Introduction

Environmental degradation has always caused populations to move in search of more habitable places. Nevertheless, it is estimated that the ongoing environmental changes will involve ever-increasing numbers of displaced by the end of the century. Since 2008, an average of 26.4 million of persons have been internally displaced each year by natural hazards. 1 There are no equivalent statistics concerning cross-border movements; nevertheless the Nansen Initiative reported that '50 countries...in recent decades have received or returned people in the aftermath of disasters, in particular those caused by tropical storms, flooding, drought, famines, and earthquakes'. 2 Faced with such a challenge, existing instruments of international refugee law have been shown to be insufficient.

While disaster displacement is mainly internal, the present contribution will rather deal with instruments and arrangements which are devoted to international movements of persons. In contrast to slow-paced events, such as desertification and other consequences of climate change, in the case of sudden-onset events like cyclones or earthquakes, it is too late to develop adaptation strategies and migration tends to be a forced choice. Cross-border migration, though, is not necessarily immediate, and more often as a result of the inadequate assistance that disaster victims receive within the country.

The 1951 Geneva Convention on the Status of Refugees (Geneva Convention) could in principle be applicable, but its requirement that asylum-seekers risk individual persecution because of a disaster would be hard to claim if not accompanied by a discriminatory policy or practice on the basis of a Convention reason. Despite some assertions to the contrary, it is also unlikely that disaster-displaced persons could benefit from regional refugee instruments. Indeed, the only explicit reference to those fleeing 'because of the occurrence of natural disasters' is contained in the Arab Convention on the Status of Refugees in the Arab Countries, 3 which was adopted by the League of Arab States in 1994 but never ratified by any State. As to the corresponding instruments in Africa and Latin America, it will be shown that their application to cross-border disaster displacement is very controversial.

In order to fill the resulting legal gap, various proposals have been submitted by international lawyers, whose common feature is either to amend the Geneva Convention, or to create...
brand new, ad hoc instrument. As is well known, the realisation of these proposals is premised on a strong political engagement by States, which unfortunately is still lacking. Taking note of this state of affairs, the present contribution offers the modest and more pragmatic objective of conducting an overview of temporary protection measures existing at regional and national level which are, or may be, applicable in a post-disaster scenario. This overview, while necessarily incomplete, will be followed by some considerations on current States attitudes on the subject and explore the advantages – if any – and shortcomings of these measures.

As a preliminary, it is necessary to clarify my understanding of two key terms whose use is crucial for the current analysis. The first one is disaster. The present contribution is concerned mainly with those disasters which are caused by sudden-onset hazards, such as earthquakes, tsunamis, landslides and floods, as well as industrial accidents. This limitation of scope is due to the fact that existing protection frameworks, with some few exceptions, only envisage displacement or migration related to the latter kind of hazards.

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Secondly, in order to identify the various instruments which – at national and regional level – address the protection needs of disaster-related migrants, the phrase ‘temporary protection’ is utilised. Historically, temporary protection, or temporary refuge, has been used as a means to protect against refoulement in situations of mass influx due to generalised violence or internal armed conflict, where individual status determination is either impracticable or inapplicable. Developed after the adoption of the Geneva Convention, temporary protection gained particular resonance in 1979, when it was launched as the framework of the Comprehensive Plan of Action to breathe that Asia and again, more than twenty decades later, into the context of the conflict in former Yugoslavia, when a consistent number of displaced people were hosted by various European States. While not being a new concept, nonetheless temporary protection remains largely undefined. Moreover, its criteria point to the consequences that its definition can aid in terms of the reduction of the scope of refugee protection and the difficulty it causes for the integration of its beneficiaries. A different protection instrument, which is occasionally associated or confused with temporary protection, is found in so-called ‘complementary protection’, in its various forms. While equally this last phrase does not have an unequivocal definition, it is generally accepted that it identifies those protection instruments or arrangements which are rooted in international human rights law (in particular the non-refoulement obligations), which are applied on an individual case basis and do not have an emergency character. This latter definition can thus be used as a yardstick in order to explain my understanding of temporary protection as applied in the context of disaster displacement or disaster-related migration. It has been argued that, in the said scenario, temporary protection can be understood as being one of the following features: it is granted on a group basis and not as an individual one; it is based on factual conditions prevailing in the country of origin (typically a disaster caused by a sudden-onset hazard); it has a residual character, being granted to those who are not eligible for refugee status or other forms of complementary protection, if a displacement is not based on international obligations; and it is conceived as a strictly temporary, interim solution, whose termination generally implies for its beneficiaries the return to their country of origin.

The foregoing analysis will start by reviewing current practices in Africa and Latin America. The selection of these areas as a first research focus is almost an obligatory choice, considering that both (1) have regional refugee law instruments which are at least potentially able to cover disaster displacement, (2) are disproportionately exposed to natural disasters, and (3) have the most of people crossing borders in search of safety and assistance. Subsequently some major regional and national temporary protection statutes will be analysed. Finally, the 2010 Haiti earthquake will serve as a case study for the purpose of scrutinising the international response to the displacement crisis which followed such a mega-disaster.

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Hosting disaster-related migrants

An analysis of international practice

Africa

The African continent benefits from a regional refugee treaty – the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa – whose theoretical importance cannot be underestimated. To begin with, it was the first, and for a long time the only, hard law refugee instrument having regional scope. Moreover, as a regional complement to the Geneva Convention, it embodies some significant adaptations to the latter which, while necessary to better fit the African displacement context, had an influence well beyond regional boundaries. In particular, a couple of its innovative features are worth recalling here. First of all, the refugee definition is broadened to include more objective circumstances than the universal notion, so as to encompass those who are ‘compelled’ to leave their country of origin and seek refuge in another country due to external aggression, occupation, foreign domination and events seriously disturbing public order. Secondly, all the said events triggering refugee protection share a communitarian approach, since they are phenomena ‘which present a generalised threat to an indefinite class of people’.

While disasters are not expressly mentioned, an objective reading of the text would seem to favour their inclusion under the category of events seriously disturbing public order. Such interpretation, though, is not supported by national case law – which is almost non-existent – and has been widely rejected by the doctrine. According to Rankin, for instance, disasters should be excluded for two different reasons. First of all, he considers that ‘“[e]vents seriously disturbing public order” is a basket clause and should arguably be read

*ejusdem generis*

to cover events that share some element that is similar to aggression, occupation and foreign domination, which are all clearly manmade events’. Secondly, and most importantly, in light of the OAU’s communitarian perspective he argues that a natural disaster represents a threat to the community, but rather than coming from within, it is an event which sees the community confront collective adversity from the outside. But it should be made equally clear that this does not licentiate a government or non-state agent to use “natural disasters” in pursuit of its own agenda. The definition would seem to capture the effects of a famine caused by state action since this is merely using nature as a tool to a political end. Kälin, on the other hand, while cautioning that ‘it is rather unlikely that the states concerned would be ready to accept such an extension of the concept beyond its conventional meaning of public disturbances resulting in violence’,

*argue that the Convention would apply if a person sought refuge because of violence such as riots in the aftermath of a disaster triggered by the government’s negligence or inability to address certain consequences of the disaster or to provide the necessary assistance to the victims’.

In any case, State practice runs counter to the inclusion of disaster-related events under the protective scope of the Convention. As a general rule, on the African continent it has always been customary for States to open their borders to displaced populations, even when the displacement results from a disaster. Nevertheless, only in rare occasions have the countries involved in this practice affirmed their intention to apply the African Refugee Convention. This was the case vis-à-vis Somali victims of the drought which occurred in 2011–2012, who were admitted by

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Kenya, Djibouti and Ethiopia on the basis of the OAU Convention. The opposite attitude was instead shown, inter alia, by Uganda in response to the 2002 eruption of Mount Nyiragongo in Goma. In fact, Ugandan authorities gave temporary refuge to the Goma displaced but specified that these people were not considered refugees under the OAU Refugee Convention. In a similar vein, Botswana and Tanzania admitted neighboring populations fleeing floods on the basis of informal arrangements. More generally, the practice of providing temporary refuge in these circumstances has been explained by African states in reference to principles of African hospitality and good neighborliness, rather than legal obligations. Furthermore, this tradition has been recently threatened by a cautious attitude that has grown stronger over the continent along with the rise of international terrorism, causing a certain distrust towards refugees by host communities. While good examples of hospitality are still present, like the open-door policy practiced by Ethiopia between 2009 and 2014, as well as by Uganda, the described development further confirms the impossibility of detecting a regional customary norm on temporary refuge.

All the above notwithstanding, it must be highlighted that the African Union (AU) has again been at the forefront in relation to refugee and migratory issues in the last decade, and this time disaster displacement took centre stage. This first happened in 2006, when AU’s Member States recognised in the Migration Policy Framework for Africa that disasters and other environmental factors are major sources of displacement and accordingly recommended that this reality be addressed through national and regional migration policies. A few years later, disasters as causes of displacement were mentioned in the Kampala Convention for the Prevention of Internal Displacement and the Protection of and Assistance to Internally Displaced Persons in Africa. This treaty is focused exclusively on internal displacement but, remarkably, enshrines a clear-cut engagement by States parties to protect and assist IDPs, including those fleeing as a result of or in order to avoid the effects of...natural or human-made disasters. In addition, one of its key innovative provisions, which calls for the promotion of displacement in particular through early warning systems and disaster risk reduction strategies (art 4.2), effectively implemented will help prevent or mitigate the impact of internal displacement outside the boundaries of the state. Furthermore, inter-State cooperation, which may be requested by the State concerned (art 5.1), could induce States parties to adopt regional approaches to cross-border displacement adopting, by analogy, the normative standards codified in this same treaty.

Latin America

As anticipated, the African Refugee Convention had an influence far beyond the continent’s borders, in particular in Latin America. The Cartagena Declaration on Refugees, which was adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama on 22 November 1984, in fact accepts the refugee definition foreseen by the OAU Convention and further enlarges it by considering as refugees persons who have fled their own country because their lives, security or liberty have been threatened by...generalised violence, foreign aggression, internal conflicts, massive violations of human rights and other circumstances which have seriously disturbed public order (III 3).

Similarly to the OAU Convention, the Cartagena Declaration was a response to the exigency of addressing new dimensions of mass displacements of persons in need of international protection. Even though it was intended as a legally binding instrument, many States in the region have incorporated, or adapted, its refugee concept into their internal legislation. As to the (in)applicability of the said concept in situations of disaster, similar reasons as those already mentioned with respect to the OAU Convention could be invoked. In particular, a report produced by the International Conference on Central American Refugees (CIECA),
interpreting the Cartagena Declaration indicates that victims of natural disasters are not enti-
tied to protection under the provision on events seriously disturbing the public order, and the
majority of the signatory States share the same opinion. Still, at present, Cuba is the only Latin
American State whose national legislation classifies as refugees those fleeing their country due
to cataclysm or other phenomena of nature. As will be seen in the next paragraph, though, in
the case of the 2010 Haiti earthquake, Ecuador and Mexico applied the Cartagena Declaration
by accepting some asylum claims from Haitians. Nonetheless, both countries grounded their
decision not on the mere occurrence of the earthquake but rather on the effects of such event
for the protection and security of the claimants.

As a consequence, within the region, laws, policies and practices on the provision of human-
itarian protection on a temporary basis to aliens in the context of disasters are found predomi-
nantly at the national level. Within this varied practice, which cannot be examined thoroughly
here, a few points merit attention. First of all, there are three States in the region which provide
temporary protection in mass influx situations to asylum seekers: Panama, Venezuela and Peru.
Temporary protection status is granted to groups of persons that have to remain temporarily in
Venezuelan territory and who do not wish to claim asylum as refugees. 26
Temporary protection can last for ninety days and is renewable once. Moreover, the Panamanian
State is required to engage in the necessary coordination with the country of origin’s authorities.
Temporary protection status in Peru, rather, has a protective scope which is similar to that of
Panama and which is granted for three renewable blocks to persons seeking 'protection'. 27
After one year, the Ministry of External Relations must evaluate the situation in order to find
a permanent solution to the mass influx 'with the support of the international community'. 28

Various other countries, including Colombia, the Dominican Republic and Ecuador, provide
for the temporary entry and stay of groups of people following extraordinary situations in their
migration – and not their refugee – legislation. The measures most commonly envisaged and
employed are those aimed at regularising the presence of migrants or at temporarily suspending
the removals. Interestingly, both have been applied to migrants fleeing disaster scenarios.

Regional practice
The European Union

Among the legal instruments which envisage a form of temporary protection for the disaster-
induced displaced, the one with regional scope so far is at present the European Union (EU)
Directive 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 according such persons and bearing the consequences thereof' (hereinafter the Direc-
tive). 30 This act, adopted by the Council of the EU back in 2001, was meant to serve as the prin-
cipal framework in the event of a major refugee influx, so as to regulate the uncoordinated
response of the Member States in the event of a mass influx of displaced persons. 31

The Directive sets out a complex mechanism requiring a Council decision adopted by a qualified
majority following a Commission proposal, which can be requested by a Member State (Article 1).
It has to be implemented either in the case of a "mass influx" or of an "immanent mass influx" of displaced
persons. 32

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persons from third countries who are unable to return to their country of origin. The Directive stipulates that a mass influx may be caused by spontaneous arrivals in the Union’s territory as well as by evacuation programmes. The meaning of ‘mass influx’ remains, however, unclear since it is defined – quite tautologically – as ‘arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area’. Moreover, past practice shows that such criterion has been interpreted restrictively. For instance, following the mass flow of migrants from Tunisia and Libya which accompanied the Arab spring, Italy and Malta demanded the activation of the Directive; their request, however, was rejected by the European Commission with the argument that the flow did not have the requisite massive character.

In order to promote a balance of effort between Member States in receiving and bearing the consequences of receiving (displaced) persons, the Directive envisages a burden-sharing mechanism. As a result, Member States should receive persons eligible for temporary protection ‘in a spirit of Community solidarity’. Nonetheless, the efficiency of the mechanism largely lies in the concrete measures that the Council decides to adopt in this respect and in their enforcement by States.

Temporary protection is one year long, with an automatic extension of two six-monthly periods for a maximum of one year (Article 4.1) and the possibility for the Council to extend it, with the same procedure, for an additional two six-monthly periods for a maximum of one year (Article 4.2). The Council can also decide to terminate it prematurely if the reasons justifying its application cease to exist, provided that return can happen ‘with due respect for human rights and fundamental freedoms and Member States’ obligations regarding non-refoulement’. Additionally, the Council has the ability to non-renew the applicability of TP to specific groups of persons pursuant to Article 5.3, based for instance on the area of origin, or by setting a specific date by which the displaced should have reached the EU territory. Each Member State can, however, expand – but not limit – the personal scope of protection by granting TP to additional groups of people who are displaced for the same reasons and come from the same country or region of origin as those designated by the Council.

EU temporary protection, while being a ‘procedure of exceptional character’ which is rather precarious if compared with refugee status and subsidiary protection, bears with it an ample range of rights and benefits: temporary residence permits, emergency health care, shelter, social benefits, education for minors, as well as limited access to the labour market and a limited right to family reunification.

Moreover, the Directive’s personal scope is quite broad. People qualifying as ‘in particular’ those ‘who have fled areas of armed conflict or endemic violence’ or who ‘at serious risk of, or again who have been the victims of systematic or generalised violations of their human rights’ has been suggested that the Directive could constitute a category of protection to be added to the displaced persons. In this respect, it should be noted that the possibility of including within the protective scope of the instrument those persons was debated during the preparatory phases. The French delegation explicitly suggested the addition of a reference to persons who have fled for as a result of natural disasters. The proposal was not accepted by other Member States and consequently did not make its way in the final text. Nonetheless, following the adoption of the Directive, the then UK Home-Office Minister affirmed that ‘The Directive that we are implementing will ensure that each European Member State plays its part in providing humanitarian assistance to people forced from their homes by war and natural disasters’ (emphasis added).

In conclusion, while during the negotiation process there was a shared understanding that the Directive was not meant to apply to so-called environmental migrants, this does not preclude a priori such an application. The latter is also supported by an objective reading of the text.
practice, though, it is quite dubious to suggest that temporary protection will be activated in disaster displacement scenarios. First of all, the fact that the Directive has never been applied does not bode well for the future. Second, the required majority voting of two-thirds makes its activation improbable unless a mass flow affects a significant number of Member States. 48 And yet, neither during the recent, and enormous, Syrian refugee crisis has the Directive’s implementation been seriously envisaged.

**National practice**

**The United States of America**

At the domestic law level, the most prominent example of temporary protection, despite its own peculiarities, is offered by the United States of America (USA). Temporary Protected Status (hereinafter TPS) was created by Congress in 1990 in order to establish a uniform, and less discretionary than previously, system for protecting those unable to return to their home countries because of a political or environmental catastrophe. 49

The USA Immigration and Nationality Act provides for the possibility to grant TPS to foreign nationals if: (i) there has been an environmental disaster in the foreign State resulting in a substantial, but temporary, disruption of living conditions; (ii) the foreign State is unable, temporarily, to handle adequately the return of its own nationals; and (iii) the foreign State officially has requested such designation. 50

The authority to designate a country for TPS originally attributed to the Attorney General, from 1 March 2003 has been attributed to the Secretary of Homeland Security. 51 After a country’s TPS designation, its nationals who already reside — even illegally — in the USA at the time of designation are eligible for protection if they satisfy certain requirements (e.g. no serious criminal record, not subject to asylum bars). TPS beneficiaries receive provisional protection against deportation and authorization to work in the USA for a limited period of time.

The Department of Homeland Security (DHS) grants TPS for an initial period between 6 and 18 months and then can renew it as long as it deems that the conditions for TPS designation continue to be met. Having a temporary character, though, once the DHS decides to end it, TPS holders revert to their prior immigration status and thus eventually to illegality.

Since its first enactment in 1990, TPS has been granted in response to various events, including natural disasters. This was the case, for instance, of the designations of Honduras and Nicaragua in early 1999 after the passage of the devastating Hurricane Mitch. At present, thirteen countries are designated. 52 Interestingly, the majority of those currently granted TPS are due to disasters, in particular earthquakes (El Salvador, Haiti, Nepal and Nicaragua) and the Ebola virus disease (Guinea, Liberia and Sierra Leone). Moreover, with respect to Somalia, the most recent DHS Notices on the Extension of TPS Designations also highlight and describe insecurity as additional factors aggravating the country conditions. 53

This short overview leads to the conclusion that TPS, while being highly discretionary, is a valuable instrument in protecting those who cannot be repatriated because of a catastrophic event in their country. Nonetheless, repeated extension of TPS often increases the risk of a permanent precarious status. An emblematic example is offered by the Latin American countries which are currently on the TPS list. Their designations have been repeatedly extended for almost two decades because of the asserted ongoing “substantial disruption of living conditions” caused by the original disaster. 54 This practice, which could be seen as an abuse, is due to the concern of avoiding the deportation of a significant number of TPS holders who are firmly established in the USA for a long time. TPS overwhelm has been linked to circumstances or expressions...
ban – that of adjusting TPS status to permanent resident status – in order to fill a protection gap in domestic immigration law. Such misuse, though, inevitably limits the chances of a proper application of TPS also in cases of natural disaster, and continues to expose this instrument to strong critiques. 55 Moreover, in its practical application, the wide discretion enjoyed by the Secretary of Homeland Security in designating a country for TPS has sometimes led to arbitrariness – an outcome which cannot be amended since decisions on TPS are categorically exempted from judicial review. 56 This happened, for instance, in the case of the volcanic eruptions in Montserrat when, in blatant contradiction with what was decided in other situations, the temporary character was invoked in order to justify the decision to terminate TPS. It was indeed argued that it is likely that the eruptions will continue for decades, [and] the situation that led to Montserrat’s designation can no longer be considered “temporary” as required by Congress when it enacted the TPS statute. 57 And yet, in such a situation, the new and recurring eruptions would have allowed a more practicable alternative to TPS extermine: re-designation.

To complete the picture, it is worth citing another instrument – deferred action – which, while administrative and not legislative in character, has been used to avoid the repatriation of foreigners whose home country has been struck by a natural disaster. Deferred action is a form of prosecutorial discretion exercised by the USA Citizenship and Immigration Services (USCIS), which accordingly does not place a particular individual in removal proceedings. Similarly to TPS, deferred action is limited in time but its beneficiaries are eligible to employment authorization. 58 It is generally granted to individuals whose cases raise compelling humanitarian concerns and to individuals whose removal is not in the best interests of the USA government. 59 Interestingly, though, in some cases it has been made available to groups of aliens, in particular to certain Haitians repatriated to Florida as well as Hurricane Katrina-affected foreign students. 60 The lack of public guidance and transparency on the procedure renders it, regrettably, scarcely accessible to those who may merit most humanitarian relief. 61

Panama

Another country whose legislation provides in detail for a temporary protection status is Panama. Despite its limited dimensions, Panama is a crucial connecting point between South and Central America and is both a destination and transit country for migrants. Introduced in 1998, Temporary Humanitarian Protection (hereinafter THP) status (‘Estatuto Humanitario Provisional de Protección’) is granted in the case of a mass influx of individuals entering irregularly in the country in search of protection. 62 Its duration is limited to two months, but in exceptional circumstances it can be extended by the executive. During this period, individual beneficiaries are accorded the rights to basic necessities and to the unity of the nuclear family. They do not have, however, the right to work in Panama. Moreover, they are subject to movement restrictions.

Once the required circumstances are in place, the executive is under an obligation to make the necessary determination so as to trigger temporary protection. This guarantees a certain effectiveness to the instrument. Additionally, it avoided triggering criteria more suitably under THP applicable in disaster displacement situations. Unlike refugee status, though, THP beneficiaries do not enjoy the same rights and benefits as those persons who are formally recognized as refugees according to the Geneva Conventions. 63 As a consequence, in an acute refugee situation, States authorities are expressly allowed to apply temporary protection status in lieu of refugee protection. 64 The Panamanian legislation also assigns a role to the States of origin. The executive is indeed required to establish bilateral mechanisms with such States in order to manage the return of their
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So far, THP has only been applied to Colombian nationals who fled to the province of Darien in Panama from 1998 to 2000, and in fact, its adoption was a direct response to such displacement crisis. Over the last few years, the precarious situation of the Colombians living in Darien has finally reached a conclusion, thanks to the passing of legislation granting them permanent residence and to the increased control by Panama of its border with Colombia. This country has thus begun to question whether to reform THP in a way so as to effectively address the new flows of international forced migrants arriving in Panama, such as the Haitians post-2010.

A case study: the 2010 Haiti earthquake

The 7.0-magnitude earthquake which hit Haiti on 12 January 2010 had a huge and devastating impact, resulting in over 200,000 deaths and 300,000 people injured, as well as the displacement of 1.5 million and the destruction of more than 90,000 buildings. In a country already reeling from poverty and corruption, it further shook the government structure, which proved its inability to cope with the disaster. The earthquake indeed was the most devastating one to ever hit an urban setting, and it disrupted a great part of government personnel and infrastructure. Following the disaster, large amounts of international relief assistance reached the country, thanks to the generosity of many donor States, which in some cases hoped that a rapid recovery would prevent a mass exodus towards their territories. These hopes, however, did not come true as most of the aid money went to areas outside of the capital... Indeed, not only was the relief funding, surprisingly, channelled to Port-au-Prince but, paradoxically, some of the well-intentioned and much-needed projects made available in Port-au-Prince ultimately exacerbated the problem.

Abroad, Haitians did not generally encounter the same generosity that was shown to them through international aid and donations to their homeland. Let us consider briefly the attitude of the major destination countries.

The USA, which hosts the largest Haitian immigrant community in the world, designated Haiti for TPS just 3 days after the earthquake. TPS status was later accorded to eligible Haitians who arrived before 12 January 2011, and the programme has been extended until 22 July 2019. The USA also decided to temporarily suspend other immigration requirements, e.g., by granting humanitarian parole to Haitians who at the date of the earthquake were in the process of being adopted by American families and by offering non-immigrant Haitian students to obtain employment authorizations. Additionally, in January 2012, Haitians were added to the list of country nationals who were eligible for H2-A and H2-B visas (for temporary workers in agricultural and non-agricultural sectors, respectively).

A policy for resumed removals to Haiti was enacted despite the continuing critical conditions prevailing in the country. Under the Policy, even those convicted for minor crimes and/or with USA citizenship and legal permanent resident children and spouses were deported, in many cases without due consideration of their medical situation. Moreover,
and more crucially, the USA took wide precautions, including a naval blockade, to avoid the mass migration of Haitians towards its territory.

As to Canada, since 2004, it already had in place a Temporary Suspension of Removals (TSR) on Haitian nationals. 70 The TSR program strongly parallels the US TPS, and ratione personae is not applicable to those individuals who choose to return voluntarily, those who are viewed as a security threat or who have a criminal record or conviction. In addition to TPS, the Canadian government adopted specific policy measures allowing the expedited immigration processing of existing applications of persons with temporary Canadian residence in Canada, as well as of applications for: citizenship certificates, extensions of temporary resident status from in-Canada and travel permits for those individuals unable to support themselves in Canada and in-process applications to adopt children from the affected country. In such cases, immigration officials were thus allowed to exercise their discretion based on humanitarian grounds. The said measures required, however, a personal link to the disaster: the individual applicants in fact had to demonstrate that they were ‘negatively affected by the situation’. 72

France, for its part, had a rather contradictory attitude. While formally supporting Haitian migrants, first of all by suspending removals to Haiti, at the same time, it generally rejected new arrivals based on the assumption that those fleeing were not refugees under the Geneva Convention. Furthermore, the suspension of removals was applied only to its metropolitan territory. Instead, in its overseas territories which had attracted Haitians (French Guiana and Guadeloupe), borders were more quickly closed. 73

Another destination country, and in fact the primary southern destination after the 2010 disaster, was Brazil. While previously only a small number of Haitians lived in Brazil, after 2010 the link between the two countries grew stronger thanks to the leading role played by the Portuguese-speaking giant within MINUSTAH, the United Nations (UN) stabilisation mission in Haiti. When Haitians arrived at the border asking for asylum, they received temporary refugee forms authorising their stay in anticipation of a final decision on their situation. The Brazilian authorities then determined that such persons did not meet the refugee definition either under the Geneva Convention or under the Cartagena declaration and the 1997 National Refugee Act. 74 Nonetheless, acknowledging that the displaced Haitians could not be treated as economic migrants, the Brazilian government ultimately put in place a humanitarian protection mechanism. This special mode of protection was employed in 2011–2012, through Normative Resolution No. 97 the existing permanent residence permit for humanitarian reasons was applied for the first time to a defined national group and not to individuals. As a result, Haitians were allowed to stay in the country for a period of 5 years and with rights similar to those of refugees. Initially such a permit had to be requested at the Brazilian embassy in Port-au-Prince, and there was a limit on the number of visas which could be issued per month. 75 However, subsequent normative resolutions in 2013 and 2014 removed both restrictions and provided that applications could be presented at Brazilian consulates across the region. As of February 2013, more than 50,000 Haitian refugees had been granted such a status and despite its shortcomings, 76 such a protection mechanism has been praised by the UNHCR. As to the other Latin American countries, reactions varied with place and time. In fact, within the same region where the Cartagena Declaration arose, there was no coordinated response to the Haitian flight. 77 The Dominican Republic, which had long hosted Haitian migrants, immediately opened its borders and welcomed medical missions to all Haitians in need while providing their families with multiple entry humanitarian visas. Such timely generosity, however, did not last long. On January 2010, the same month of the earthquake, the new Dominican Constitution entered into force with the effect, inter alia, of granting citizenship to Dominicans from children of unknown parents. Such a revision was made further by a later decision of the Constitutional Court which enabled its application retroactively. 78 The most affected by this legislation

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were, not coincidentally, Haitians. In addition, by 2011 Dominicans became increasingly hostile vis-à-vis their island neighbours, partly out of fear that the cholera outbreak which hit Haiti would spread in their country. This growing hostility inevitably led to discriminatory policies and deportations towards Haitianised Dominicans.

Temporary humanitarian visas were issued by Venezuela and, to a greater extent, by Mexico. The latter granted temporary visas to Dominicans as well as to all those arriving irregularly, who were allowed to work or study. Contrary to Brazil, through regular and unilaterally issuing humanitarian visas to all those arriving from Haiti, the 2010 earthquake’s effects were particularly limited.

The humanitarian visas program, after an extension, expired at the end of 2011 and deportations were resumed immediately after. The same happened in Venezuela, where, correspondingly, Haitians are still being sentenced and deported. To conclude the picture, it bears noting that a few countries – Panama, Peru, and Ecuador – granted refugee status to some asylum-seekers from Haiti based on the consequences of the 2010 earthquake which caused massive human and material losses and exacerbated preexisting situations of political instability and insecurity (emphasis added).

By way of conclusion, a few points are worth highlighting. As mentioned, the massive humanitarian aid provided to the Haitian capital was not followed by a parallel engagement by States in receiving those displaced. Moreover, the extent and rapidity of the Haitian flight was unexpected at both national and international level. The first reaction by host countries was, however, for the most part quite benevolent and many of the existing immigrant restrictions were suspended in recognition of the huge consequences of the disaster. Among the most utilised measures, there was a halt to deportations and the issuance of humanitarian visas. Additionally, a common feature was the short duration of the various instruments adopted, which were generally revoked despite the fact that the conditions prevailing in Haiti were still extremely difficult.

Concluding remarks

When natural hazards or industrial accidents become ‘disasters’ in the words of the International Law Commission’s international cooperation proves fundamental, both for assisting the affected State and the affected population in place and for protecting those who fled towards other countries. In these situations, temporary protection measures are fairly frequent in time and space, even though they do not match a single model. The overview conducted reveals the existence of three different general schemes: temporary protection stricto sensu, a halt to removals and the introduction of informal temporary protection measures. All of them can be grouped together by the fact of being ‘disaster-related’ while only the first and the third categories specifically concern disaster-related displaced people.

The first approach is exemplified by the European TP Directive and the Panamanian THP statute. None of them, though, has ever been applied in practice to a disaster context. Temporary protection stricto sensu, on the contrary, is the most widely adopted scheme, either as an act of mercy or as an application of an existing statute, with the case of TPS in the USA and TSR in Canada. As to the third category it encompasses more informal arrangements (typically used on the African continent) where States do not have regional or national TP mechanisms to address mass migrations. Despite the wide variety existing among and within the three categories, their most common feature is understandably time-dependent, however. As a consequence of the short duration, despite its widespread nature, it is not supported by the opinio juris necessary to be considered an expression of a customary norm.

Temporary protection measures in general have been described by the UNHCR as the Guidelines on Temporary Protection or Stay Arrangements (hereinafter UNHCRTP Guidelines) as...
pragmatic tools’ for offering sanctuary to those fleeing humanitarian crises. Absent an obligation to protect those coming from a disaster-affected country, the discretion that typically characterises such measures could be seen as an advantage, providing host States with a certain flexibility in implementing them. Nonetheless, discretion can easily turn into arbitrariness, as shown by the USA practice, and increases legal uncertainty. Moreover, there are risks of discrimination both between people coming from different States and contexts, and within a same group of selected beneficiaries, since not all nationals of a given country hit by a disaster have the same – or in fact any – protection needs as a consequence of that disaster. Moreover, a specific concern relates to those situations in which the disaster situation and, consequently, the duration of the cumulative protection mechanisms are protracted, leaving beneficiaries in a legal limbo. In such situations, however, ‘or where transition to solutions is delayed’, the UNHCR TP Guidelines recommend that ‘the standards of treatment would need to be gradually improved.’

In order to remedy these shortcomings, it would be advisable to devise more predictable and protection-oriented mechanisms, ideally in a multilateral or regional context. But why should States have an interest in limiting their leeway with respect to a category of people which is not protected as such by existing international norms? It is a fact that the burden of hosting and protecting these persons falls excessively on neighbouring States in those areas of the world which are the most hit by disasters. It would thus seem profitable, especially for such States, to agree upon regional temporary protection frameworks based on solidarity and burden-sharing.

To maximise their effectiveness, and to attract targeting to those countries which are generally States of destination and not of origin of mass influxes, the said frameworks should be accompanied by an engagement to set up national disaster risk reduction programmes. Although in practice effective solidarity mechanisms are still lacking even at the regional level, as the Haitian crisis has sadly shown, there is nonetheless a growing awareness by the international community of the need to tackle disaster-related migration in a spirit of international cooperation. Over the last few years several international consultative processes, such as the Migrants in Countries in Crisis Initiative, the Nansen Initiative and the Platform on Disaster Displacement, have been started precisely to address this huge humanitarian challenge.

Selected bibliography


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Notes


3. Cf. art 1 para 3.


7. As was aptly put by Joan Fitzpatrick, [t]emporary protection is like a magic gift, assuming the desired form of an enthousiast's policy objectives. Simultaneously it serves as a magic mirror of its observers' fears. For refugee advocates, TP [temporary protection] expands the protection of forced migrants who cannot satisfy the criteria under the 1951 Convention and it promises group-based protection when the determination of an individual's status proves impossible. At the same time, rights organisations fear that informal and discretionary TP may detract refugee protection from the status of enforceable human rights. (J. Fitzpatrick, ‘Temporary Protection of Refugees: Elements of a Formalized Regime’ 94(2) AJIL (2000) 279, 280).


10. Art I(2). Hathaway remarks that the OAU definition acknowledges ‘that fundamental forms of abuse may occur not only as a result of the calculated acts of the government of the refugee's state of origin but also as a result of that government's loss of authority’ (J. Hathaway, The Law of Refugee Status (Cambridge University Press, 1991) 17).


15. Ibid 88–89.


18. Ibid 34.


20. Cf. art 1(k).

21. Ibid.

23 They are Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Uruguay.

24 Cuba, Decreto No 26, Reglamento de la Ley de Migración (1978)/ARTICLE 80. – ‘Se clasifican como Residentes Temporales, los asilados políticos y los refugiados’.


27 Peru, Ley No. 27911, 20 December 2002, art 10.

28 Peru, Reglamento de la Ley del Refugiado, art 99.


31 The Directive explicitly references, in the Preamble, to people ‘displaced by the conflict in Y ugoslavia’ (Recital 3), as well as to the Council’s conclusion calling ‘on the Commission and the Member States to learn the lessons of their response to the Kosovo crisis’ (Recital 6).

32 The European Parliament, instead, has a very limited role to play, which consists of the right to ‘be informed of’ any Decision taken by the Council (art 5.5).

33 Art 2(a).

34 See art 2(c) and (d).


36 Art 1.

37 Art 25.1.1.


39 Art 6.2.

40 Sic art 2(a).

41 Indeed these two statuses can be revoked only in a limited number of situations. Moreover, as was remarked by Durieux, the TP mechanism was not conceived as an alternative to the refugee protection regime, but rather as a ‘prelude to [its] normal operation’ (J. Durieux, ‘Temporary Protection: Hovering at the Edges of Refugee Law’ 445 Netherlands Yearbook of International Law (December 2014) 221).

42 Arts 8–19. It bears noting that the Directive provides only minimum standards (art 1). Member States are thus empowered ‘to introduce or maintain more favourable provisions for persons enjoying temporary protection in the event of a mass influx of displaced persons’ (Preamble, para 12).

43 Art 2(c)(i).

44 Art 2(c)(ii).


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48 According to a study commissioned by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs:

Considering that this Directive is applicable only in cases of mass influx and thus does not include cases where individual applications for temporary protection are made or in exceptional circumstances and taking into account the high political thresholds to activate the Directive (see art 5(1)) and considering that the Directive's mechanism has never been used in practice and the Directive has often ended up acting as a substitute for domestic legislation which provided for the original scheme to develop the Directive. A flexible and immediate protection mechanism such as subsidiary protection will be more relevant for individuals displaced due to environmental disasters, and indeed other categories of refugees.


49 Before 1990, the executive branch dealt with this scenario by designating certain countries for Extended Voluntary Departure (EVD), an administrative status that amounted to an exercise of prosecutorial discretion by the Attorney General not to pursue nationals of certain countries for removal if found to be within the United States. The designation of a country under the EVD program was based on a determination by the Attorney General that conditions in a country were such that permitting nationals of the country to remain in the United States would be contrary to the national interest. The Attorney General could designate a country under the EVD program at any time, and the designation could be terminated at any time. However, there were no established criteria explaining how a country might qualify for EVD, and critics alleged that decisions regarding the grant of EVD to nationals of a particular country were often politically motivated. This argument became especially prominent in the late 1980s, when the Reagan administration decided not to designate El Salvador for EVD despite the country's ongoing civil war.

USA, Immigration and Nationality Act, as amended, 4 March 1990, Act 198. Temporary Protected Status, Section 244.1(b)(1)(B).

50 USA, Immigration and Nationality Act, as amended 4 March 1990, Act 198. Temporary Protected Status, Section 244.1(b)(1)(B).

51 Cf. USA, Homeland Security Act of 2002, Public Law 107–296. Accordingly, responsibility for administering the TPS program was transferred from the former Immigration and Naturalization Service (INS) to a component of the Department of Homeland Security (DHS), the US Citizenship and Immigration Services (USCIS).


54 For instance, with respect to El Salvador, in the last Extension Notice it is affirmed: 'There continues to be a substantial, but temporary, disruption of living conditions in El Salvador resulting from a series of earthquakes in 2001, and El Salvador remains unable to handle adequately the return of its nationals' (USA Citizenship and Immigration Services, Extension of the Designation of El Salvador for Temporary Protected Status, Notice, 81 FR 44645, published on 7 August 2016).


58 8 C.F.R. para 274a.12(c)(4).


62 Panama, Decreto ejecutivo 23 de 1998, 'Por el cual se desarrolla la Ley No. 5 del 26 del octubre de 1977 que aprueba el Convenio de 1951 y Protocolo de 1967 sobre el Estatuto de Refugiados, se derogan el
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Draft No: 190 del 1 de julio de 1998 y la Resolución Ejecutoria No. 96 del 3 de octubre de 1998, y a su segunda en el artículo 142 de su normativa temporal de transición para la reforma constitucional.

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during the time. The nature of protection to be regulated in the national refugee law. In this respect, it must be noted that Panama is one of the few countries, along with Costa Rica, Venezuela, Colombia and Ecuador, which simply approved the expanded Cartagena definition from its legislation in 2011, which have not incorporated the Cartagena Declaration as an internal instrument. Moreover, Panama has long adhered that it does not consider itself bound by the Cartagena Declaration. (D. Cantor and D. Trimiño Mora, “A Simple Solution to War Refugees? The Latin American Expanded Definition and Its Relation- ship to IHL” in D. Cantor and J.-F. Durieux (eds), Humanitarian Law (Brill, 2014) 204, 214 ftn 44).

Cf. Law 81/2011, which amends legal provisions governing the Temporary Humanitarian Protection regime to apply for permanent residence.

Cf. art 3(a) of the ILC Draft on the Protection of Persons in the Event of Disasters and Bartolini’s chapter in this volume.

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83 Ibid 5, para 17.
84 This is what is proposed, not coincidentally, by the UNHCR in the 2014 TP Guidelines.
85 Willie and Mfubu (n. 17) 13.
86 Cf. Guadagno and Sironi’s chapter in this volume.
87 Cf. Kälin’s chapter in this volume.