UNIVERSITY OF OXFORD – REFUGEES STUDIES CENTRE

"Protecting People in Conflict and Crisis –

Responding to the Challenges of a Changing World"

Opening Address: "Humanitarian Space"

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Erika Feller, Assistant High Commissioner – Protection, UNHCR

First a word on what this presentation is and is not about. Its perspective is that of a practitioner agency. It tackles the question of humanitarian space less from its conceptual basis and more the daily and direct experience with which UNHCR is confronted. In this sense it responds to the call for evidence-based analysis without attempting to weave the threads of the analysis too finely into research hypotheses.

Secondly and somewhat unashamedly the presentation has quite a strong focus on refugees and the limits to their protection as the litmus test of protection space. This is done without in any way downplaying the fact that persons displaced internally – by conflict or new displacement drivers such as climate change – are as, or even more, vulnerable, certainly more numerous and seriously impacted by diminished humanitarian space. But in my experience, in a rush of enthusiasm to push the boundaries of thinking about forced displacement, refugee concerns can too easily be eclipsed by the popular topics of the day – climate displacement being one. This does not do justice to their continuing seriousness. "Old hat" they are regrettably not yet.

Thirdly it does not endeavour to provide answers to many of the very apt and difficult questions raised in the document setting out the scope of this conference. Let the conference discussions themselves try to do this. More humbly, it aims to contribute to generally setting the scene with some central conclusions – that humanitarian space, of which asylum space is a part, is narrowing in too many countries, that physical insecurity of the displaced and of humanitarian workers assisting them is amongst the main indicators of this, that political will is weak on the part of governments to insulate refugee protection principles against erosion due to global circumstances like the growth in terrorism, transnational crime, irregular migration and the economic downturn, and that there is a resulting need to re-visit the protection architecture in some key areas to ensure that it responds in meaningful ways to 21st century displacement challenges.

The Office of the UN High Commissioner for Refugees is a humanitarian agency which operates independently of any political agenda. This means that the rights and needs of individuals of concern are at the heart of our mandate and that we work to protect and address them in accordance with basic principles of

humanitarian action – notably impartiality and independence. The Statute of the Office refers specifically to the non-political character of our work, and specifies that it should be 'humanitarian and social' in nature. This does not mean, however, that refugee protection is somehow immune to, or not influenced by, the very political environment in which UNHCR's mandate has to be delivered. Political factors are certainly increasingly a constraint on our mandate. Maintaining the neutrality and independence of humanitarian action in the context of an ever stronger drive, not least in the UN system, towards integrated approaches combining political, military, humanitarian and development strategies, is a constant challenge. Another way of saying all this is that humanitarian space has been markedly and incrementally shrinking over recent years. The High Commissioner has labelled this "UNHCR's biggest concern" at the moment. Why and how is what I want to look at in this presentation.

The term "humanitarian space" has been in use for at least two decades and captures a number of inter-related concepts. Some definitions, such as that developed by Medecins Sans Frontières [MSF] in the 1990s, focus on the establishment of an environment within which humanitarian agencies can operate independently of external agendas: "A space of freedom in which we are free to evaluate needs, free to monitor the distribution and use of relief goods and have a dialogue with the people". With the years, the notion has gained popularity, even if its precise meaning remains vague. Depending on the source, it can be used to refer to matters as diverse as demarcated areas for civilians to find safety in conflict; the loftier notion of a realm where the principles of humanity have full sway; or more practically an operating environment conducive to effective humanitarian action. If UNHCR is the user of the term, it is most often to the last of these that we are referring. Humanitarian space means in effect that we are able to deliver on our mandate and that persons of concern to us actually benefit through better protection and accessible solutions. Beneficiaries are traditionally persons forcibly displaced across borders (mainly refugees) but increasingly persons driven into displacement inside their own countries.

Discussion on humanitarian space proceeds most often on the assumption that it is seriously shrinking. Indicators of this include the number of humanitarian workers deliberately or unintentionally killed through acts of violence while they are working. UNHCR, for one, has lost three staff members this year, and has had to endure kidnappings, threats and security-driven program reversals. Figures suggest that attacks on humanitarian workers are up more than 350% in the last three years. In Iraq alone, at least 88 international humanitarian workers were killed between March 2003 and May 2007. Clearly, insecurity for humanitarian actors is a huge constraint on program delivery, not least because it severely limits access to beneficiaries. UNHCR is particularly vulnerable because the mandate of the Organisation often requires operating in remote and unstable areas and in complex emergency situations. Finding more reliable ways to deliver on our protection and assistance responsibilities in highly insecure environments is a current preoccupation. The aim is to avert having to leave, because of extreme insecurity, and instead to work out how to stay, how to ensure the safety of our staff, how to improve access to our beneficiaries and how to deliver meaningful protection.

The other chief indicator of narrowing humanitarian space is the increasing insecurity of beneficiaries themselves. Deliberate targeting of civilians, so as to destabilise populations through terror and displacement, is widespread in countries like Afghanistan and Somalia, to Sudan, Pakistan or Iraq. To take one current example, the conflict in the Eastern DRC was recently termed "the worst war on the (African) continent right now, an intensely predatory conflict driven by a mix of ethnic, commercial, nationalist and criminal interests, in which various armed groups often vent their rage against women…Nothing so far - not 18,000 peacekeepers, not various regional peace treaties, not other high-level diplomatic visits - have stemmed the violence."[1] A growing number of attacks by the Ugandan rebel group known as the "Lord's Resistance Army" [LRA] forced some 12,500 Congolese civilians from their homes in July alone this year. Since September 2007 the LRA has killed, abducted and violated people with relative impunity. Their victims include large numbers of children and women who, if they survive, are physically and mentally scarred for life. There are terrible stories of violent rapes of both women and men. As the SG remarked recently in his address to the Security Council on 7 August, "Parties to the armed conflict continue to use sexual violence with efficient brutality. Like a grenade or a gun, sexual violence is part of their arsenal to pursue military, political, social and economic aims".

So far UNHCR has not been able to reach more than some 45% of the displaced. This disturbing statistic repeats itself, more or less, in many of the environments in which we are currently working. UNHCR's capacity to reach populations of concern is constrained by many factors, not least but certainly not only physical security. The presence of refugees may be politically very sensitive, particularly where linked to cross-border conflicts. Assistance may be viewed as support to anti government elements, as in Sudan. Governments may not accept our protection role for IDPs, perhaps as in Myanmar even denying that internal displacement or humanitarian concerns exist.

The involvement of military actors in relief operations is often a necessity, given the precarious security environment in which many are undertaken. This however is blurring the identities of both and runs the risk of mis-characterising aid workers as party principals to a conflict. It also facilitates greater political manipulation of humanitarian assistance and actors.

Humanitarian agencies are no longer seen to be independent from parties to the conflict, from the big powers and their agendas, or even from those of the donors. Seen from the perspective of non-State actors, agencies may be viewed with great suspicion as agents of the Government. The irony is that this can be the case even where, as the national authorities tend to accuse, the humanitarian agenda is at odds with that of the Government.

Then there is the problem of the humanitarian aid itself. The de facto, just as the regular authorities, may derive substantial financial gain, capacity, and even legitimacy with their constituencies, depending on where and how the aid is disbursed. This feeds concerns about agencies being partisan, not independent.

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[1] Jeffrey Gettleman, "Clinton Presents Plan to fight sexual Violence in Congo", *The New York Times*, 11 August 2009.

It also encourages manipulation, fraud and criminality, but attempts to hold accountable these responsible are few. Such a climate of impunity is an incentive in itself to greater abuse.

The degree of "cross fertilization" of war and crime is a particularly problematic aspect of modern conflicts, with hybrid groups resorting to criminal activities, including hostage taking or drugs, to finance military objectives. These groups are not accountable to political structures, often have unclear or diffuse chains of command, and may work with contract soldiers or mercenaries, so that impunity and lack of accountability is a central feature of their modus operandi.

As more relief operations are mounted in conflict situations involving a plethora of different types of actors, from regular forces to paramilitaries and guerrilla groups, with adherence to the "civilising" rules of conflict less and less the norm, humanitarian agencies are increasingly witness to serious human rights violations, even crimes against humanity. As the reach of the international criminal justice systems broadens, agency staff are attacked, intimidated, expelled or have their access to populations of concern seriously impeded so as to limit what they might see or are able to provide testimony on. UNHCR is committed to "zero tolerance" for impunity but it is a fact that facilitating testimony – of its own staff or of refugees – can magnify the security risks for both and can put continuation of the agency's operations in a particular country in jeopardy. There is a fine balance yet to be struck between tackling impunity and maintaining humanitarian space, and there are often tensions between the advocacy role inherent in our protection mandate and the need to ensure that we can remain present and able to deliver assistance and protection to our beneficiaries.

Turning now to a particular UN angle on the issue of diminishing humanitarian space, within the UN, the push towards integrated approaches which bring together humanitarian, political, peacekeeping and development strategies can risk undermining the neutrality of humanitarian action, particularly where conflicts are ongoing or peace processes have not yet fully taken root. These are tensions which we struggle to resolve. Certainly, as a UN agency, we should be honest in acknowledging that we cannot operate with the same degree of neutrality and independence as certain other international institutions. But our clearly-defined mandate, located within overarching refugee protection norms, is our great strength, and allows us to operate on the basis of a clearly-defined legal framework which underpins decades of experience in engaging with a range of state and non-state actors in complex emergencies.

All of these factors are being extensively examined within the UN system and its Inter-Agency Standing Committee has been mandated to develop an action plan to respond to them. [2]

At the "bigger picture" level, as the High Commissioner recently observed, the narrowing of humanitarian space should be understood as a loss of ground on the emerging principle of the "responsibility to protect", due in part to what he

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[2] **Inter-Agency Standing Committee, 70th Working Group Meeting Background Document,** *"Preserving Humanitarian Space, Protection and Security"*, **11-13 March 2008.**

termed "a new and dangerous" affirmation of State sovereignty, particularly when it comes to protection of displaced civilians. International humanitarian law, human rights and refugee law, together offer a framework for holding governments and their administrations accountable for the protection of civilians. However, in most contemporary conflicts, the principles are either unknown or wilfully disrespected.[3] The 2005 UN World Summit, in launching the concept of the responsibility to protect, endorsed the notion of "sovereignty as responsibility". Flowing from this understanding, and to prevent sovereignty being the shield behind which to hide crimes committed against civilians, it was agreed that if states are unwilling or unable to honour their responsibilities to protect their own citizens, then the responsibility to protect shifts to the international community. However the debate has had great difficulty moving beyond the theory, in spite of the committed efforts of the Special Representative of the Secretary General on the Responsibility to Protect, Ed Luck, and in fact has probably gone into neutral gear judging by the divisions apparent during the most recent United Nations General Assembly session on it. A recent article in the Economist even suggested that the efforts of opponents of the concept to link it to the unpopular doctrine of humanitarian intervention may form part of a widespread campaign to sabotage the concept completely[4].

Up to this point I have focussed very largely on the broader environment for delivery of humanitarian mandates. I want now to take a slightly different angle on the issue of humanitarian space. As a refugee-protection-mandated agency, a key consideration for us in assessing humanitarian space is the extent to which the operating environment furthers or impedes international protection of refugees. For UNHCR, the concept of humanitarian space is closely linked to the related notion of protection space, which we understand to equate with an environment sympathetic to international protection principles and enabling their implementation to the benefit of all those entitled to protection.

There are certainly many challenges to delivering protection. The recurring cycles of violence and systematic human rights violations in many parts of the world, the changing nature of patterns of displacement, the new drivers of displacement (including potentially climate change), the unfavourable cost/benefit equation of asylum, and serious apprehensions about international crime and "uncontrolled" migration in this era of globalization are both the environment in which refugee protection has to be realized, and the obstacles to it. Trafficking and human smuggling, abuse of asylum procedures and difficulties in returning unsuccessful asylum-seekers are additional, compounding factors. This has led to a growth in an overly restrictive application of refugee protection principles, coupled with ever more ingenious obstacles to hinder access to them. Clearly, physical safety is still the most urgent and compelling aspect of protection. Refugees are frequently hosted in areas close to the conflicts which drove them from their homes, and in environments which represent diverse threat to their physical safety.

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[3] The EU has expressed its concern in the recently adopted European Consensus on Humanitarian aid, which builds on its own 2005 Guidelines on promoting compliance with international humanitarian law.

[4] "Responsibility to protect, an idea whose time has come—and gone?" The Economist, July 23, 2009.

I have been describing, to this point, some of the challenges inherent in assisting and protecting displaced populations in conflict situations. Physical safety is, therefore, also an issue for individuals and groups of refugees. Disentangling refugees from migrants so as to ensure their protection is one aspect of this. This is a problem which presents itself equally at sea, land and air borders. Safeguards in place together with controls at land borders and airports are less prevalent when it comes to sea borders, and most often absent in the context of the increasing number of "virtual" or "offshore" border controls, which include visa-requirements, interception practices, carrier sanctions and out-posted immigration officials. Foreign search and rescue zones are becoming a new point of reference when it comes to deciding where disembarkation of "boat people" and asylum should come about. This is starting to compete with the more traditional criteria of flag state and coastal state responsibilities and has been hailed by some as a new form of extra-territorialisation of migration control, or as "jurisdiction shopping" in order to alter the locus of international protection obligations. Often the very purpose of extra-territorial controls is to keep regulatory mechanisms outside the ambit of regular judicial review.

The situation in the waters off Malta, Italy or even Thailand, where we have been witnessing particularly aggressive examples of interception and "turn-back" policies, are illustrative of declining protection space. The "new" boat people in the Southeast Asia region, Rohingyas, originally from Myanmar, have been encountering a very tough response from Thailand, whose authorities have refused them entry and towed boats back out to sea with little or no food or water. Hundreds have reportedly perished after being set adrift. Others who have been intercepted are currently being held in detention on remote islands off the Thai coast. Italy's policy of push-backs to Libya, a country which is not a party to the 1961 Convention and which practices a harsh detention policy, is currently notorious.

Xenophobia continues to loom large in different regions of the world. Racism and anti-foreigner sentiment are prevalent in many countries, including in countries with a solid reputation of support for asylum and refugees. While intolerance is obviously not solely linked to refugee arrivals, it is part of the asylum equation, in subtle and not so subtle forms. It impacts border control measures, refugee status decisions, resettlement and integration programs, and the sustainability of refugee and asylum policies in many countries. Unprovoked and lethal attacks against foreign communities of the sort witnessed from South Africa to the Ukraine, is one example. More subtly, intolerance takes the form of laws which criminalise asylum-seekers who have arrived irregularly, stripping from them basic due process of law protections, such as their right to complete their asylum process and exhaust all local remedies before deportation. In some countries appeals are allowed but have ceased to have a suspensive effect on deportation.

Detention remains a concern in a number of situations, from Egypt, across Europe to the US. Both the practice of detention in itself, absent serious reasons

to justify it, and the conditions of detention, which can be deplorable, are of concern. Penal conditions, including handcuffs, shackles and plexiglas interviews, are not uncommon, parole possibilities are limited, and in some cases impossible conditions for release condemn people to arbitrary prison stay well beyond the expiry of their terms, without the possibility of legal challenge. In Egypt, to take one example, it is of particular concern there that asylum seekers from one clearly refugee-producing country, Eritrea, end up with a 12-month prison sentence for their unauthorized entry, coupled with a $1000 fine, which most often they cannot pay, thereby leading to months more in prison and usually deportation thereafter without access to any adjudication of their claims.

Detention of children, as a deterrent and a response to irregular entry, is still quite prevalent in a number of countries. There are many places of detention used, from waiting zones in airports, to immigration detention centres, police cells or prisons. In some instances, children may not even have had a chance to apply for asylum due to immediate detention upon arrival. At other times, children may suffer long delays before asylum claims are determined, leading to prolonged detention. In other instances status is recognized but detention is nevertheless the rule. Witness for example the Nong Khai detention centre in Thailand which holds 158 Lao Hmong refugees, including some 90 children, crammed into two dark, dank rooms. Resettlement countries have offered them a new home, but the refugees remain confined after many months, as a legacy of a period of history that ended long before any of them were born.

CONCLUSION

To say we live in a troubled world is of course a truism. But it is more than born out by global turbulence and conflict, as well as persecution of peoples for reasons of ethnicity or politics in countries on all continents. We live too in a world whose population is increasingly mobile, where horizons are ever broader and where the impetus to migrate somewhere else has its roots in a myriad of social, economic, political and human rights push and pull factors.

Conflict, human rights violations and environmental disasters, together with lack of social progress, economic under-privilege and sharp divisions between the "haves" and the "have nots" will variously continue to displace Iraqis, Afghans, Sri-Lankans, Sudanese, Somalis or Congolese, Chechens or Ossetians, Roma and Rohingas, pushing them towards and even across the borders of other countries. And these countries will not only be neighboring states or the big migrant takers. They will also include countries facing huge development or security challenges, countries with economies in transition, or countries on transit routes to those of chosen destination. Mobility cannot be obstructed. The odds are against this, including the prevalence of smuggling and trafficking.

As far as refugees are concerned, obstruction, which denies refugees their basic security and safety, is not only not possible but also not permitted under international law. Protection space is not only an applicable concept in distant

parts of the world, but it applies as well in one's own backyard. There is nothing that prescribes that refugees should only be protected in countries contiguous to the country of origin; there must be space made available to shelter and protect where the well founded claim is made. This includes at sea, as well as at land and air borders. The protection needs of persons displaced inside their own countries are not so dissimilar; nor too their rights albeit that the architecture for their protection may not be so well developed. The challenge is not to prevent movement but to better manage the many sensitive issues at stake, including national security and identity, social harmony, and economic progress, in a manner which protects state interests and individual rights, which maximises protection space and which promotes a proper sharing of responsibilities. I would like to suggest that it is timely to re-engage with states on some basic questions, in the light of evolving displacement scenarios: who is responsible, for whom, when, and against what indicators, in accordance with what arrangements? This would be a discussion fundamentally about burden sharing and responsibility sharing, which are different but related concepts. It would also be a discussion about the contours of asylum today, the situations to which it is the relevant response and with what content and duration.

The international protection regime has to be strengthened in a number of areas and made flexible enough to accommodate the new challenges of displacement. With the magnitude and frequency of displacement crises today, with asylum systems in difficulty or under major review in a number of countries, with the pressure mounting for rationalisation of processes, the 60th anniversary of the Convention in 2011 may well be the right occasion.