

Sixtieth Session of the
Executive Committee of the High Commissioner's Programme
Agenda item 5(a)

Statement by Ms. Erika Feller
Assistant High Commissioner - Protection

Mr. Chairman,

My responsibility is to speak to the Note on International Protection, which reflects important protection developments over the past twelve months. It is a wide-ranging review which, in my experience, is best presented to this Committee through the lens of selected key trends. I will single out a few only, chosen because, in spite of their specificity, they illustrate both the state of protection today and indeed what the notion "protection" actually means in practice.

First, though, a reflection on the overall picture.

The note details a range of positive developments. Refugees do find effective protection in many countries. Refugees can and do go home, with more than 600,000 persons having returned in 2008. Resettlement numbers are also higher than in past years, and there have been a number of positive initiatives to move refugees away from care and maintenance to self-sufficiency. The naturalization of over 12,000 long-term refugees in Tanzania is a most praise-worthy development. There is a heightened sensitivity to "at risk" populations and a better-calibrated response to the challenge of preventing and responding to sexual and gender based violence. Some important States on the frontline of mixed migratory flows have moved to formalise administrative and legislative frameworks which integrate protection considerations very directly. That there will shortly be a legal instrument for the protection of internally displaced persons in Africa is a major step forward, and UNHCR has also welcomed the openness with which its overtures on behalf of stateless people are now starting to be received.

This being said, if I look back at the various reports I have been making to this Committee over a number of years, I find a worrying consistency when it comes to the problems. Insecurity and narrowing protection space are prevalent in too many countries, with the deliberate targeting of civilians, to destabilise populations through displacement and terror, including by resorting to brutal sexual violence. Refugees are frequently hosted in areas too close to conflicts and in environments which represent diverse threats to their physical safety. The non-availability of solutions has left millions of refugees and internally displaced persons locked in exile for years on end. There are asylum systems which remain ineffective or unresponsive, in spite of substantial investment in capacity building, with many lacking sufficient procedural or protection safeguards, perhaps to serve a deterrent function. To take one, coming out of a report received last week from a European office, the weaknesses of the national system were identified to include: "lack of procedural guarantees in the accelerated procedure, remote and isolated location of reception centres for asylum-seekers, limited access to and low quality of state legal aid and interpretation services, absence of time limits for detention and insufficient number of procedural guarantees for vulnerable groups; no

special integration programme for refugees and others of concern; and lack of legal and other provisions for family reunification of refugees.”

We are often asked to explain the meaning and content of the protection function. One way to answer this question is to observe that protection is a multifaceted concept with a variety of applications. Generally, it both describes the needs of the forcibly displaced and identifies core responsibilities of governments to address them. It is, too, descriptive of the main deliverables expected of UNHCR under its mandate. Finally, protection is the defining feature of the international framework which secures the situation and protects the rights of refugees. In short protection is a responsibility, a need, a deliverable and a legal framework.

PROTECTION AS A RESPONSIBILITY

Protection is primarily the responsibility of States for which UNHCR can never be an effective substitute. The high degree of reliance by some States on UNHCR, beginning with determining who is a refugee, is a worrying trend. It is startling to discover that in 2008 UNHCR took more refugee status decisions, at 62,919, than any other status determination authority, even in Convention State Parties.

While many States expect UNHCR to perform this function, the process is not always appreciated or facilitated. I must stress that the integrity of UNHCR’s RSD process can only be guaranteed if it is allowed by governments to operate free from any external pressure. We appeal to all States, consistent with the non-political nature of asylum, as reaffirmed by EXCOM over many years, to allow individual decision-making to follow its proper course. There have been regrettable instances of linkages being made between decisions in an individual case and possibilities to continue to implement UNHCR programmes on the ground.

For protection to be genuinely available, it has to be practiced with its humanitarian objectives to the fore, in a manner consistent as much with the spirit as the letter of the refugee protection regime. We talk a lot about shrinking humanitarian space and the sister concept of protection space. Whether the sea is still an area of protection space is an open question at the moment. Rescue at sea is a time-honoured tradition, a fundamental matter of conscience and an international legal responsibility. It is also under serious strain due to factors as diverse as the global economic crisis, the resurgence of piracy, terrorism, an exponential growth in trans-national crimes like people smuggling, as well as a hardening attitude on the part of governments to irregular immigration. That systems may be seriously challenged, however, does not mean that responsibilities can be avoided. Protection is not only an applicable concept in distant parts of the world, but it applies as well in one’s own backyard.

Loss of life at sea is now a real and constant threat. Asylum-seekers together with migrants take to sea for a variety of compelling reasons, including push and pull factors, which are regularly a complicated mix. The boats are more often than not inadequate and the individuals themselves are usually ill equipped for such a journey. They may use the services of smugglers who can be quite callous when it comes to human life. In 2009, 145 people have died and at least 177 are listed as missing as a result of attempting to cross the Gulf of Aden. In the Mediterranean region, there are 100 recorded deaths and 228 missing.

While not all of these persons are refugees, quite a number are likely to be. Where they come from refugee-producing countries, as many do, the likelihood is high. That people use the services of people smugglers, or arrive at State borders side by side with migrants who are not refugees, does not strip them of their own refugee character. Similarly so, their claim does not fall because they pass through several countries en route. There is nothing in international law that suggests that refugees should only be protected in countries contiguous to the country of origin. In any case, distinctions between refugee or migrant, do not matter at the point of rescue. Saving life does. These are all factors which must be carefully weighed should it be contemplated to push boats off or back somewhere else.

Turning to another issue we want to keep in focus, both the practice of detention in itself, absent serious reasons to justify it, and the conditions of detention, which can be deplorable, remain a huge challenge in all parts of the world. Penal conditions, including handcuffs, shackles and plexiglass interviews, are not uncommon; parole possibilities may be limited, and, in some cases, the conditions for release are impossible to fulfill, condemning people to arbitrary prison stay, beyond the expiry of their terms, and outside the scope of legal challenge. A UNHCR team recently sent in the following details about one centre visited. “The situation was shocking. Pregnant women in detention, no health care for more than 150 women with 50 babies kept in one room, collapse of the centre’s services and minors kept with adults”. The centre had no running water at the time of the visit and one toilet for every 100 people. It was deemed by our staff a physical and psychological health hazard, an offence to human dignity and in violation of fundamental rights.

Steps taken in a number of countries to seriously pursue alternatives to detention, departing from a culture of punitive enforcement, are welcome. These have ranged from curfews to pilot programmes using individual case management, risk assessments case by case and community-based residence arrangements. Sponsored residential housing programmes or NGO community-based shelters are becoming more popular. Such alternatives are proving cheaper than traditional detention, do not result in greater rates of absconding and most importantly, they do not usually entail serious human rights concerns. The most successful, in our experience, are those which constitute real alternatives to detention, not the less satisfactory alternative forms of detention, such as family confinement arrangements, ankle bracelets or onerous reporting constraints. We are supportive of proposed amendments to the European Union Reception Conditions Directive which might mean that Member States would be obliged to assess the alternatives to detention in each individual case.

PROTECTION AS A NEED

Clearly, physical safety represents the most urgent and compelling aspect of protection needs. This has already been much discussed. I want to turn your attention to two discrete issues which include but go beyond this aspect and are deserving of this Committee’s careful reflection.

The first is the strong tension which can exist between law and policies designed to protect children, and the actual experiences of children confronting the migration and asylums systems of national States. These systems are most often created with adult beneficiaries in mind, thereby exposing children to totally inappropriate or damaging situations, including but going beyond detention.

The increasing number of unaccompanied and separated children seeking asylum is one of the more disturbing protection trends. It is difficult to know the true size of the problem, as few countries produce official statistics on it, but rough estimates put the number over a million. In fact those children who do come to official attention are actually only a fraction of the total number. The 'invisible' children living in the shadows are particularly at risk.

Some have been sent by caregivers, willingly or otherwise, to secure a future in countries that appear to offer better prospects. Many others are survivors of precarious journeys involving consecutive displacement, and of situations entailing persecution, human rights violations, trafficking or generalised threat from conflict. Unfortunately, we have yet to see in many situations a child-friendly lens turned to border controls, interception on the seas, detention of irregular arrivals and access to the asylum systems. It should be noted that the same definition of "refugee" applies to all individuals, irrespective of age, and there are children who flee on account of fears which bring them within it.

We appreciate that reception of unaccompanied minors, in countries and in municipalities, can pose difficulties not to be under-estimated. However, no matter what their status, children must be treated as children first and their best interests professionally identified and respected.

UNHCR's Age, Gender Diversity Mainstreaming (AGDM) accountability framework has brought out some weaknesses in UNHCR's own responses to child protection, including when it comes to use in the field of existing guidelines. Flowing from its Best Interest Determination Guidelines, and in follow-up to the 2007 Conclusion on Children at Risk, UNHCR is currently exploring how to make its approaches to child protection more inclusive and integrated, including through fine-tuning the Strengthening Protection Capacity Project (SPCP) methodology for child protection gaps analysis. As a result, we have seen a marked enhancement in the response capacity of our implementing partners, and new partnerships emerging, such as in Yemen, between the national child protection network and the juvenile court.

More generally, the AGDM framework has proved its worth as an accountability tool. The third year of its implementation will be one of consolidation and integration. While we intend to maintain the focus on accountability for AGDM objectives, we will align the framework integrally within the current efforts to strengthen accountability and results-based management overall.

The principles of Age, Gender and Diversity Mainstreaming must be taken conscientiously into account in the design of UNHCR programmes wherever they are to be implemented. This includes in urban areas. The protection risks for refugees in urban settings are many: the threat of arrest and detention, *refoulement*, harassment, exploitation, discrimination, inadequate and overcrowded shelter and access to medical assistance as well as vulnerability to SGBV, human smuggling and trafficking.

UNHCR's new policy on urban refugees – long-awaited, I appreciate! – has now been released. Moving quite far from the policy of the past, it has been informed by a number of considerations, including: (a) the rapid pace of urbanization in many parts of the world as well as the growing number and proportion of refugees who are taking up residence in cities and towns; b) the serious difficulties encountered by many urban

refugees in their efforts to access protection, solutions, livelihoods and services in urban settings; and (c) the limitations of the previous urban refugee policy, which was introduced in 1997.

The new policy is based on the principle that the rights of refugees and UNHCR's mandated responsibilities towards them are not affected by their location or the means whereby they arrived in an urban area. We hope that the High Commissioner's December Protection Dialogue will lead to greater recognition that urban areas are indeed a legitimate place for refugees to enjoy their rights and receive protection.

Implementation will be a challenging task. Visiting a makeshift camp hosting at any one time from 1000 to 2000 refugees, with thirteen or so each to a cardboard shelter, without the benefit of any adequate sanitary facilities or medical support, was a stark reminder for me of the dimensions of the challenge.

I imagine that the policy will not be without its controversies. In particular, States will understandably want to be reassured that sovereignty, national legislation and local institutions are not compromised. In fact all three are central to how the policy is conceptualized and must be implemented. State authorities have the primary role, with that of UNHCR being to support and to partner.

Finally a word, under this general heading of protection as a need, on the question of when that need ceases. Cessation of refugee status takes place pursuant to cessation clauses of applicable international and regional instruments and within the guidelines of this Committee. As there are several refugee situations, including the Rwandese, Liberian and the Angolan situations, in relation to which a cessation review is ongoing, some observations are in order.

Cessation, once declared, creates the clear and actionable expectation that the group or groups affected will, within a declared timeframe, lose their refugee status, barring exceptional reasons in individual cases to the contrary. Flowing from this, the solution, in the first instance, will be their return to their home country. It is, however, incumbent on receiving and returning States to make this a solution which is viable, meaning that efforts to promote voluntary repatriation should be exhausted and there has to be investment in reintegration, and protection of acquired rights, as well as a commitment to meet any residual refugee protection needs. There will also be situations where a cessation decision opens up a continuum of alternative possibilities based on a variety of other statuses available to former refugees in the Host States. All this is best ensured through specific arrangements agreed between the affected States, with direct input from the refugee communities themselves. There will always be situational specifics which have to be respected to make it fair, safe and equitable.

PROTECTION AS A DELIVERABLE

UNHCR continues its efforts to develop the operational aspects of its statelessness mandate, going beyond the traditional role of providing technical advice and advocating for accession. Lichtenstein's Friday accession to the two statelessness conventions is very positive. A handbook on the application of the statelessness definition is in preparation, and, in this connection, we will shortly be putting on the table guidance on interpretative questions such as de facto statelessness, a term that is frequently used, but not always well understood. De facto stateless persons have a nationality in name,

but the nationality is ineffective because they are unable, or for valid reasons unwilling, to avail themselves of the protection of the State of nationality. A key question is what constitutes “valid reasons”. We hope to clarify this and perhaps reach some understandings on this with you.

In the area of IDP protection, progress continues, building on the enhanced predictability and accountability in the humanitarian response to IDP populations brought in through the cluster approach. Here too however there are difficult questions still to clarify. These include the need to reach an agreed understanding on when displacement ends and on how we define and give content, in a context of armed conflict, to the basic safeguards, including the voluntariness of return, and return in safety, and dignity. These are currently the subject of policy formulation in-house.

For UNHCR, protecting refugees, asylum-seekers and internally displaced people also means protecting their livelihoods. For numerous refugee women, however, this potential is constrained by multiple barriers which field operations are now trying specifically to address, through multi-year strategies of comprehensive livelihoods support, where women are highly visible. The Women Leading for Livelihoods programme (WLL) is one of UNHCR’s more visible tools to address livelihood challenges facing women and girls. Our target for WLL is to implement 20 new projects in 2010 and 2011.

Many of you will be familiar with UNHCR's Strengthening Protection Capacity Project [SPCP]. It has proved useful for capacity building in Host States, for mapping protection needs and gaps when it comes to stateless persons and for comprehensive needs assessment more generally. Our next ambition for the SPCP project is to explore and perhaps pilot it, with some adjustments, as a tool to underpin gaps analysis for child protection, as well as implementation of cessation decisions.

UNHCR will continue to support governments in addressing mixed migration challenges, including through furthering the implementation of the 10-Point Plan. We have been pleased with the extent to which States are now finding the Plan useful. You may be aware that the Office has provisionally released a compilation of practices in implementing the 10 Point Plan earlier this year, which we hope will provide useful guidance on how to manage some of the challenges of mixed migration. The compilation is a living document and your comments and suggestions are invited and welcome.

UNHCR takes seriously its responsibility to ensure that asylum procedures properly deal with undeserving asylum-seekers and remains committed to work with States to ensure that asylum systems function fairly and responsibly, without opening any avenues for those supporting or committing terrorist acts to secure access to asylum. To this end, we have been exploring avenues for more strategic interaction with the Counter-terrorism Committee’s Executive Directorate (CTED). In a related context, I want also to draw your attention to an important issue affecting Convention Travel Documents [CTDs]. The 1951 Refugee Convention envisages that travel by refugees should be facilitated through the issuance of refugee travel documents by the Host States. The Schedule to the Convention provides the model for the CTDs which has been most broadly used. The problem is that this model was drawn up in an earlier age, before such innovations as machine-readable passports and biometric inclusions in travel documents. There is now an urgent need for new formats, compatible with ever more stringent country requirements, if the CTD is to be accepted as a legitimate

document for travel. We are working with ICAO, which is the Organisation *inter alia* charged with promoting safe, secure and sustainable development of civil aviation, to update the format before the ICAO approved minimal standards for travel documents enter into force in April 2010.

I cannot end without a brief word on solutions, which is after all the best “deliverable” over the longer term that we can promote. Resettlement is one of the three traditional solutions which has regained its importance over recent years. In tandem, UNHCR’s identification and referral capacity has much improved, not least thanks to our partners. The more than 121,000 resettlement submissions and 65,800 departures in 2008 represented a 22 per cent and 32 per cent increase respectively compared to 2007. Good, but not good enough!! The problem is that our efforts to expand the reach of the resettlement solution are not being matched by a sufficient number of available places. We are now confronted by the question as to whether it makes sense for the Office to continue to refer beyond the capacity of countries to take. With the global resettlement system at risk of “over-heating”, there is an urgent need for an increase in resettlement commitments.

The credibility of resettlement efforts depends on programmes being balanced according to global needs and priorities. Ending long term exile is one high priority for UNHCR and its Executive Committee. We are particularly urging States, in the face of the proliferation of protracted refugee situations, to engage in multi-year planning and to be flexible on resettlement admissions for refugees in situations where they may have difficulty articulating a current Convention-based claim. Of course resettlement can be but one part – and likely a small part – of overall solutions planning for protracted situations, which has to be comprehensive and include all three traditional solutions.

I cannot mention protracted situations without a word on the current EXCOM conclusions process. The fact that we will not be able to adopt a conclusion on protracted situations at this session is a singular disappointment, not least in the light of the strong support the High Commissioner’s initiative on Protracted Refugee Situations has attracted over the recent months. It is difficult, in fact, to make the connection between this support and the reluctance now to translate it into even a general set of guidelines. Perhaps this is as much a product of a malaise in this Committee on EXCOM conclusions as of the subject matter itself. Again, though, this is puzzling, given the strong endorsement of the value of EXCOM conclusions coming out of the independent evaluation presented to this Committee last year. We have to do some further soul-searching together on these issues, or the danger is real and present that conclusions which matter will become a thing of the past.

CONCLUSION: THE OVER-ARCHING PROTECTION FRAMEWORK

2009 is the 40th year since the OAU Refugee Convention was adopted in 1969. The 60th anniversary of the 1951 Refugee Convention is approaching in 2011. The 60th anniversary of UNHCR arrives in 2010. All these are not only important dates in themselves, but they offer the possibility for renewed reflection about where we have come from and where we want to take refugee protection for the future. I would leave you with this thought. The refugee protection architecture, with these instruments UNHCR at its centre, has proved itself resilient and ever relevant. This being said, there are displacement situations today which strain the international protection regime and

the institution of asylum at its base. A core purpose of asylum is to restore refugees to a state of safety, enabling recovery from the brutality and pain of displacement. The fact is, however, that asylum conditions can prove as devastating an experience in some situations as the circumstances which forced the exile, in spite of the best endeavours of all concerned. The situation in Dadaab camp is one distressing illustration, entailing as it does massive congestion, refugees without shelter in a very harsh environment, inadequate reception or registration systems, poor health and sanitation conditions, a worrying level of malnutrition, and all this a very fragile protection environment. One can but wonder how, in these conditions, it can be said that asylum is providing real or meaningful human security. Asylum in the context of large scale arrivals, responding to displacement generated or exacerbated by new drivers, such as climate change, and burden sharing in the context of both, are in need of some new thinking. The 60th anniversary of the Convention in 2011 may well be the right occasion.