

Statement by

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“The Work of the Refugee Protection Division in the International Context”

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Mr. Chairman, Ladies and Gentlemen

I am grateful for the invitation to address this National Training Seminar of the Refugee Protection Division of the IRB. I am particularly grateful for the opportunity to address you here in Canada, a country with a long and proud tradition of offering asylum and indeed permanent settlement to refugees. Canada also provides both political and financial support to UNHCR, including our protection activities. For this we are very grateful.

I have been asked to talk about the international context within which you do your work, and I am happy to do that. My address will deal with three themes of relevance to the international context: the asylum-migration challenge; the role of national asylum procedures and the judiciary in advancing international protection; and UNHCR's own experience in refugee status determination. I will include in this presentation a few thoughts on the Canadian refugee protection system.

The Setting

The global problem of displacement is vast in terms of its size and human impact. UNHCR's year end statistics for 2006 record 32.9 million persons as being of concern to the office. This figure includes refugees, asylum-seekers, returnees, stateless people and internally displaced persons. The refugee total rose for the first time since 2002 to a total of almost 10 million persons, with women and children forming the significant majority and major host countries remaining predominantly in the developing world. The rise was due primarily to the situation in Iraq with some 1.5 million Iraqis having sought refuge in other countries, particularly Syria and Jordan. More than 5 million refugees have been in exile for longer than 5 years, and a considerable number of these persons for decades. The number of internally displaced persons of concern to UNHCR, at almost 13 million (including in Uganda, Democratic Republic of Congo, Liberia and Somalia), is also high, but indeed misleading in that it represents about half of the estimated 24.5 million displaced inside their own countries. And that figure is on the increase.

While numbers remain deeply disturbing, equally of concern is the fact that asylum space has noticeably shrunk over recent years. This has made preserving access to, and the quality of, asylum quite a challenge. In the developing world the contours of

the problem are very much shaped by the insecurity prevalent in many refugee hosting areas, the lack of freedom of movement, or of self sufficiency possibilities, in closed camp environments, and the precariousness of unregularised stay for urban refugees, who often live in marginalised communities around big towns. Asylum fatigue is a result of perceived imbalances in burden sharing, the destructive effect of protracted stay on the environment and community harmony, and security concerns flowing from the presence of combatants and militant supporters of conflicts or ideological causes just across the border.

The viability of the asylum institution is challenged in other countries by different sets of issues. Concerns about the costs of running asylum systems, about the precision of the definitions in the context of modern migration flows and the newer dimension of human smuggling, trafficking and terrorism, have led to a major re-shaping of asylum systems in countries in the North, with a long tradition of active political support for refugee protection. This has certainly contributed to the falling numbers we are witnessing. Overall the figures for arrivals of asylum-seekers and refugees coming irregularly to countries in the north are at their lowest for a decade.

In 2006, the number of new and appeal applications globally fell 11% from 2005 to about 500,000. In the industrialized countries, most applications were in the U.S.A, France, the U.K., Sweden and then Canada. The top countries of origin were Somalia, Iraq, Zimbabwe, Eritrea, China and Rwanda.

This fall in numbers in global refugee applications over the past years is partly explained by changes in conditions in countries which have produced a major portion of the refugee arrivals, such as Afghanistan. Certainly, however, the more restrictive asylum policies now in place in many receiving countries have played their part as well. These policies have included heavier and indiscriminately applied border controls, additional migration restrictions, sub-standard asylum conditions for those who achieved entry, contestable interpretations of the refugee definition and substitution of discretionary forms of protection for protection based on universal principles. The numbers also mask the changing face of irregular migratory movements, with not only migrants but also refugees choosing channels other than the asylum channel to seek entry and protection. Asylum seekers come well informed. They are certainly aware of a certain disinclination to be flexible in applying the refugee concept, as asylum decisions in refugee status bodies and the courts attest. I will shortly return to this issue.

The Asylum/Migration nexus

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

As to the base, if we look at the month of August 2006 alone, Spain's Canary Islands registered some 6,000 irregular arrivals, which boosted the total of such arrivals since the beginning of the year to 20,000 persons. It is sobering to compare this to arrivals in 2005, when the total for the entire 12 month period was only 4,700. These movements are very mixed. Most who come are not refugees – or even asylum seekers. However among the groups are people with real and compelling protection concerns. In 2006, the number of sea arrivals to Italy totalled some 14,500 people, of which well over 12,000 landed on the tiny island of Lampedusa. And these figures for the European rim multiply themselves many times when one takes into account the huge numbers of people arriving in a similar manner to Yemen, or Libya, or those passing through southern Africa, across the Indian sub-continent, through South East Asia or the Balkans.

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

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

Irregular migration is a global phenomenon. It is neither confined to particular regions nor uniform in its presentation. Some five years ago, our Executive Committee encouraged UNHCR, through the *Agenda for Protection*, to promote better understanding and management of the interface between asylum and migration “so that people in need of protection find it, people who wish to migrate have options

other than through resort to the asylum channel and unscrupulous smugglers cannot benefit through wrongful manipulation of available entry possibilities.”

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

Mr Chairman,

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

Role of refugee status determination procedures and the judiciary

Here, the role of effective refugee status determination procedures and the judiciary can be key.

Fair and efficient procedures for the determination of refugee status are, in our understanding, essential for a full and inclusive application of the 1951 Convention. UNHCR encourages countries to sign the Convention and to set up such procedures, in order to identify quickly and accurately, those who need international protection and those who do not. In our experience, the core elements of an effective system for determining refugee status are (i) a single, specialized first instance body with qualified decision-makers, trained and supported with country of origin information;

(ii) adequate resources to ensure efficiency, to identify those in need of protection quickly and to curb abuse; (iii) an appeal to an authority different from and independent of that making the initial decision; and (iv) a single process to deal with both refugee status and complementary forms of protection.

On numerous visits to Canada, I have been able to witness for myself, of course, that many of these hallmarks are present in the system here. The IRB is a specialized tribunal with jurisdiction to determine refugee status and you have excellent country information, training and a cadre of qualified Members. Moreover, the IRB is an independent body. In our experience, bodies lacking this independence are sometimes subjected to the introduction of political or other considerations in their decision-making. The independent nature of the IRB is a key element in quality decision-making in Canada. Canada has also consolidated decision-making on refugee and complementary grounds of protection, which is very positive.

UNHCR has concerns with the process related to the lack of an appeal on the merits and the growing backlog. Most national procedures for determining refugee status include an appeal or review of the first instance decision, on the basis of fact and law. Some have judicial review on questions of law thereafter. UNHCR's experience leads us to recommend that the appeal or review of the initial RSD decision be made by a specialized administrative tribunal. Decisions of such tribunals not only help to ensure fairness in the individual case but also provide formal guidance to the primary decision-making body and enhance consistency. The recent growth in the backlog of cases can affect the time asylum-seekers must wait for a decision, as well as public confidence in the system. The IRB dealt impressively with a backlog of cases just a few years ago and it is our hope that adequate resources and staffing will be provided so that this can be done again, and that further backlogs will not develop.

Based on our review of asylum procedures world-wide over many decades, there is no doubt that the involvement of the judiciary in a national system is a positive factor. Judicial supervision is important during the process that determines whether asylum-seekers are, in fact, in need of international protection and will be permitted to remain in the asylum State. States have a flexible margin of discretion to design and implement a national procedure that is appropriate to their national context. All procedures must, however, serve the humanitarian object and purpose for which they were intended – here, the effective identification and protection of the rights of refugees. Obviously, procedures must be implemented promptly and accurately, but expediency should not trump justice. A key function of the judiciary at this point is to make sure that administrative action satisfies basic principles of fairness and due process.

The judiciary can also ensure that the international refugee definition is applied with the proper flexibility, in an objective manner uninfluenced by considerations which have nothing intrinsically to do with the refugee concept. If this sounds, by the way, self evident, it is not always the case in practice. There are regrettably notable instances of refugee status being denied, or a lesser status conferred, for reasons of public policy or foreign policy concerns.

Outside the realm of the interpretation of the definition, the judiciary may also deal with refugees in terms of such basic rights as housing, education, medical support,

family unity, work and social security, or indeed in deportation hearings. In all these contacts with the host state legal system, understanding from the judiciary for the special vulnerability of refugees and their cultural or linguistic differences can add real meaning to refugee protection.

This being said, I would reiterate UNHCR's long standing position that protection of refugees through resort to the judicial system serve as an adjunct to, not a substitute for, a credible national asylum procedure. There are several reasons for this. In our experience, the systems which have worked the best are those where the prime responsibility for refugee status determination falls on a specialised tribunal, with the role of the Courts being to review issues of consistency and general compliance. Refugee law is not an exact science. The definition in the 1951 Convention was intended to apply to circumstances generating refugees which are often chaotic, or at least not always clear on their face, and where application of the benefit of the doubt is a fairer way to adjudicate uncertainties than resort to the strict rules of evidence. To subject international law to minute legal dissection may well serve to eviscerate the spirit and ethical values of refugee protection. A "purposive" approach, rather than a strict constructionist approach, to interpreting international law is required to help to ensure that the focus is kept on the victim and the palliative purpose of protection.

Investment in an effective national procedure for determining refugee status – in solid training of decision makers, informed interpretation and application of the refugee definition, in interview practices, in the use of interpreters, and in the country of origin information, to name a few, is an investment in more timely protection, earlier solutions, and the overall credibility of the system in the public mind.

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

UNHCR's interest in the structure and processes of national legal systems flows from the functions with which we have been vested by States. UNHCR was established as of January 1, 1951 by the General Assembly of the United Nations. According to its Statute, UNHCR has two principal functions – to provide international protection to refugees within its competence, under the auspices of the United Nations and to seek durable solutions for them, in cooperation with governments. The Statute defines who is a refugee and how UNHCR might provide for their protection. This Statute has a universal nature, meaning it applies in all Member States of the United Nations, including those which are not party to any of the international refugee instruments.

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

"1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations

which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.” (underlining added)

Thus the Convention establishes a formal link between the international authority responsible for the protection of refugees and the Convention defining their status and rights. The Contracting States recognize the protection function entrusted to UNHCR and undertake to facilitate the performance of this function. Many signatory States have implemented their obligation under Article 35 by granting UNHCR a role in their national procedures. In Canada, commitment to co-operation with UNHCR is incorporated into the Immigration and Refugee Protection Act, art. 166. Provisions regarding implementation of the Refugee Appeals Division also engage UNHCR, should the RAD be implemented.

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

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

We have recently supplemented the Handbook with a series of seven Guidelines on particular issues: Religion, Membership of a Particular Social Group, Internal Flight or Relocation Alternative, Gender-related Persecution, Cessation, Exclusion and the application of the refugee criteria to victims of trafficking. These were all canvassed in the Global Consultations a couple of years ago. Each topic was examined in detail by government officials, members of the judiciary and of the legal profession, academics, UNHCR and non-governmental organizations. On some of the topics, like Membership of a Particular Social Group and IFA, there were wide divergences in national jurisprudence. Part of UNHCR’s aim was to examine these in an effort to bridge them.

In addition to this doctrinal advice, UNHCR is often involved in precedent-setting cases. UNHCR’s views are generally communicated as *amicus curiae* briefs or other submissions.

Turning to the issue of the authoritative nature of our advice, it may not be widely known but UNHCR itself is actively engaged in interpreting and applying the refugee definition in individual cases. While States have primary responsibility to determine the status of individuals arriving on their territory, UNHCR can itself undertake refugee status determination (RSD) under its own mandate. UNHCR normally does not do RSD in signatory States, but it certainly can, applying virtually the same

refugee definition as States. As the Statute makes protection a mandatory function for the Office, it can undertake RSD at the request of States, or on its own initiative, as may be required for protection reasons.

UNHCR currently conducts RSD in some 80 countries and has been compelled to commit increasing resources to carrying out RSD under its mandate in recent years. Between 2003 and 2006, the number of refugee applications world-wide decreased by 38% but during the same period, the number of applications submitted to UNHCR increased by 48%. Last year UNHCR received applications from some 91,000 persons. In 2006, UNHCR received 15% of all asylum applications globally and accounted for some 11% of the total global number of decided asylum claims. We would prefer that States put in place functioning national asylum procedures. We should not, and indeed satisfactorily cannot, replace such State structures. When we do so it is by default, in the absence of a State procedure.

One result of this longstanding activity is that UNHCR has accumulated considerable jurisprudential experience in the implementation of the 1951 Convention. This is, not least, the underpinning for the authoritative character of UNHCR's opinions which derive not only from the fact of our formal supervisory responsibility, but also from our widespread practical experience in applying its terms. The UNHCR Handbook has over time gained explicit recognition by different Courts and Tribunals globally spread as an authoritative text on the interpretation of the Convention Refugee definition. The Guidelines are with increasing regularity cited in judgments, for example in Australia, New Zealand, the U.K, and the U.S.A. For example, two of UNHCR's guidelines – on particular social group and on gender related persecution – have been extensively resorted to by the House of Lords in its October 2006 decision in the case of *Fornah and K*. UNHCR acted as intervener in this case.

Conclusion

Mr. Chairman, just a few words in conclusion.

Refugee dramas play out with sad regularity on all continents, the human consequence of war, violence, persecution and fear. Protection of the forcibly displaced is a common trust which is ever more relevant in today's world. The Members gathered here, and the Immigration and Refugee Board as an institution, play an invaluable role in ensuring that those who require protection here in Canada receive it. On behalf of the High Commissioner, I would like to convey to you how much UNHCR greatly appreciates the work you do.

As some of you may know, UNHCR and the Board have signed a Memorandum of Understanding under which IRB staff have taken missions to UNHCR Offices in a number of countries, sharing their expertise with our staff, who are often new to refugee status determination. Our Offices have found this to be extremely helpful and I would like to thank the Board for this "in-kind" contribution to our work, and I hope that we can continue this in the future.

On a personal note, I would also like you to know that the Canadian system is one of the few UNHCR holds out as a model for other States to examine when they are

establishing procedures. Canada is also viewed world wide as a leader in the area of refugee status adjudication. Canada has earned this place not only because of the high quality decision-making and guidance it has produced, but also, and perhaps more importantly, because of the motivation or spirit behind the Canadian process – the desire to protect those who need it. If I have any message to you at all, it is to maintain your approach, and indeed, through training seminars such as this, to strengthen it even further.

Thank you.