

5th Special Meeting of the United Nations Counter Terrorism Committee
with International, Regional and Sub Regional Organizations

On

“Prevention of Terrorist Mobility and Effective Border Security”

United Nations Conference Centre
United Nations Office in Nairobi (UNON)
Nairobi, Kenya
28 – 31 October 2007

Keynote speech

on

“Preserving the Institution of Asylum and Refugee Protection in the context
of Counter-Terrorism: the Problem of Terrorist Mobility”

by

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Wednesday, 31 October 2007

Distinguished Colleagues
Friends
Ladies and Gentlemen.

UNHCR is entrusted with the mandate to ensure the protection of refugees and to collaborate with States in finding solutions for their problems. The prevention of terrorism is not, as such, a responsibility with which UNHCR is mandated. Yet we are here today, and pleased to be so. Moreover, we have cooperated keenly with the Counter Terrorism Committee in the respective substantial and organizational aspects of this meeting, as well, indeed, as other general or discrete aspects of counter-terrorism initiatives with relevance to UNHCR's accountability for its refugee protection mandate.

There are good and profound reasons why UNHCR must, both literally and figuratively, have a foot in the theatre in which counter-terrorism initiatives are being played out. Put simply, the institution of asylum and refugee protection has been touched crucially by predicaments arising from both the spectre of terrorism as such and, even, measures to combat it, no matter that these may be intended and taken legitimately. In key respects, the nature of this intersection is putting the integrity, perhaps even the survival, of the asylum institution at stake. The imperative, as we see it, is that this institution must be preserved and nourished. Of course, UNHCR also fully acknowledges that international terrorism poses unprecedented threats and challenges, and fully supports all legitimate efforts to secure national security and the safety of all. It is to these two needs, which may sometimes be viewed as contradictory, that I shall speak today, with particular reference to the problem of terrorist mobility. Once again, UNHCR's optic is that the asylum and refugee protection system can and should be affirmed and valorized even as legitimate measures to repress terrorism receive the priority they call for.

I hope that you will have seen by now in the UNHCR working paper for this meeting¹ the nature and purposes for which the asylum and refugee protection regime has been established. This institution is the quintessential mechanism for the international protection of refugees. It is established and valorized by international law as such, and human rights and refugee law in particular. Most notably, the 1948 Universal Declaration of Human Rights underscores in Article 14 the right to seek and enjoy asylum. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol for their part together set out the essential obligations, rights and responsibilities of the system. Asylum is thus law based. It is by nature a humanitarian, peaceful and non political system which provides a structured framework of obligations, rights and responsibilities for the protection of those individuals who are forced to find safety and security away from home for reasons of persecution, violence, forced displacement or serious human rights violations, including situations resulting from terrorist acts.

Yet, in the period since September 11, this meaning and purpose of the asylum and refugee protection regime, refugees themselves or persons seeking to be protected under the system have become severely misunderstood, misrepresented or even stood upside

¹ UNHCR, "Background Paper on Preserving the Institution of Asylum and Refugee Protection in the Context of Counter-Terrorism: The Problem of Terrorist Mobility"

down, both deliberately or fortuitously as measures which may be taken legitimately have in any case had adverse effects. Among others, the institution of asylum is viewed not in humanitarian terms, but rather as a haven or harbinger for those with bad, and, particularly, terrorist intent. Many a refugee or asylum-seeker today triggers in the popular imagination the image of a terrorist. Those with particular ethnic, religious or political affiliations are especially vulnerable to this kind of vilification as well as particular forms of racism, discrimination, xenophobia and other forms of intolerance which have taken root against refugees, asylum-seekers and other foreigners as the scourge of international terrorism has likewise enlarged as an issue of public pre-occupation. Either for these reasons, or when specifically suspected of terrorist intent or inclinations, many refugees and asylum-seekers have been denied admission, or, if already on territory, detained, extradited, returned or expelled with limited or no recourse to legal procedural guarantees or judicial process, including through measures of rendition and diplomatic assurances.

I wish to highlight that, from the totality of these types of measures, one of UNHCR's greatest preoccupations in respect of counter-terrorism is that the cardinal principle of non-refoulement, the protection of refugees from being returned to territories in which they face risk to their safety or human rights, has become seriously jeopardized. Likewise, some States have applied the exclusion clauses established in refugee law, or other legal, policy or administrative notions or instruments, in a manner which has considerably broadened the terrain of exclusion as such and severely narrowed procedural and substantive rights. This is a particular concern in respect of the adoption of terrorist-linked offences defined within domestic legislation in broad and ambiguous terms but which, when applied to refugees, asylum-seekers or indeed other foreigners, puts them beyond the pale of predictable interventions in terms of legal rights and applicable protections.

With particular reference to terrorist mobility, as we have heard these past two days, States have adopted a range of measures designed to regulate access into or out of borders and territories. The objective is greater restriction of broader migratory movements as such and/or access to and enjoyment of asylum, including through the avenues of identity verification systems, issuance of identity and travel documents, visa requirements, granting of legal status, carrier sanctions, interception, access to data, management and sharing of intelligence and criminal information, expulsion, extradition, and other forms of removal. Refugees are finding it ever more difficult than before to obtain travel documents, authorization to travel, or recognition of their travel documents. On the whole, the spectre that asylum and refugee protection are facing from measures of this nature is one of incrementally diminishing humanitarian space and, particularly, of the ability to realize and enjoy basic protection and human rights.

I am of course not suggesting that all these measures and their consequences are necessarily born out of ill intent. For, sadly, the truth is that, the protections available under the system of asylum and refugee protection are attractive to those who may wish to misuse and abuse them for untoward purposes. In the particular case of international terrorism, a recent study apparently confirms that asylum claims are the pre-eminent

method through which terror suspects gain entry into host or other countries². Against such data, it may be understood how the perception of asylum and refugee protection as harbingers of inordinate danger may come to gain ground. The point, however, is that under this outlook, this system is transformed from one that should be legally valorized, upheld and owed due diligence, to one in which the objectives of control, restriction and suppression which underlie and drive counter terrorism measures are considered to be proper and applicable. Refugees thus come to face a terrible situation of double jeopardy: unable to find safety at home, they also cannot find it in the countries in which they have been obliged to seek asylum.

This is a trend which it is imperative for all human rights players to help attenuate and, even more importantly, reverse. I wish to propose that the necessary actions consist in four main clusters of initiative: The first is effectively a political effort, the second a reaffirmation effort, the third an implementation and due diligence effort, and the fourth a framework which fosters and enhances synergy and international cooperation and solidarity.

In regard to the political effort, I am referring to the urgency to stem the tendency to stereotype, stigmatize, vilify and equalize refugees as one and the same thing as terrorism. That one or even more perpetrators of terror may have, as the Kenyan Police Commissioner put it yesterday, masqueraded as refugees or asylum-seekers, does not mean, less so justify, that the millions of refugees and asylum-seekers who are routinely compliant should become aggregated and tarnished as themselves terrorists. Business, student, tourist, immigrant and family reunification visas have similarly been abused and misused, but this has not led, nor should it justify, the labeling of these categories as vehicles of global terrorism. I fully acknowledge that under charged circumstances, it is easier said than done to maintain composure and logic where the tendency to ascribe an alien source of danger is such a strong national emotion. This is why, in referring to this as a political task, I am particularly pointing to the responsibility that rests in the political leadership at moments like these to champion and steward a no doubt equally difficult, but nevertheless crucial, effort.

Turning now to reaffirmation, I am referring to the necessity that the asylum and refugee protection regime should not become deprioritized as a secondary or even only tertiary value in the fight against terrorism. In fact, General Assembly and Security Council Resolutions which have consistently underlined that counter-terrorism measures should not be inconsistent with international human rights, humanitarian and refugee law, have thereby set the latter as the compliance standards for those measures. In respect of refugee law, I offer that this standard means, first, that no such measures should gainsay or disrupt the most cardinal of the principles of the asylum and refugee protection system which I shall touch upon shortly in talking about the imperative of implementation, and, particularly to deepen and effectuate due diligence.

² Robert S Leiken and Steven Brooke, "The Quantitative Analysis of Terrorism and Immigration: An Initial Exploration", Vol 18, **Terrorism and Political Violence**, 503-521 (2006)

There are two trajectories to this latter imperative. For the first of them, I return to the mantra I have already referred to which requires that counter-terrorism measures themselves should be implemented in a manner that is balanced and consistent with the rule of law and international and refugee, human rights and humanitarian law. Over the past two days, many a speaker at this meeting has recalled and reiterated this threshold consideration, but I would like to talk a little bit more about what it means in respect to refugee law. Crucially, the most cardinal principles of the asylum system should be respected, starting with the admission of asylum-seekers to the territory in which they seek asylum and permitting them access to due procedural and substantive rights in the determination and disposal of their claims for refugee status. Secondly, refugees and asylum-seekers should not be approached with the presumption of guilt or as potential terrorists, an approach which thus enables them to be dealt with principally in line with penal enforcement rather than protection. This means that, in particular, administrative, non-penal and non-justiciable detention should not be the stock recourse through which new refugees and asylum-seekers are dealt with as a matter of finality.

In the particular case of refugee mobility, which is a quintessential element in seeking and later being able to instrumentalize asylum and protection, it should not be equated to or dealt with in the same terms as terrorist mobility, which is travel for or to escape from, capital mischief and thus merits to be dealt with in terms of repression and penal enforcement.

Finally, the range of measures, including expulsion, extradition, and other forms of removal or return which collectively are putting the principle of non-refoulement under such stress should themselves be fundamentally conditioned by the requirement of judicial governance upon which they are founded in international refugee law.

The second trajectory of effectuation relates to the legal, policy and operational instruments already available within the refugee regime itself and which, when properly applied, can yield strong dividends for national safety and security, including in the context of counter terrorism. Here, I would like to refer particularly to three of these instruments, namely, one, refugee status determination; two, the principle of exclusion from refugee status; and, three, a comprehensive system of refugee management. Duly implemented, all three would ensure that persons undeserving of international protection, including those with regard to whom there are serious reasons to believe they have committed serious crimes, or who seek to abuse and misuse the asylum system for the same reasons, are not brought under the protections available under the system.

I make this point with due awareness of the concrete challenges for which solutions need to be found. A key one, highlighted already in this meeting thus far, relates to the availability and sharing of information which would genuinely underpin refugee status determination, particularly in those cases involving persons seeking to take advantage of refugee status for pernicious purposes. Humanitarian agencies such as UNHCR have real limitations in eliciting the kind of sensitive intelligence information which would most meaningfully underpin exclusion decisions, for instance in the case of terror operators. I have thus found the discussions at this meeting relating to the Al-Qaida/Taliban sanctions

regime pursuant to Resolution 1267 quite interesting, and possibly potentially instructive as a solution. Clearly, the repository of information, over and beyond the lists that are made available publicly, under this regime would be extremely pertinent in either general or, particularly, individual cases. Is there scope therefore to consider how such information might be sharable in respect of complex decisions of exclusion from refugee status? Away from the 1267 framework, could ways be found by which either national, international, regional or sub-regional intelligence establishments could provide similar information which they evidently have in much greater volume and detail than UNHCR?

Before turning to conclude on the question of synergy and international collaboration, let me say a brief word about the comprehensive refugee management to which I have already alluded. I wish, in particular, to concentrate on the situation, which is not untypical in many countries in which UNHCR operates. Beyond border control measures, the management of asylum and refugee affairs entails a much vaster array of policy, legal, institutional and operational structures which, in effect, should accompany the full cycle of the refugee experience. Critical among these are refugee status determination, registration, documentation, and, perhaps most important of all in the context of the subject of this meeting, a records and data system. Sadly, in many countries, these critical apparatuses are not always in place. That there will be no national policy or legislative framework is also not unusual. What is more, it is UNHCR which is often obliged to assume responsibility for these what are in effect key features of State responsibility. Humanitarian mandates, such as UNHCR, can only go so far in the governance of what often are critical questions of rights, law, order and enforcement in those cases in which it is claimed that refugees or asylum-seekers in or transiting a country have become involved in terrorist activities. The capacitation of States, in policy, legal, institutional, knowledge and staff terms is thus also a crucial requirement in the meeting point between asylum and refugee protection on one hand and counter-terrorism on the other.

Let me turn, finally, to the imperative to exploit the economies of synergy, collaboration and solidarity. Following September 11, UNHCR, as other agencies, effected the policy and operational adjustments in its work and instruments that this event and its aftermath necessitated. In terms however of institutional collaboration with other players, it is only principally as the Organization has followed, and increasingly collaborated in, the work of the Counter Terrorism Committee that it has come to appreciate the opportunities and economies of scale that lie to be taken advantage of in this domain through pushing forward even more strongly with international collaboration, solidarity and partnership on this question. This meeting, bringing together even more players, is another vital reflection of the reinforcing value of such of such partnership for the work of UNHCR, particularly as far as sister or kindred organizations such as UNODC, ICAO, IMO and WCO are concerned. And, of course there are even more international, regional and sub-regional organizations in this theatre. Yet, there is at this stage no comprehensive forum on a standing basis that brings all these players together, and in which an integrated, coherent approach or work plan, exchange of information or reinforcing linkages can be engineered on a systematic and predictable basis. I can therefore conclude appropriately on this issue, namely to reiterate UNHCR's readiness to continue working with States of course in discharging their refugee obligations duly and properly in a context in which

they must also respond to counter-terrorism imperatives, and with all other players in a way that will foster synergy, comparative advantages and solidarity in a manner appropriate to UNHCR's mandate, objectives and international reputation and image.

I thank you all very much for listening to me.