

Statement by

Erika Feller, Assistant High Commissioner - Protection
UNHCR

The role of the judiciary in the protection of refugees

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Mr. Chairman, Distinguished Justices and Judges, Ladies and Gentlemen:

It is a privilege to address this meeting of Immigration Judges and I thank you for the invitation. My remarks today will address the role of the judiciary in the protection of refugees, albeit from the global perspective. The contextual setting will be the problems which present, in this regard, at the nexus where asylum and migration concerns meet. Time permitting, some information on UNHCR's role in supervising the international refugee instruments and in refugee status determination might be of interest to those who are not sure about UNHCR's place within the broader legal framework. I will conclude with a few remarks on the European Council Qualification Directive which I understand is of particular interest, and indeed relevance given that the 10 October deadline for implementation by Member States has just passed.

The Setting

The global problem of displacement is vast in terms of its size and human impact. UNHCR's year end statistics for 2005 record 20.8 million persons as being of concern to the office. This figure includes refugees, asylum-seekers, returnees, stateless people and internally displaced persons. The refugee total alone stood at some 8.4 million persons, with women and children forming the significant majority and major host countries remaining predominantly in the developing world. More than 5 million refugees have been in exile for longer than 5 years, and a considerable number of these persons for decades. The number of internally displaced persons (IDPs) of UNHCR's concern, at 6.6 million, is also high, but indeed misleading in that it represents but a portion of the likely numbers of people displaced inside their own countries. A conservative estimate here is around 23.7 million persons. And the figure is on the increase.

While numbers remain deeply disturbing, equally of concern is that asylum space has noticeably shrunk over recent years. This has made preserving access to and the quality of asylum quite a challenge. In the developing world the contours of the problem are very much shaped by the insecurity prevalent in many refugee hosting areas, the lack of freedom of movement, or of self sufficiency possibilities, in closed camp environments, and the precariousness of unregularised stay for urban refugees,

who often live in marginalised communities around big towns. Asylum fatigue is a result of perceived imbalances in burden sharing, the destructive effect of protracted stay on the environment and community harmony, and security concerns flowing from the presence of combatants and militant supporters of conflicts still raging just across the border.

The viability of the asylum institution is challenged in countries such as your own by a somewhat different set of issues. Concerns about the costs of running asylum systems, about the precision of the definitions in the context of modern migration flows and the newer dimension of human smuggling, trafficking and terrorism, have led to a major re-shaping of asylum systems in countries in the North (and some in the South as well), with a long tradition of active political support for refugee protection. This has certainly contributed to the falling numbers we are witnessing. Overall the figures for arrivals of asylum seekers and refugees coming irregularly to countries in the north are at their lowest for a decade. According to UNHCR statistics, in the UK the number of claims went down by 50 % in two years, from 60,000 in 2003 to 30,500 in 2005.

This fall in numbers is partly explained by changes in conditions in countries which, over recent years, have produced a major portion of the refugee arrivals, such as Afghanistan or Iraq, although current prognoses are no longer all positive here. An increasing number of Iraqis are sheltered in neighbouring countries (recent estimates put them at around 1.6 million, and our own monitoring indicates that every day some 2000 persons are crossing into Syria). Returning Afghans are increasingly facing a deteriorating security situation in some areas. Certainly, however, the more restrictive asylum policies now in place in receiving countries have played their part as well. These policies have included heavier and indiscriminately applied border controls, additional migration restrictions, and sub-standard asylum conditions for those who achieved entry. The numbers also mask the changing face of irregular migratory movements, with not only migrants but also refugees choosing channels other than the asylum channel to seek entry and protection. Asylum seekers come well informed. They are certainly aware of a certain disinclination to be flexible in applying the refugee concept, as asylum decisions in refugee status bodies and the courts attest. I will shortly return to this issue.

The Asylum/Migration nexus

UNHCR has been particularly concerned that asylum issues have gained an increasingly negative optic in political and public debate around the highly contentious issue of migration. One of the main underlying causes for the increasing inflexibility of asylum systems in many receiving countries is a deep concern among governments and civil societies about the spectre of uncontrolled illegal migration. In some countries, this concern has a base. This is though not the justification, in our assessment, for generalised responses disproportional to the threat and perilously close to being at odds with international obligations.

As to the base, if we look at the month of August 2006 alone, Spain's Canary Islands registered some 6,000 irregular arrivals, which boosted the total of such arrivals since the beginning of the year to 20,000 persons. It is sobering to compare this to arrivals in 2005, when the total for the entire 12 month period was only 4,700. These

movements are very mixed. Most who come are not refugees – or even asylum seekers. However, among the groups are people with protection concerns. The scene is not so dissimilar in neighbouring countries. Since the beginning of this year, the number of sea arrivals to Italy totals some 14,500 people, of which well over 12,000 landed on the tiny island of Lampedusa. And these figures for the European rim multiply themselves many times when one takes into account the huge numbers of people arriving in a similar manner to Yemen, or Libya, or those passing through southern Africa, across the Indian sub continent, through South East Asia or the Balkans.

In actual fact, Spain and Italy have responded in a manner which takes careful account of their international responsibilities. In other countries confronted by irregular boat arrivals, or indeed irregularly arriving refugees and asylum seekers regardless of their mode of entry, this has not, though, consistently been the case. Asylum seekers and refugees actually account for a relatively small portion of these mixed movements, but they are a part of them. As most such movements take place in the absence of requisite documentation and frequently involve people smugglers, States regard them as a threat - to sovereignty, social harmony and security. They are key policy issues for States, as well as a humanitarian challenge for governments and for organisations like UNHCR. Such irregular movements are directly responsible for hefty barriers being erected at borders, which impact generally and indiscriminately on economic migrants and persons with protection needs alike. Should asylum seekers manage to enter, they then more often than not confront a very lukewarm reception. Increased detention, reduced welfare benefits and restricted family-reunion rights are only a part of a slow but steady growth in processes and laws whose compatibility with the protection framework is rather tenuous.

In addition asylum seekers and refugees are likely to have to confront xenophobia and discrimination against foreigners, inflamed by misconceptions and populist policies which mix together all the categories that may be on the move – asylum seekers, refugees, illegal migrants, transnational criminals and even terrorists. The fact that many arrivals use the services of people smugglers has contributed to fears here. And it makes unfortunately little difference –at least until now – that the travellers are as much victims as they are beneficiaries of this flourishing trade in human misery. People smuggling more often than not results in serious violations of the human rights of those who are smuggled, including total disrespect for the right to life. People smugglers are as inclined to toss people overboard, bound and gagged, as to land them in safety. Those who make it have often had to travel in inhumane conditions and have regularly been victims of exploitation and abuse, including rape and other sexual violence.

Irregular migration is a global phenomenon. It is neither region specific nor uniform in its presentation. Almost five years ago, our Executive Committee encouraged UNHCR, through the *Agenda for Protection*, to promote better understanding and management of the interface between asylum and migration "so that people in need of protection find it, people who wish to migrate have options other than through resort to the asylum channel and unscrupulous smugglers cannot benefit through wrongful manipulation of available entry possibilities."

UNHCR's efforts are directed at having it recognised, in government policies and refugee status determination processes, that refugees are not migrants, at least as classically defined. There is a need and a legal obligation to treat them as a distinct category of persons. The refugee protection regime is premised on the international community's recognition of the specific rights and needs of these persons, which include but are not limited to the *non-refoulement* principle. We have made clear we agree that the growth in transnational crime and terrorist violence calls for extra vigilance; and that we appreciate the need to be sensitive to problems stemming from the mixed character of people movements. Our advocacy and our partnering has though, as a clear aim, countering attempts to put in question the distinctive situation of refugees, their need for international protection, their right to seek asylum and their entitlement to enjoy it. We promote responses which combine a coherent approach to migration management with the effective protection of refugees, two functions which are distinct, but complementary and mutually reinforcing. Here, the refugee protection instruments, notably the 1951 Convention, have to retain their centrality. In this day and age, it is sad to observe, this is no longer guaranteed. The Convention itself needs some protection!

Mr Chairman,

UNHCR has consistently rejected laying the migration problems of today at the door of the 1951 Convention, as if this instrument were somehow to blame. The Convention cannot be held accountable for its limits as a migration management tool. It was never intended to serve this role, but rather was drafted as a rights protection instrument. The refugee problem is, very centrally, an issue of rights – of rights which have been violated and of resulting rights, set out in international law, which are to be respected. Refugees – as other persons of concern to us – are victims of human rights abuses or human rights deficits, who lack a national government willing or able to redress their situation. Flight and seeking asylum is the best option for them and their family, to protect their right to life, security and dignity of person. The Convention has been, for over 50 years, the main tool that we have to ensure that this option is a realistic and realisable one. There is an obligation on all parties, as well as UNHCR, to have it applied in a manner faithful not only to its letter, but also to its objects and purposes.

Role of the judiciary

Here, the judiciary can be key. There are some very distinct areas where strong judicial supervision, or even appropriate intervention, can provide essential support for refugee protection.

First, is the crucial moment of arrival at the borders of the asylum State. UNHCR fully recognizes the sovereign right of all States to control their borders and to protect the interests of the host population. We also share States' concerns that the institution of asylum is not exploited by people not requiring, or deserving, international refugee protection. On the other hand, consistent with the Convention framework, any national migration control system must allow genuine asylum-seekers the opportunity to have their refugee claims fairly and effectively assessed. Regrettably, some of the most restrictive migration measures adopted by States have been placed within the purview of executive action, taking them somewhat outside the reach of routine

judicial supervision. These measures include, for example, the interdiction border policies and accelerated "turn-around" procedures of some States, which can have serious consequences for refugees and the institution of asylum. Migration control measures deserve closer judicial scrutiny than hitherto, with one aim being to disentangle refugees and ensure the rights at issue enjoy the benefit of due process of law.

The second phase where judicial supervision is important is during the process that determines whether asylum-seekers are, in fact, in need of international protection and will be permitted to remain in the asylum State. States have a flexible margin of discretion to design and implement a national procedure that is appropriate to their national context. All procedures must, however, serve the humanitarian object and purpose for which they were intended – here, the effective identification and protection of the rights of refugees. Obviously, procedures must be implemented promptly and accurately, but expediency should not trump justice. A key function of the judiciary at this point is to ensure that administrative action satisfies basic principles of fairness and due process.

The judiciary is also at this point the guarantor that the international refugee definition is applied with the proper flexibility, in an objective manner uninfluenced by considerations which have nothing intrinsically to do with the refugee concept. If this sounds, by the way, self evident, it is not always the case in practice. There are, regrettably, notable instances of refugee status being denied, or a lesser status conferred, for reasons of public policy or foreign policy concerns. One dilemma which does come up for the courts, when asked to monitor compliance with international standards, is the imprecision of the language of international law itself. Its interpretation is not an exact legal science because, by and large, refugee (and human rights) law has been crafted by diplomats, not domestic lawyers, with international law more often than not couched in the language of political compromise. To domestic lawyers and judges used to the precision of national law, these treaties may seem crude and imprecise - and perhaps unreasonably altruistic. Judges may be reluctant to embrace standards that have no clear legal underpinning in their national laws. However, to ignore the principles runs the risk of creating injustice and may even make the judiciary complicit in a State's failure to translate its international legal commitments into effective domestic action.

Thirdly, the judiciary has an important role to ensure that refugees and asylum-seekers are treated in a fair, dignified and humane way throughout the duration of their stay. There has been a common but mistaken view that the only international obligation owed by an asylum State is not to return people to places where they are likely to face persecution, or other serious human rights violations (the *non-refoulement* principle). The effect of this is that people have been allowed to remain in the asylum State's territory, but are often denied the most basic rights to support and sustain themselves during what is often a traumatic period of exile. In recent years, UNHCR has noticed a gradual curtailment of basic rights to adequate housing, education, medical support, family unity, work and social security. There has been an increase in restrictions on people's freedom of movement and greater resort to different forms of detention – including of women and children.

In short, the judiciary can make an important difference to the protection of refugees in a range of areas. However, in our view, resort to the judicial system should serve as an adjunct to, not a substitute for, a credible national asylum procedure. There are several reasons for this. In our experience, the systems which have worked the best are those where the prime responsibility for refugee status determination falls on a specialised tribunal, with the role of the Courts being to review issues of consistency and general compliance. As mentioned earlier, refugee law is not an exact science. The definition in the 1951 Convention was intended to apply to circumstances generating refugees which are often chaotic, or at least not always clear on their face, and where application of the benefit of the doubt is a fairer way to adjudicate uncertainties than resort to the strict rules of evidence. To subject international law to minute, legal dissection carries with it the danger of eviscerating the spirit and values of refugee protection. A "purposive" approach, rather than a strict constructionist approach, to interpreting international law will help to ensure that the focus is kept on the victim and the palliative purpose of protection.

Then there is an additional factor to weigh. Not all governments have been happy about what they have perceived as "judicial meddling" in the management of a policy concern high on the national interest agenda. Governments have also become alarmed by the rising costs and delays inherent in a process built on multiple appeals. These concerns have been at the root of efforts in some quarters to corral the courts and limit their powers of review. This cannot be in the broader interests of preserving the rule of law.

Investment in the first instance stage of a national asylum system – in solid training of decision makers, informed interpretation and application of the refugee definition, in interview practices, in the use of interpreters, and in the country of origin information base, to name a few – is an investment in more timely protection, earlier solutions, and the overall credibility of the system in the public mind. In the UK context, as you may be aware, UNHCR has been cooperating with the Government within the framework of the so-called "Quality Initiative", to make first instance decision-making more expert and expeditious. This project, reflecting a stated commitment by the UK authorities to improve the domestic asylum process, is much appreciated by UNHCR, not least as a potential model for engaging with national asylum systems elsewhere. Specific activities for UNHCR have included auditing 2% of first instance decisions to identify issues for review or streamlining, including as regards interpretation of the 1951 Convention, assessment of credibility, legal reasoning, and use of country of origin information. Under this project, UNHCR is also assessing fast-track procedures, examining the role of interpreters, and even visiting reception and detention centres in the context of auditing fast-track procedures. We have so far issued three reports to the Government, including some 90 recommendations, of which about 70 have been accepted by the Minister. A working group has been established to monitor progress in the implementation of these recommendations.

UNHCR's role in supervising the international legal regime and in refugee status determination

At this point, some of you might be querying the propriety of a UN humanitarian agency like UNHCR putting forward recommendations for the structure and processes of national legal systems of sovereign States. Domestic judges also from time to time

raise doubts as to whether UNHCR can and should serve as an authority on questions of legal interpretation. This merits also some comment.

First on the propriety issue, we offer such recommendations because the responsibility to do so is, we believe, inherent in the mandatory, not discretionary, functions with which we have been vested by States. UNHCR was established as of January 1, 1951 by the General Assembly of the United Nations. According to its Statute, UNHCR has two principal functions – to provide international protection to refugees within its competence, and to seek durable solutions for them, in cooperation with governments. The Statute defines who is a refugee and how UNHCR might provide for their protection.

Article 8 of the Statute calls upon the High Commissioner to provide for the international protection of refugees, *inter alia*, by supervising the application of Conventions, by promoting measures calculated to improve the situation of refugees and reduce the number requiring protection, and by promoting also the admission of refugees, not excluding those in the most destitute categories, to the territories of States. A corresponding article in the 1951 Convention, Article 35, entitled “Co-operation of the national authorities with the United Nations,” States:

“1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.” (underlining added)

Thus the Convention establishes a formal link between the international authority responsible for the protection of refugees and the Convention defining their status and rights. The Contracting States recognize the protection function entrusted to UNHCR and undertake to facilitate the performance of this function. Many signatory States have implemented their obligation as stipulated under Article 35 by granting UNHCR a role in their national procedures.

UNHCR exercises its supervisory role in a number of ways, including by developing standards, interpreting standards and applying them.

As regards interpreting standards, UNHCR routinely provides advice to authorities, courts and other bodies on the interpretation and practical application of the provisions of the international refugee instruments. Such advice frequently deals with the refugee definition. In an effort to promote a harmonized interpretation of the criteria in the refugee definition, UNHCR makes available guidance on the eligibility of certain groups of refugees and advice on the interpretation of the definition itself. Of particular note is the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, prepared by UNHCR in 1979 at the request of Governments, in order to provide guidance to their officials involved in refugee status determination. It was based on the practice of States and of 25 years of experience by UNHCR.

We have recently supplemented the Handbook with a series of seven Guidelines on particular issues: Religion, Membership of a Particular Social Group, Internal Flight

or Relocation Alternative, Gender-related Persecution, Cessation, Exclusion, and the application of the refugee criteria to victims of trafficking. These were all canvassed in the Global Consultations a couple of years ago. Each topic was examined in detail by government officials, members of the judiciary and of the legal profession, academics, UNHCR and non-governmental organizations. On some of the topics, like Membership of a Particular Social Group and Internal Flight Alternative, there were wide divergences in national jurisprudence. Part of UNHCR's aim was to examine these in an effort to bridge them. Some might say that UNHCR's guidelines suffer from an imprecision similar to that to which I alluded earlier, although we are encouraged by the increasing number of references to these in national jurisprudence. I would be interested to know about your own experiences in this regard. In addition to this doctrinal advice, UNHCR is often involved in precedent-setting cases. UNHCR's views are generally communicated as *amicus curiae* briefs or other submissions to courts, but also to government administrations, or Parliament.

Turning to the issue of the authoritative nature of our advice, it may not be widely known but UNHCR itself is actively engaged in interpreting and applying the refugee definition in individual cases. While States have primary responsibility to determine the status of individuals arriving on their territory, UNHCR can itself undertake refugee status determination (RSD) under its own mandate. UNHCR normally does not do RSD in signatory States, but it certainly can (in some 30 such countries in 2005), applying virtually the same refugee definition as States. As the Statute makes protection a mandatory function for the Office, it can undertake RSD at the request of States, or on its own initiative, as may be required for protection reasons. And although UNHCR is accorded a special status as the guardian of the 1951 Convention and its 1967 Protocol, the Office is not limited, in the exercise of its protection functions, to the application alone of these treaties. Our competence to provide protection – and to determine eligibility for such protection under our mandate – is exercised separately from a state's treaty obligations.

This is a growth area for the office. UNHCR currently conducts RSD in some 78 countries and last year received applications from almost 90,000 persons. In fact in 2005 UNHCR status decisions accounted for some 14% of the total, global number of decided asylum claims.

One result of this longstanding activity is that UNHCR has accumulated considerable jurisprudential experience in the implementation of the 1951 Convention. This is, not least, the underpinning for the authoritative character of UNHCR's opinions which derives not only from the fact of our formal supervisory responsibility, but also from our widespread practical experience in applying its terms. The UNHCR Handbook has over time gained explicit recognition by different Courts and Tribunals worldwide as an authoritative text on the interpretation of the Convention Refugee definition. The Guidelines are, as I have mentioned, with increasing regularity cited in judgments, for example in Australia, New Zealand, the U.K, and the U.S.A. Two of UNHCR's guidelines - on particular social group and on gender related persecution – as well as our position on claims based on an individual's membership of a family or clan engaged in a blood feud, have been extensively resorted to by the House of Lords in its October 2006 decision in the case of *K and Fornah*. As you may be aware, UNHCR acted as intervener in *Fornah's* case.

Conclusion

Mr. Chairman, I will conclude with some remarks concerning the EU Qualification Directive.

UNHCR readily embraced the European Council asylum harmonisation process from its outset. Our goal has been to contribute to the successful development of harmonised European asylum policies in line with international standards and best practice. The objectives of such harmonised standards are expected to be: first, a clear distinction, in terms of access to territory, between refugee protection imperatives and migration control priorities; second, fair treatment for all in need of international protection; and third, workable mechanisms for equitable sharing of asylum responsibilities, both within the European Union, and between the Union and other regions. Our participation in deliberations around the drafting of the Directive, and now its transposition into national law and implementation, have their base in our statutory authority, which I earlier described, to foster a common understanding of who should benefit from international protection and what should be its content, built on the full and inclusive application of the 1951 Convention.

In this light, there are obviously very positive aspects to the Directive. The recognition in the Directive of non state persecution as the basis for a valid claim is an EU-wide advance, for example. So too is the introduction of a legal basis for the provision of protection going beyond the 1951 Convention. The types of concerns we draw attention to include those in relation to the more restrictive understanding of persecution *per se*, the rather high standard of proof requirements and the scope of the exclusion possibilities.

Colleagues of mine have earlier addressed some of you about UNHCR's specific issues with provisions of the Directive. I will not repeat them, but will rather use this occasion to make some points of a more general character.

My main point is to urge that the refugee definition in the 1951 Convention remain the central point of departure for the examination of an asylum request, and that it is clearly present in your deliberations as well as your decisions. If there is a divergence between the Convention and the Directive, the Convention definition should prevail. In this regard, it is noteworthy that the Preamble of the Directive refers to the call of the European Council Meeting in Tampere for a full and inclusive application of the Convention, as the "cornerstone of the international legal regime for the protection of refugees." However, the Directive itself does not, in and of itself, ensure the centrality of the Convention. There is no provision in the Directive clarifying the relationship between the Directive and the 1951 Convention. Some provisions do reproduce the Convention text, albeit without reference to the Convention articles in point. The international source of the provisions could well be overlooked, leading to differences in interpretation and application and the creation of two bodies of law at odds with each other on the same norm. In addition, several articles of the Directive differ, in both editorial and more substantive ways, from the related Convention provisions; on occasion there is a clear divergence. As well, there is the problem of

provisions in the Directive drafted in such a way as to serve as interpretative guidelines for the application of the refugee definition; yet there is no clear specification as to the hierarchy here, as between the Convention provisions themselves and the interpretative guidance offered in the Directive. We find this mix of interpretative guidelines and Convention source provisions potentially confusing and problematic. Overall it is our sense that the Convention provisions themselves have been handled in such a way in the Directive that there is a risk of the European protection system in practice losing the doctrinal link with the Convention, or at least it becoming much weakened. This could lead to the establishing of standards in the EU that are different from or below Convention standards. Such a development would not be in line with the underlying intent of the 1951 Convention to put in place a universal protection regime.

The national judiciary, together with the ECJ, have, we suggest, a responsibility to ensure that such concerns do not materialise and that the 1951 Convention will remain the cornerstone of refugee protection in Europe, not only in solemn declarations but also in the practice of refugee recognition. Lord Bingham of Cornhill, for one, would seem to be of this view in his judgment in *K and Fornah* – the case I mentioned earlier – where he takes close account of UNHCR’s views in his discussion on Article 10 of the Qualification Directive. I was also very pleased to read, in the same case, Lord Brown of Eaton-under-Heywood conclude that the Qualification Directive has to be interpreted consistently with UNHCR’s Guidelines on particular social group.

I would therefore encourage regular resort to the provisions of the 1951 Convention directly and to international interpretative guidelines, including those of UNHCR in the many sources I have earlier cited, as one means to ensure closer consistency between the evolving European protection system and the broader international regime, particularly when it comes to applying articles in the Directive which relate to the refugee definition. When various interpretations are possible, resort may usefully be had to the object and purposes of the 1951 Convention more broadly.

In conclusion, the judiciary is a key and valued partner of UNHCR in its central mission of protecting refugees. I thank you for your attention.