

III. Temporary Protection

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The authors argue for a humane and dignified conceptualization of temporary protection, in which "refugee containment" is emphatically rejected. Mechanisms to respond to refugee vulnerabilities, safeguard the family, preserve forms of social organization, and meaningfully involve refugees in constructive interaction with their host communities are outlined. A maximum duration of five years is proposed, subject both to early adjustment to meet special needs and a firm commitment to ensure a permanent solution at the expiration of that timeframe. The necessity of mandated repatriation in safety and dignity is acknowledged, though proposals are advanced to maximize voluntary repatriation as a preferred response. This is a substantially abbreviated version of the authors' original work. Please refer to the notice at the end of this section if you are interested in obtaining a full copy of the paper, which is expected to be published in mid-1996.

In asking whether there is good reason to consider the adoption of temporary protection as either a complementary remedy to, or replacement for, traditional modes of protection, commentators assume permanent integration of refugees to be the *status quo* position. To the contrary, at least in law, temporary protection is already the universal norm. International instruments do not establish a right of refugees to permanent admission to an asylum state. Whereas humanitarian or human rights concerns would arguably dictate granting to refugees some form of durable protection where safe repatriation is impossible, international refugee law presently obligates the state of reception only to avoid the return (*refoulement*) of a refugee to a

country where she or he may face persecution.¹ There is no binding requirement to grant permanent residency in the asylum state.²

This legal framework notwithstanding, many Northern countries have in fact traditionally linked refugee status to permanent residency. In the less developed states of the South, however, permanent admission of refugees has not been the routine policy response.³

Recently, Northern states have also begun to establish temporary protection regimes. Does this trend to emphasize temporary protection in the industrialized world provide evidence of a failure of the refugee protection system? On balance, such a proposition appears more rhetorical than substantial. An important potential advantage of temporary protection is the facilitation of a more generous conceptual approach to refugee protection. States are more inclined to pursue definitional expansion against the background of a practice of temporary, rather than permanent, admission. Care must be taken, however, not to overstate the ability of a shift to temporary protection to counter exclusionary trends. The objective of the international refugee regime should be to establish the minimum acceptable basis for granting protection to as many refugees as possible.

How to Render Temporary Protection Humane

For temporary protection to be humane, it must enable refugees to live their lives in dignity. This is not simply a matter of meeting the minimum standards set by international human rights instruments, but rather requires full respect for the needs and reasonable aspirations of refugees. It is particularly important that a humane system of temporary protection avoid the assaults on human dignity that are typical of refugee "containment."

The obvious starting point of a humane regime of temporary protection must be scrupulous adherence to the duty not to interfere with access by asylum-seekers to the protection system. It is imperative that governments respect the principle of *non-refoulement* by allowing potential refugees admission to their territory, pending assessment of their claims by an international supervisory agency.

Beyond protection against *refoulement*, the "core rights" to be ensured during temporary protection should build on applicable general standards found, for example, in Conclusion No. 22 of the UNHCR Executive Committee.⁴ More fundamentally, account should be taken of the fact that refugees are involuntary migrants who have been forced to flee their homes; that the conditions of refuge they face are often very stressful; and that uncertainty about their future options will be a source of anxiety for them. The rights guaranteed to refugees should constitute a meaningful response to these concerns.

It is important that the temporary protection regime be conceived to restore the refugee's sense of security. As a general principle, assistance should be structured to create a climate of increasing social representation and participation of refugees in deciding every issue regarding their stay and future. The overriding focus should be to assist refugees to become self-supporting under altered social and economic conditions. The needs of refugee children and women refugees must be the focus of specific concern.

Losing the support of family is particularly disruptive of a refugee's sense of self. The separation of families, especially where some members remain at risk in the country of origin, can exacerbate the psychological stress already encountered by most refugees. The shaping of a humane system of temporary protection therefore

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requires respect for the significance of family. The right of individuals and groups within a refugee community to determine the structure of their own communal life is both intrinsically and instrumentally important. Temporary protection should be conceived to encourage refugees to devise collective and shared solutions to the dilemmas of their life in refuge.

Because refugees do not have the choice to return home in order to support themselves, they should be guaranteed attenuation of general restrictions on the right of non-citizens to, for example, access the labour market, enjoy internal freedom of movement, or own land and other means of production. Development programs conceived as joint ventures with the local population may prove particularly helpful in overcoming resistance to refugee participation in the labour force. Culturally appropriate educational programs for children should be a clear priority and labour-oriented training for adults is also important. Language training and health education are also important priorities.

How Temporary Protection Should be Structured

There is little logic to a regime that imposes all responsibility for ongoing protection of refugees on whatever state they happen to arrive in. The apparent arbitrariness of this present rule, coupled with the sheer size of contemporary refugee flows, no doubt contributes to the increasing reluctance of states to admit refugees to their communities, even for the purpose of providing temporary protection. The international supervisory authority should therefore initiate a process of consultation with the refugees, host government, and members of the broader international community to determine whether the country of first asylum is also the most appropriate site in which to provide temporary protection. We believe, however, that particular attention should be given to issues of physical security, functional compatibility, cultural harmony, and geographical proximity.

Determining how long temporary protection should last is a difficult and complex matter. The restoration of safety in the country of origin and the possibility of a dignified return and reintegration of refugees are logical standards for termination of the temporary protection regime. Yet because it is impossible to guarantee that conflicts will be solved within a reasonable period of time, a cutoff point has to be established at which temporary protection yields to a permanent solution.

We view five years as an acceptable outside limit for temporary protection. The timeframe must be long enough that there is a reasonable prospect of temporary protection functioning as a practical mechanism regularly to renew asylum capacity. While clearly not all refugee-producing crises are resolved in five years, there is solid empirical evidence that a significant proportion may be solved within five years after their commencement. As well, viewed from the refugee's perspective there is some evidence that five years in asylum is not usually long enough to cause a loss of one's original cultural identity. The international community must commit itself to the provision of a *permanent solution* to persons who have received temporary protection for five years.

How Temporary Protection Should be Brought to an End

We believe that every effort should be made to avoid the necessity for mandated repatriation of refugees. Voluntary repatriation, where it is possible, is both more respectful of individual autonomy and less socially problematic than is mandated return. In keeping with this philosophy, we believe that it is important that the temporary protection regime be constructed in a way that enables refugees freely to assess the desirability and appropriateness of a decision to return to their home. The international supervisory agency should have a budget to facilitate the voluntary return of refugees. To avoid abuse of such funds, it may be necessary to restrict eligibility to per-

sons who have received temporary protection for perhaps one year or more. There should also be a guarantee of non-penalization of refugees whose attempts to re-establish themselves prove unworkable.

The fact remains, however, that not all refugees will choose voluntarily to repatriate to their state of origin even when a safe and dignified return is possible. To ensure, however, that mandated return is minimally violative of the former refugee's dignity, and simultaneously to minimize the social disturbances that inevitably accompany involuntary repatriation, we recommend adoption of the Norwegian notion of the establishment of a generous deadline for departure, of perhaps six months duration.

While mandated return will never be avoidable in all cases, the reformulated refugee regime should be attentive to all possibilities to ensure that it is an option of last resort. In any event, mandated return should be carried out in a way that bears strict scrutiny from the optic of human dignity. Human rights monitoring by the international community, preferably in the context of negotiated security guarantees with democratic and accountable authority structures in the state of origin, should be an integral part of the repatriation process. ■

Notes

1. "No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion": *Convention relating to the Status of Refugees* (Refugee Convention), at Art. 33(1).
2. The responsibility of states is phrased in permissive terms as simply an undertaking "... as far as possible [to] facilitate the assimilation and naturalization of refugees": Refugee Convention, *supra* note 1, at Art. 34.
3. During 1992 alone, UNHCR assisted some 2.4 million refugees to return home, especially Afghans, Guatemalans, and Cambodians. The average rate of 46,000 persons returning home each week was unprecedented: UNHCR, *The State of the World's Refugees: The Challenge of Protection* 103 (1993).
4. "Protection of Asylum Seekers in Situations of Large-Scale Influx," UNHCR Executive Committee Conclusion No. 22 (XXXII). □