mixed population movements, in situations where existing responses are unsuitable or inadequate. To encourage predictability in responses, the Guidelines call for 'standing arrangements' to be agreed on a multilateral/regional basis and to be activated in response to particular situations or events when they arise. The emphasis on such arrangements, rather than unilateral action or ad hoc action, aims to encourage

In a case in 2014, the Immigration and Protection Tribunal of New Zealand rejected the climate change-related claim of a Tuvaluan family for refugee status under the 1951 Refugee Convention. The family of four argued, among other things, that the effects of climate change – in particular, sea-level rise and a lack of fresh drinking water – would

have adverse impacts on them if they were forced to return home. While the Tribunal stayed their deportation and granted them residency, this was an exercise of the Tribunal's discretion on humanitarian grounds because of their strong family ties within New Zealand.¹ The decision was not based on any domestic or international legal obligation.

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harmonisation of standards of treatment across countries in the same region and thus reduce motivations for onward movement.

Temporary protection is a decades-old concept that has been applied in many different situations and countries, notably in mass influx situations. The new Guidelines acknowledge the many achievements in providing temporary protection over the years in many different contexts but we were concerned that confusion remained over the scope and meaning of the concept. In addition we recognised the need for predictable and harmonised yet flexible responses to humanitarian crises and complex population movements. The Guidelines therefore clarify what temporary protection/stay **is**, what it **is not**, and what it **should not be**.

They also identify four scenarios in which individual refugee status determination may not be applicable or feasible and therefore where TPSAs may be particularly suited:

- large-scale influxes of asylum seekers or other similar humanitarian crises
- complex or mixed cross-border population movements, including boat arrivals and rescue at sea scenarios
- fluid or transitional contexts
- other exceptional and temporary conditions in the country of origin necessitating international protection and which prevent return in safety and dignity.

The Guidelines also call for a transition from temporary protection or stay to other statuses or solutions. In the Guidelines the approach to ending temporary protection is situation-specific or based on circumstances, rather than being determined on the basis of a pre-determined timeframe. At the first expert meeting, it was widely agreed that the upper limit of such protection should not exceed three years. However, at the same time, it was felt that no lower limits should be set, as it is rarely possible in the

initial stages of a humanitarian crisis and complex population movements to determine with any certainty the length of stay that would be needed. Further, setting minimum periods could discourage the activation of the regime if they are considered too long.

In order to provide a solid degree of protection for beneficiaries to be assured of a dignified stay, the Guidelines also cover operational and practical aspects of TPSAs around entry and reception, minimum standards of protection, international cooperation and burden-sharing, and consultation and coordination. They also make clear that the standards of protection are intended to improve as stay extends.

Importantly, the Guidelines make clear that TPSAs are without prejudice to the obligations of states under international law, including particularly the 1951 Refugee Convention and/or its 1967 Protocol, as well as other human rights and/or regional refugee instruments to which states are party. Rather they should be seen as complementary to and building on the international refugee protection regime.

As the Nansen Initiative on Disaster-Induced Cross-Border Displacement draws to a close in 2015, it is hoped that states, in defining a Protection Agenda for the future, will take the opportunity to give serious consideration to the value of taking pre-emptive action to agree and set in place predictable temporary protection and stay agreements, including in their national legislation. The need to do this is likely to become particularly pressing in regions that are already or will be prone to disasters, including disasters linked to climate change.

Volker Türk turk@unhcr.org is Assistant High Commissioner (Protection), UNHCR Headquarters. www.unhcr.org

The Guidelines are available at:
<http://refworld.org/docid/52fba240a.html>

1. Decision of the Tribunal, 4 June 2014, available at https://forms.justice.govt.nz/search/IPT/Documents/Deportation/pdf/rem_20140604_501370.pdf