

**Sixty-first Session of the  
Executive Committee of the High Commissioner's Programme  
Agenda item 5(a)  
Statement by Ms. Erika Feller Assistant High Commissioner - Protection  
RULE OF LAW 60 YEARS ON**

**Mr. Chairman,**

**PROTECTION DEVELOPMENTS**

The purpose of my presentation is to review with you significant protection developments over the past year, as highlighted in the Note on International Protection which I am today introducing. I do so enjoying the relative advantage of having made such presentations for a number of years now, and being able to look back and draw the lessons, on the eve of the 60<sup>th</sup> anniversary of the 1951 Refugee Convention, for the road ahead.

Refugee protection is global concern and a common trust. This means that responsibility for it is shared, not individual. It also means that, unless this is shouldered widely, it may be borne by none. This is one of the salient lessons of the last 60 years from UNHCR's perspective and a reason why burden-sharing is a common thread running through this presentation.

Ten years ago I reported to this Committee the following: "a deteriorating quality of asylum world-wide; hundreds of thousands of refugees without access to timely or safe solutions; less reliable partners for our traditional protection activities; a level of disillusionment about aspects of the 1951 Convention; and a protection system generally with serious gaps and strains".

**PROGRESS**

How different is the situation today? Certainly there has been progress. The Agenda for Protection gave direction to the efforts both of UNHCR and of States to bridge important gaps, with useful conclusions adopted by this Committee on concerns identified in the Agenda, from women and children at risk, to repatriation, statelessness, local integration and persons with disabilities. Particularly for women and children, it is proving significant that risk factors are more easily identified and accountability mechanisms are in place for their redress. The 10-Point Plan is increasingly employed as a planning tool by UNHCR and by States, to improve management of asylum and migration linked movements. Flowing from the High Commissioner's 2008 initiative, interest has been re-kindled in the plight of persons locked in protracted displacement with some situations now resolved and others – but not all – moving positively forward. Also, the long-awaited urban refugee policy of UNHCR is currently being piloted in a number of countries with major urban populations.

That solutions are do-able is also clear; as intractable as they might otherwise appear, situations can be resolved. Northern Uganda is a good illustration, with over 90 percent of the IDP camps [i.e. some 229] of past years now closed and close to 1.7 million internally displaced persons having returned home. Zambia offers another example, where we are witnessing the closure of two long standing refugee camps, Kala and Mwange, quite a milestone in a country that has generously hosted thousands of refugees from the DRC for over 10 years. If more examples are needed, they are there to point to, including the naturalisation of the some 162,000 Burundian refugees in Tanzania, or the return to Southern Sudan of more than 330,000 refugees, i.e. around 75 percent of the UNHCR registered 428,000 refugees in the neighbouring countries at the time the Comprehensive Peace Agreement was signed.

Asylum in the industrialized world remains an important durable solution for a significant number. In Europe, North America and Oceania last year, around 150,000 persons received Convention status or subsidiary protection, with all the rights necessary for full social inclusion. When it comes to resettlement, there have been important success stories, with 24 countries now offering resettlement places and over 84,000 persons able to benefit from this solution last year. This represents an increase compared to 2008, albeit still an insufficient one when measured against need. The reality is that for every 100 refugees in need of resettlement, only 10 are resettled each year. Hence a “10 of 100” project was launched at this year’s Annual Tripartite Consultations on Resettlement (ATCR), aiming to realize a 10 percent increase in resettlement places, including emergency and medical places, in line with UNHCR’s 2010-2011 Global Strategic Priorities and the Agenda for Protection.

## **SETBACKS**

This leads me into the challenges. The world for many millions remains a very insecure place. Hazard is not an abstract concept but in many situations an ever present, proximate and lethal threat. *Refoulement* incidents of high visibility have occurred in a number of regions of the world, including in Europe, Asia and the Middle East. Take just the case of Somalis being returned to Mogadishu. In one widely documented incident – which by no means stands alone – a woman deported when heavily pregnant together with her nine-year old son, fell victim to a mortar attack, which left her permanently incapacitated and her son seriously injured. In that mortar attack her two-month old infant died.

Graphic images abound: a young couple stoned to death for wanting to be with each other; bodies strewn around after a suicide bombing; peacekeepers hacked to death in the DRC, a deeply sad situation anyway where sexual violence and abuse is almost too commonplace to report. The destitution of the many millions of flood and earthquake victims have been dominant images over 2010, the victims including some 12 percent of the total registered refugee population in Pakistan.

If nationality might seem like a universal birthright, an estimated 12 million people around the world – probably a much underestimated number – are struggling to get along without it. This means, in practice, a daily struggle for legitimacy, to establish a legal residence, to find work, to access medical assistance and education for their children. It is thought-provoking that nationality legislation is still being drafted that writes into law the deprivation of nationality on the grounds of gender, of national origin, or even because of disapproved marriages. At the current rate of three ratifications every 12 months to one or other of the Statelessness Conventions, we may be looking at another 50 years before we can talk about a truly global assumption of responsibility to reduce the statelessness problem.

Even in regions where the tradition of asylum is long and time honoured, and where regional institutions are a force for stability and responsiveness, not all recent developments have been positive. Some asylum systems are purposefully in decline! There have been appalling incidents of kidnappings of migrants, including asylum-seekers, for the purpose of extortion, accompanied by serious human rights abuses, notably rape, torture and murder. Researchers working at Mexico’s southern border have reported as a phenomenon the “normalization of violence” because it is becoming routine to hear irregular migrants take it as a given that they will be victimized en route.

Urban refugees and asylum-seekers are a growing protection challenge as numbers increase, programmes to secure protection, health, housing and education are costly and not always supported, and resettlement and repatriation remain realistic solutions for very few. Many urban refugees are dependent on UNHCR for financial, psycho-social and protection support, but the needs far outstrip the possibilities and the gaps are many.

The protection needs of children remain a paramount concern, but have not always been sufficiently prioritised. We are worried that many asylum systems are not “child friendly”, take no account of the special circumstances of child applicants, and legitimate the automatic repatriation of children, without resort to established protections, such as best interests of the child determinations. Refugee education is everywhere a challenge, regardless of where and how refugees are received. Education is both a human right and a protection issue - children who go to school may well as a result escape recruitment by armed groups. Girls who drop out of school are often forced into early marriage. Lack of education opportunities can also mean the difference between success or failure of integration for the more permanently settled refugees, as the recent AGDM reports from central Europe have brought out.

In spite of this recognition, the unsatisfactory situations are many. Take the not atypical example of Eastern Chad. A recent UNHCR field study reveals overall a lack of qualified teachers and a shortage of classrooms which anyway are hopelessly overcrowded and under-supplied. As a result, in some refugee camps up to 40 percent drop out during the school year. In Rwanda, where there are some 55,000 refugees mainly from the DRC, UNHCR's objectives for 2011 include to help 15,000 refugee minors enrol in primary school. However, a funding shortfall will mean that a fifth of them will not be able to. As worrying is that secondary education possibilities, in most refugee situations, are far more remote still. As of April 2010, only 370 Sudanese refugee youths were enrolled in a total of five secondary schools. The number of potential secondary school students (aged 15-17) is more than 16,000.

I cannot leave this overview without mentioning detention. Detention of asylum-seekers continues to create great individual hardship in many countries on the American continent, in Oceania, Asia, Europe, and the Middle East. The duration can be over-long, the conditions unjustifiably harsh and the possibilities for legal oversight or review very limited. It has reached the point in some countries where there are actually more due process safeguards regulating detention of criminals than of asylum-seekers. There is a critical need for states practicing detention at least to review the processes in place for its regulation. UNHCR continues to promote alternatives to detention and has been encouraged by initiatives taken in some states to pilot such alternatives. We look forward to the extension of these pilots beyond the pre-return period, to cover all stages of the asylum determination process.

In summary, then, physical insecurity, legal insecurity, socio-economic insecurity, environmental insecurity are all regrettably quite commonplace. This is the background for the 60<sup>th</sup> anniversary commemorations, with their focus on strengthening the existing protection framework, promoting a new protection dynamic, mobilising support for stateless people and the reduction of statelessness, as well as building solidarity with forcibly displaced and stateless persons.

## **RULE OF LAW**

The 60<sup>th</sup> anniversary programme, seen from one perspective at least, is about strengthening the rule of law when it comes to protection of persons of concern to UNHCR.

For UNHCR rule of law is a rather basic notion. We work increasingly in societies where conflict or human rights violations have very much relativised the notion – situations in which the basic components of the machinery of protection and justice simply do not exist, or, where they do, have lost their legitimacy. In displacement and return situations, rule of law has most often to be reconstructed by States and their partners, institution by institution, law by law, capacity by capacity. Countries may be faced with a multitude of challenges: devastated institutions, exhausted resources, diminished security and a traumatized and divided population. Sustained efforts to develop functioning national protection structures, including through effective and accountable public justice systems, is a shared priority for UN entities, including UNHCR. One area receiving particular attention in UNHCR's protection programmes is housing rights. The loss of home and land is a key feature of many displacement situations, and their recovery, or

compensation for loss, can remain one of the most enduring and divisive issues for sustainable return and peaceful reintegration.

In many refugee situations, there is also the challenge of addressing impunity. This is a 60<sup>th</sup> anniversary issue, and we have planned a joint examination, together with human rights bodies and international criminal law institutions, of emerging complementarities between respective bodies of law and practice. At the more micro level, our programmes in countries of asylum and countries of return target impunity where they can. To take one of a multiplicity of examples, in Katanga, UNHCR has provided financial support and has assisted in the temporary deployment of judges to hear and rule on 13 cases of sexual violence perpetrated on girls aged between 6 and 15. This led to prison sentences pronounced of between 2 to 15 years, with compensation by way of damages to the victims.

## **IDP'S AND THE CLUSTER ARRANGEMENTS**

SGBV and impunity is an issue of high significance. Such violence tends to impact disproportionately the more vulnerable, with women, girls and boys exposed to extreme forms - rape, brutality and killings. Sadly Resolution 1325 is still honoured more in the breach than the practice. UNHCR for its part is making a determined effort to respond with SGBV standard operating procedures now in place in over 90 percent of our camps and multiplying when it comes to urban locations as well. Women and girls will have a prominent place during the 60<sup>th</sup> anniversary commemorations. National dialogues with them are being organised in six different regions, designed to allow concerns to surface through the optic of their direct experiences and spoken in their own voice.

Their issues are a particular priority for the IDP protection cluster, which we chair globally, as well as in many field situations. The cluster arrangements have made it easier to identify where there are gaps, notably when it comes to protection of women and children, in the overall humanitarian response. Working in coordination has reduced duplication of efforts, has encouraged more harmonised standards of delivery and has enabled stronger advocacy. There are, though, still shortcomings with the cluster approach. Participatory approaches to programming are integrating only slowly, and the heavy process orientation can be at the expense of concrete outcomes. Overall it remains perhaps too internationally focused, with local actors and national capacities insufficiently tapped or developed. This does not always encourage the necessary government buy-in and ownership.

## **PROTECTION, STATE RESPONSIBILITY AND UNHCR'S PROGRAMMES**

This issue of state buy-in is a thorny one across the spectrum of our activities. We can capacitate, but we are never an effective substitute for the exercise by States of their own, and primary responsibilities to decide to whom and how they owe protection. There is reluctance here, and we understand the reasons, including incapacity and lack of expertise, a misconceived belief that systematising asylum in laws and institutions is an imported construct with no local relevance, as well as a lingering concern that offering asylum might be taken as an unfriendly act. What this means, however, is that UNHCR continues to assume a disproportionate share of responsibility, in particular for refugee status determination, including in Convention signatory States. In 2009 UNHCR received 114,000 asylum applications in over 50 countries, amounting to 12 percent of the total claims (900,000) worldwide. We believe it is time for a concerted discussion on benchmarks for handover of our status determination responsibilities. The commemorations in 2011 would be a good occasion.

We will of course continue to assist with capacity and training. We can equally assist with procedures to improve the speed and efficiency of asylum processes and address asylum blockages. We have a responsibility to contribute to the sustainability of national systems in such ways, and we have been particularly pleased by the enthusiasm of States in Europe for engaging with us in

so-called “Quality Initiatives”. To date, these joint exercises have variously involved 16 countries, (the UK, Sweden, Austria, the Czech Republic and the 12 countries in Central and Eastern Europe). They have led to some quite innovative improvements, such as the integration of quality assessment units formally into national asylum systems. We would be happy to explore with any interested states in other regions – and some have already signaled an interest to us – how such initiatives might be used to enhance the credibility and reliability of their own systems.

There will, of course, remain a requirement for mandate status determination by the Office and we, for our part, are committed to professionalising our processes. All UNHCR RSD operations are now being conducted in accordance with global Procedural Standards. Mandatory RSD Learning Programmes have been introduced and we continue to expand UNHCR’s RSD Community of Practice, an internal, online platform for discussion of RSD issues in field offices worldwide.

Capacity though remains a challenge. RSD is resource intensive and requires staff with specialized knowledge and skills. A recent review of UNHCR RSD practices highlighted an over-reliance on affiliate workforce arrangements, leading to a very high turnover of RSD staff. This does impact our processing capacity, contributing to backlogs and compounding the difficulties of creating a professional core. Amongst a number of initiatives we are currently exploring, such as enhanced training for managers of RSD operations and dedicated backlog elimination projects, we are looking at measures to recruit and retain staff with RSD experience and to expand professional development opportunities for staff who are performing RSD functions.

I have dwelt on our RSD challenges so as to underline how much we count on your support to make refugee status determination more expert, more consistent, less vulnerable and better capacitated, which is ultimately in everyone’s interests, States included.

## **REFUGEE PROTECTION AND SECURITY CONCERNS**

Refugee protection processes, including RSD, can be vulnerable to misuse, which you rightly continue to signal to us as a serious concern in an age of heightened security concerns. UNHCR is very aware that in a number of regions the environment has fundamentally changed. Our processes need to catch up. Amongst other initiatives, our guidelines and our practice on exclusion and on information sharing are currently under review. So, too, are our resettlement referral arrangements. We are introducing enhancements to our registration processes through strengthened monitoring and the use of biometrics, to be followed by a new policy on biometrics, complemented by a review of our registration handbook.

Security and human rights are not mutually exclusive, but rather mutually reinforcing. UNHCR has been concerned that this appreciation has not always found its proper place in the responses of States to national security. Refugee policies in many States are now heavily contoured by security concerns, which on occasion mean literally closing the border to refugees. Legislation is being changed with the express purpose of restricting access to asylum procedures and with extremely low thresholds for the exception to the principle of *non-refoulement* being introduced, together with reinforced detention regimes.

How UNHCR and States can better respond to security imperatives whilst ensuring the integrity of the international protection regime continues to merit the attention of this Committee. Criminalising the search for asylum is not the answer. It has serious protection consequences for refugees, and breeds its own secondary problems for States, including racism and xenophobia. Quality systems should be able to make the necessary distinctions.

## **UNHCR’S GUIDELINES**

Quality will improve where the practice is helped to catch up with modern realities. This is for instance the case with persecutory practices today. Last week UNHCR organised a Round Table

intended to promote better understanding of the protection needs of people fleeing persecution due to their sexual orientation or gender identity. UNHCR guidelines and policies will be revised to ensure that the particular vulnerabilities of the impacted groups are recognized at every stage of the displacement cycle, from the pre-flight risks, through stay in asylum countries, to participation in RSD processes and the realisation of appropriate solutions.

Quality of processes can be much enhanced by accurate and timely information. Over the past year we have been actively discussing, inside and outside UNHCR, expectations of us when it comes to provision of such information. The Office is rightly regarded as an authoritative source, based on its 60 years of practical experience and its formal responsibilities under Article 35 of the 1951 Convention. Senior courts and national administrators routinely pay deference to UNHCR's Handbook on interpretation of the definition, and accept its Guidelines as important evidence of evolving practice. There have, though, been issues raised with the currency and timeliness of certain of our eligibility guidelines or their generality. We take this feedback seriously and are currently reviewing how to broaden their information base and change their periodicity.

In October 2009, UNHCR issued a revised note on the Applicability of Article 1D of the 1951 Convention to Palestinian Refugees. This derives from the fact that, while Palestinian refugees under the care and support of UNRWA fall outside the Convention's frame and UNHCR's responsibilities, UNHCR continues to provide protection to Palestinian refugees residing outside UNRWA areas of operation on a case-by-case basis. This applies, for example, to Palestinian refugees previously residing in Iraq. In May 2010, I co-chaired with UNRWA's new Commissioner-General, Mr. Grandi, a discussion on how both organisations can further enhance cooperation to improve synergies and minimize protection gaps for Palestinian refugees.

## **SECONDARY MOVEMENTS AND REGIONAL PROTECTION**

I turn now to another perennial challenge for asylum systems globally. Arrivals of undocumented migrants continue to test the capacity of States, with the problem of so-called "irregular secondary movement" exacerbated in recent years by boat arrivals. The Pacific, the Mediterranean, the Caribbean or the Gulf of Aden are all regular theatres, with 'boatpeople' being interdicted, intercepted, turned around, ignored by passing ships, shot at, or denied landing. Even when rescued, disembarkation somewhere has no guarantees attached, as an incident currently playing out off the Somalia/Djibouti coasts starkly reminds us.

All this is seriously at odds not only with protection principles but also with the reality that when they manage to gain access to territory and asylum processes, a large percentage of asylum-seekers who come by boat are actually found to be refugees.

It is regrettable that such realities are under-reported in the media, and that not enough is done to correct this. Migrants and refugees are too often linked in the press to social problems, like the rising rates of unemployment, or to violence and criminality. Asylum-seekers and refugees from outside a region will often be classified, without qualification, as abusers of national systems, particularly where their travel has been facilitated by smugglers. Relatively little attention is given by the media, or by those who feed it, to the human side of people movements and to the root causes of migration, or the consequences, including separation of families, unaccompanied children or trafficking; nor are the positive contributions of migrants sufficiently recognized.

Boat arrivals can provoke fears and high emotions which may be difficult for Governments to manage. However, in our experience, an approach built predominantly around closing borders and trying to prevent movement is not the answer, as it does not work. In fact it can make situations even more difficult to deal with. Developments in relation to one country that has pursued a tough policy towards boats are actually quite revealing. While arrivals by sea are dramatically down, arrivals by land have basically doubled. In addition, while sea arrivals had been able to be concentrated through being channeled to one main reception point, land arrivals now come through

multiple crossing points and have been able to disperse more effectively and rapidly through the community, below any radar screen. The evidence suggests that tough sea policies have not solved, just changed and indeed complicated the dynamics, of irregular movements.

UNHCR is concerned about irregular migratory movements, whatever their form. Overall they can destabilize structured international efforts, built on burden and responsibility sharing, to provide appropriate solutions for refugees. The problem of secondary movement has many faces. The phenomenon of refugees on the move for non-protection reasons is also growing. Numbers and categories vary with the regions but the concern is global. On the African continent, where camps are more the norm than the exception, it is preoccupying that camp environments are starting to be compromised by a form of transit migration to and through them, with refugees, and others, seeking to use their facilities for R&R en route to a more distant destination. Just as concerning has been the misuse of reception centers as way-stations, or even lucrative recruitment opportunities for smugglers and traffickers. These facts are not a rationale for abandoning camps or centers. They are, though, a solid reason to rethink how better to manage them within a burden sharing framework.

## **BURDEN SHARING AND REGIONAL PROTECTION**

The 1951 Convention is predicated on international solidarity, or the notion that states should address refugee problems collectively, sharing responsibilities to balance the burdens. Concern about lack of fair burden-sharing is cross-cutting and consistent, with a majority of refugees being found in countries without the resources to meet their needs. There have been some promising initiatives over recent times to deal with this, including resettlement pools, redistribution agreements and emergency evacuation arrangements. An agreed quota system for humanitarian evacuation or transfer never won too much favour, outside the context of the Kosovo emergency, but this should not preclude it being revisited. Evacuation arrangements are becoming one important tool to handle emergency resettlement needs. Romania imaginatively and courageously led the way here and a number of States have now joined this effort, with transit evacuation concretely supported in the Philippines, Slovakia, and the Czech Republic, among others.

One path to better burden-sharing could be some regionalisation of protection arrangements. This is proving a secondary benefit of regional, migration-centred arrangements. Africa is again a pioneer here. There have been, for example, some very promising efforts to build refugee protection into protocols or agreements of various sorts intended to promote freedom of movement within a common economic and political space, whether it be ECOWAS, EAC or SADC. The challenge, seen from our perspective, is to build these common spaces in a manner which does not compromise the right to seek and enjoy asylum. The international protection principles rest on non-discrimination, meaning that refugees have to be able to rely on finding protection, should this be necessary, in countries within their region, as well as outside it. Their actual nationality cannot be a bar to lodging a refugee claim.

Elsewhere, collaboratively run centres that undertake tasks like RSD support or resettlement on behalf of several States are currently under review in several regions. UNHCR is supportive as long as such centres work as a complement to, not as a substitute for, national asylum systems, and are fully embedded in more comprehensive arrangements.

## **THE NEW CHALLENGES**

The Convention's framework is of enduring relevance in providing a basic definition of who is a refugee and prescribing what cannot happen to refugees and what treatment they should or must receive. It does, though, stop short of setting up, in unambiguous terms, a system which places affirmative obligations on States Parties to act to ensure that every refugee has a right to asylum which is enforceable somewhere, or put another way, that States cannot act in such a manner that renders this right meaningless. The Convention regime rests on notions of international solidarity

and burden and responsibility sharing, but offers no agreed indicators for either. The Convention foreshadows various types of solutions, as refugee status is by definition temporary, but does not contain special arrangements to ensure they are realizable in a timely and durable manner. And it gives little guidance when it comes to settling whose responsibility it is to protect persons forcibly displaced outside a more classic refugee context. In short, if the Convention is the irreplaceable starting point, the cornerstone of refugee protection, it nevertheless does not hold all the answers for modern displacement situations.

We hope its 60<sup>th</sup> anniversary will be the occasion to ensure that the international protection regime is reinforced through reaffirmation of its basics, as well as through some evolution of the principles and practice. There is a high probability that patterns of displacement will be increasingly impacted by environmental factors with conflict, extreme deprivation and climate change tending to act more in combination. Typical protection concerns in such situations variously include physical insecurity, from sexual and gender based violence to riots over food distribution, or property and land disputes partly fuelled by loss of documentation. There may be unequal access to assistance, particularly for women, the elderly and persons with specific needs. Separation of families, including of young children from their caregivers, is commonplace.

Apart from how to handle these practical protection challenges, the legal implications of displacement driven by forces other than persecution, human rights violations and war, have yet to be seriously thought through. There is a legal vacuum when it comes to the plight of populations whose states physically are engulfed and disappear, the so-called “sinking islands” phenomenon. The natural disaster victims who are displaced externally will also confront an uncertain legal situation. Such issues also need to find a place on the 60<sup>th</sup> anniversary commemorations agenda.

## **CONCLUSION**

In short, the upcoming commemorations are singularly important for a variety of reasons. Many expectations are attached to them. However, and in conclusion, let me bring to you a message I recently received from colleague which captures better than I could hope to do the core meaning of the commemorations. He wrote: “A few years ago, the IDP camps in Northern Uganda were some of the most heart-rending examples of the wretchedness and suffering that displacement can be. Heavily congested, rife with danger, dirty, bereft of all but only the most basic services, they were a saga of suffering hard to describe. Today, for someone having in mind this desperate portrait, it is impossible to take in what you see or, rather, do not see, when you visit Northern Uganda. But for the few camps which still remain, some of which are on the way to being closed, there is no evidence of the multitude of earlier camps left to see, whichever way you look. There are no footprints left in their trails to evoke the past that was played out here. Not only have more than a million people returned to their homes from these camps, the empty shacks that were left behind have been cleared, and these locations have been vigorously and productively renewed. What you see now are plantations of thriving crops, maize, rice, grain etc. It is literally a spectacle of a rebirth of the normalcy and productivity of life. It made me very proud that our Organization was a key in making all this happen.”

In December 1950, UNHCR was created with a mandate the significance of which was perhaps not fully appreciated. The colleague’s quote goes on: “In this year when, at 60, it might be thought that the organization starts to face an existential crisis borne of old age, UNHCR staff are still very much astir with energy, ambition and the capability to bring about transformative change. Looking forward to the Ministerial Conference next year, how appropriate it would be to make commitments which will enable this organization and its mandate to continue being the difference between life and death, danger and risk, desperation and solutions that it actually represents for millions!”