

**Statement of Erika Feller, Assistant High Commissioner – Protection,
UNHCR**

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SEA RESCUES – A DUTY AND A MATTER OF CONSCIENCE!

Rescue at sea is a time-honoured tradition, a fundamental matter of conscience and an international legal responsibility. It is also under serious strain due to factors as diverse as the global economic crisis, the resurgence of piracy, a growth in trans-national crimes like people-smuggling, as well as the not-unrelated re-appearance of xenophobia together with a hardening attitude on the part of governments to irregular immigration of all sorts. The imperative of protecting the tradition of rescue at sea against further erosion in the face of, or in spite of, such a multiplicity of concerns is the subject of my presentation.

I rather hesitate to broach the topic after reading the front page piece this morning in the IHT on empty ships piling up in Singapore waiting for cargo. I understand that the global economic crisis has hit the shipping industry hard. With the working place on a vessel allegedly the highest investment in the world after oil and gas pipelines, with shipping rates and markets seriously down, and with many shippers unable to rely on guarantees that even daily running costs will be met, I imagine a presentation on sea rescues as a matter of conscience and a duty could confront quite a mix of skepticism and disinterest in this audience. I am nevertheless very grateful to the organisers for having been given the opportunity to explain why UNHCR is directly interested in this issue; how we understand the responsibilities at play; what we would hope to see from you; and what you can expect from us. On these issues, I could provide four very succinct responses. Our interest is to see refugees who have had to flee by small boats and are in peril on the sea not passed by bigger ships, but actually rescued. In our understanding this is a humanitarian imperative, but also an international legal responsibility. We hope you would agree, and translate this agreement into clear instructions to ships masters to rescue. From us, you can expect assistance of various sorts to make this as painless as possible.

Let me now elaborate, first through some excerpts from another recent news report.

I represent the United Nations Refugee Agency. We are possibly a modest enterprise when compared to the goods and chattels you own and move. We run on a budget which averages out yearly somewhat above \$1 billion and work with a staff of some 6500 spread throughout offices in 116 countries. There is, though, a very sizeable number of persons we are charged to assist. At the current time UNHCR is working on behalf of 31 million people globally. Shipping companies do from time to time help us in this effort, through cash donations or in-kind donations of free shipments of emergency relief supplies. Here in Japan, Mitsui OSK Lines has regularly helped us.

Your image of refugees is most likely gleaned from the news reports and documentaries which tend to present them as enduring spartan conditions in refugee camps in Africa and Asia. The fact is, however, that many millions, and an increasing number, are part of the modern phenomenon of urbanisation, living in shanty settlements in or around big towns. They have arrived there legally or irregularly having often crossed several borders - land, sea or air. Many tragically do not make it, particularly those who take the sea route.

Globalisation has greatly and positively facilitated the legal movement of goods and money around the world. The same cannot be said for movement of people. While there are now many more international transport possibilities, these have been accompanied by a tightening of the rules when it comes to entry into third countries, coupled with a marked growth in the obstacles created to obstruct the progress of the would-be entrants. While this might be understandable in itself, it means for refugees, who have to flee to protect the physical integrity of themselves and their families from persecution, war or gross discrimination, it is becoming harder and harder to find the necessary asylum on a legal basis. The attitude they confront, which is increasingly narrowing asylum space, is "ok, we sympathise with your plight, but resolve it please in some other country". One clear if untoward result of this has been, aside from refoulement or return of refugees back to the danger they have tried to escape, that achieving illegal entry has become big business for people smugglers. This is particularly the case when it comes to sea arrivals.

Boat people are not a new phenomenon. One only needs to cast one's mind back to the '80's and early 90's which witnessed one of the largest scale outflow of people by sea, from the countries in Indo-China. Today the press on any one day is likely to be reporting, in main or

side articles depending on the loss of life, the latest arrival of boats and their human cargo to the shores of Yemen, Mauritania or Malta, the islands off Australia, the countries in the South China Sea, or the European islands of Lampedusa in Italy, the Canaries of Spain, or the Greek Islands like Mytilene off the Turkish coast. The problem is that the media visibility of sea arrivals conjures up images out of proportion to their actual numbers in global movements. Even leaving aside mass influxes of refugees, boat arrivals are actually but a small percentage of the overall total of asylum seekers arriving in destination countries. To take a single statistic, in Australia in 2008, of the over 4500 asylum claims lodged, only 179 were from persons coming by boat. In Italy the figures are larger but still telling: out of a total of 31,000 asylum seekers some 12,000 arrived by boat.

This being said, no matter how modest the numbers, the perils of these sea journeys are very alarming. The stories that accompany them are various, but the common elements include that the departure vessels are usually small, not so seaworthy boats able to carry considerably fewer numbers than actually embark on them. The very large majority of boats used are less than 15 metres in length, and most of these are not over 8 metres, according to Italian coastguard statistics. When you remember that the number of persons these boats carry is, for the small ones, up to 50 and for the bigger ones between 100 and 150 people, even beyond 200 people, at any one time, then it is not difficult to understand the extreme peril these people are in. Regularly too the persons on board cannot swim, are often seriously abused by the smugglers who might accompany them, and the boats are not properly provisioned for the unpredictability of sea conditions. In 2009 alone to date, 131 people have died and at least 66 are listed as missing as a result of attempting to cross the Gulf of Aden from the Horn of Africa. In the week of 1 April more than 300 persons trying to reach Europe were believed to have drowned in waters off Libya. According to Libyan officials, four overcrowded boats departed from the coast near Tripoli over a weekend, bound for Italy. They are believed to have run into fierce sandstorms and capsized. The persons on board were mainly from Eritrea and Somalia, Egypt and Tunisia. On Thursday 16 April, a boat which had departed from Indonesia bound for Australia and carrying 49 people, mainly Afghans but also some Sri Lankans, suffered an explosion in the engine room and sank, with many injuries and some deaths as a result.

In another part of the world, on the same day, 16 April, the Malta Rescue Co-ordination Centre was directing the Panamanian flagged Turkish cargo ship “Pinar E” that was heading

for Tunisia, to provided assistance to approx 70 persons adrift on a small boat 45 miles off Lampedusa in the SAR Maltese region. The Pinar E reported that another wooden boat with approximately 75 persons on board was heading in its direction as well. The affected groups included some 40 minors under the age of 18, as well as pregnant women and one corpse. They came from a variety of countries, mainly Nigeria, but including also Somalis. The Pinar took both boatloads on board, somewhat reminiscent of the now famous Tampa affair, but did not get permission to land on Lampedusa where it had been instructed to head. Disembarkation was finally achieved on the 19th of April, but not before conditions on board had become very problematic, healthwise, necessitating airlifts of supplies and medical personnel by Italian navy helicopters. Throughout, UNHCR was in constant contact with the Tanker's captain and with the Italian authorities to urge disembarkation.

One could multiply the examples. They are a regular occurrence. These three are chosen because they starkly illustrate the challenges. Loss of life is a real and constant threat. The boats are inadequate, the smugglers are unscrupulous, and the individuals are ill-equipped for such a journey. Unfortunately these facts are not a sufficient disincentive to departure; the push factors are stronger than the fears of the journey, meaning that the journeys will be attempted regardless. The push factors are more often than not a complicated mix of refugee and migrant concerns, including war, human rights violations and unsustainable lives at home, which blend with pull factors including reunification with families and the lure of better economic and education possibilities abroad. Quite often the ability and inclination of the coastal states from which boats depart to control these departures is very limited, given long coastlines and the amounts of money changing hands, encouraging local authorities to turn a blind eye. There may also be a certain sympathy for those seeking a more sustainable life for themselves and their families, or even a sense of "it's not our problem as the people do not want to stay". Either way, there will always be those who will help the migrants and refugees on their way for different reasons but particularly in light of the lucrative financial incentives.

Their rescue is imperative, but far from uncomplicated in itself. The rescuer is most often an official vessel of a coastal state, but may well be also a private commercial vessel, as in the Pinar case. It may be one of your own vessels. It is of course abundantly clear that tankers are not provisioned or expertised as rescue ships. The costs of playing that role are many. Delays mean lost revenue. Passengers on board, even for a short period, can be a health and security hazard. Disembarkation of irregular entrants brings ships into a legal interaction with port

authorities. The explosion of pirate attacks and the concerns this must give rise to when considering who and how to rescue is a whole other set of issues. These inevitably all weigh heavily in decisions by ships masters about how to respond to boat people situations.

The concerns of the UN Refugee Agency are inevitably very different. While not all of these persons are refugees according to the international refugee definition, quite a number are likely to be. Where they come from refugee producing countries like Iraq, Somalia, Afghanistan, Sri Lanka or Eritrea – as many do - the likelihood is high. Again to give you an illustrative statistic, in Australia, some 40% of persons arriving by air or land are successful in their refugee claims, while the figure rises dramatically to 90% for boat arrivals. As refugees, they have a right to seek and enjoy asylum and there is no requirement that they try to exercise this only in a legal manner, with visas and regular tickets. This is anyway extremely difficult, when not impossible, for people fleeing for their lives. 145 States have signed on to the international Refugee Convention, the 1951 Convention, which prevents them from denying entry if this exposes the asylum seekers to risk to life or persecution. The Convention contains a regime of rights and responsibilities which adherents are legally bound to respect for refugees. In addition, basic humanitarianism and the broader the human rights framework which most states today have also adhered to, demands that for all persons, refugees or not, the right to life be respected and that no-one is treated in a way that is cruel, inhuman or degrading. In short, when it comes to boat arrivals states are obligated under international law, and quite probably under their own laws as well, to respond in a principled way to refugees and others seeking their protection and assistance.

Then, there is another regime of rights and responsibilities which is directly relevant. The rescue of persons in distress at sea is an obligation under international law, quite aside from being a humanitarian necessity, regardless of who the people are, or their reasons for moving. Hence we chose, in the magazine we circulated at this conference, to caption the title page, “Refugees or Migrants – when it matters”. Clearly it doesn’t matter at the rescue stage. Our understanding is that the integrity of the global search and rescue regime, as governed by the 1974 International Convention for the Safety of Life at Sea and the 1979 International Convention on Maritime Search and Rescue, must be scrupulously protected, as a responsibility of the international community as a whole. Obviously ships masters have a first duty to assist, triggered at the outset of the rescue and ending when passengers have been disembarked at a place of safety. How this duty is exercised will be influenced by factors such

as the safety and well-being of the ship and its crew and the appropriateness of the place of landing, measured against factors such as safety, closeness and the ship's pre-rescue schedule. Here the professional judgement of the ships masters is key. But it is also the responsibility of States, under international law and as an imperative for the preservation of the time-honoured practice of rescue, to facilitate the rescue in every possible way, including not least through an approach which minimizes the losses and inconvenience to private actors in fulfilling their maritime obligations. Clearly this calls for expedited disembarkation, in the first instance.

UNHCR is not a maritime law entity. We are a refugee protection agency. However in fulfilment of our protection responsibilities we have found it necessary both to engage with ships masters and coastal and flag states in the maritime law context and, more generally, to advocate for approaches to sea rescues which respect not only refugee law but the fundamentals of maritime law, so that refugees are not doubly jeopardised by being passed by on the high seas. We have hence advocated strongly with our State interlocutors for acceptance and respect of baseline understandings here: that ships masters who undertake rescue operations should not be seen as part of the problem but that their actions in saving the lives of persons in distress should be recognised and supported by states; that a non-state vessel is not an appropriate place to screen and categorize those rescued, or devise solution for them, nor should such a vessel be used as a floating detention centre; that the ships master has the right to expect the assistance of coastal states with facilitation of disembarkation and completion of the rescue; that states should not impose a requirement that shipping companies or their insurers cover the repatriation costs of people rescued at sea as a precondition for the disembarkation; that disembarkation procedures should not be governed by immigration control objectives and that the responsibility for finding solution to enable timely disembarkation in a humane manner rests exclusively with States and not with private actors.

If I have covered the sorts of advocacy goals we pursue in some detail, it is for the purpose of showing you, I hope, that we view much of the process of rescue in very similar terms to yourselves, and that we are your ally in trying to reinforce acceptance of these basic understandings. (We have organised over recent years a number of international meetings to discuss and underpin intergovernmental support for them. We have broadly distributed the results of these meetings including to all member States of the United Nations at conferences of Law of the Sea in New York, as well as to our own intergovernmental Executive Committee, numbering 75 states members. We work closely with the IMO to promote

evolution of Sea Law instruments, or their interpretation, which supports such propositions I have just outlined. We do awareness-raising activities, including with representatives of the shipping industry, in an effort, from another perspective, to encourage greater understanding of the plight of refugees and the reasons for encountering them on the seas, as well as the legal framework which enshrines their rights and states obligations.) And, our activities are not confined to advocacy. Circulated to you at this Conference is a Rescue at Sea Leaflet which we have produced together with the IMO. It is now in its second edition, in 4 languages. We intend to supplement this with a more simplified hand-out containing basic facts and explaining how we interact over individual incidents involving rescues of persons who may be of our concern.

As you will note from the Pinar case, and many that have proceeded it, we have a role in individual situations in pressuring states on disembarkation and in assisting them, following disembarkation, to find solutions. We may become one of the intermediaries between the shipmaster and coastal states in negotiations on disembarkation. We are also elaborating arrangements with individual states on areas for our direct cooperation so as to encourage disembarkation, making it as painless as possible. In particular countries, such as Yemen, Italy, or Greece, together with the authorities we run specific programs of assistance and protection for the refugee arrivals. More generally, we are part of a consultative arrangement involving other relevant intergovernmental organisations in New York, Vienna, Geneva and London – such as the IMO, the Office for Drugs and Crime Control, the Secretariat with Law of the Sea Responsibilities working to the General Assembly in New York etc- to improve UN collaboration on rescue at sea issues. It might well be that this arrangement could be broadened to serve as a tool for better management of actual situations where the UN might have to play a role.

In conclusion, ships masters and the companies they work for are not alone in doing the right thing. Rescue at sea has centuries of tradition and law behind it. Distinctions between refugees or migrant, visa-carrying or illegal entrants do not matter at the point of rescue. The responsibility not to pass people by is however holistic, implicating not only the ships masters, but also the companies for which they work, the flag and coastal states who are party principals in the rescue, and the international community as a whole, including the United Nations agencies such as our own. Only if it is approached as a shared, or collective, responsibility dependent upon all the concerned actors playing committedly their proper role,

will it survive not only as a principle, but most important as an actual practice. We can encourage, even facilitate, this responsibility-sharing. But we need you – or rather the refugees need you – to commit wide-heartedly to it as well.