



UNHCR presentation to the Joint Seminar of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and Committee on Article 36 (CATS) organized by the Slovenian EU Presidency, Ljubljana, 17 – 18 January 2008

“Terrorism as a Global Phenomenon”

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Mr. Chairman, Ladies and Gentlemen,

UNHCR is not an agency with a mandate in the field of counter-terrorism. It has been mandated by the United Nations General Assembly and its Statute to provide international protection to refugees and to work with States to seek permanent solutions for the problem of refugees. As part of its functions, UNHCR seeks primarily to ensure that asylum-seekers, refugees and other persons of concern to the Office are treated in accordance with internationally recognized legal standards. Refugee protection and counter-terrorism do, however, connect sometimes in critical ways.

Let me therefore thank the Slovenian Presidency for this opportunity for UNHCR to highlight today the relationship between these two fields and some of our concerns.

UNHCR fully supports legitimate efforts by Governments to combat and prevent terrorism. It is recognized that States are facing increasing challenges in preserving the rights and values of democratic societies (of which the principle of asylum is a cornerstone), while taking measures to protect their citizens and institutions.

As part of its mandate, UNHCR assists and provides guidance to States in fulfilling their obligations to refugees. These obligations also include States' responsibility to ensure that the institution of asylum and core principles of refugee protection are not eroded, undermined or ignored as a consequence of implementation of counter-terrorism measures, and that those who are in need of international protection are not denied such protection. One of our main concerns today is that an automatic and unjustified link is sometimes made, in the media, public perceptions and policy discussions, between terrorism on the one hand, and asylum-seekers and refugees on the other. UNHCR has repeatedly stated that refugees and asylum-

seekers are often themselves fleeing from persecution, violence, forced displacement and even terrorist acts, rather than being the perpetrators of terror.

There is a clear perception in some quarters that asylum is misused to hide or to provide safe haven for terrorists. Such perceptions are statistically and analytically unfounded, and must change. Terrorist attacks in Europe and elsewhere over the last ten years have shown that terrorists do not need to use the asylum channel to commit their criminal acts.

UNHCR is concerned, based on its observations and experience, that justifiable efforts to fight terrorism have also had critical adverse impacts on the international protection of refugees. Asylum-seekers and refugees have been vilified, stigmatized or labeled as terrorists. As a consequence, refugees from certain religions, cultures, regions or political backgrounds, including those who are opposing oppressive regimes, are implicitly or sometimes automatically viewed as potential merchants of death, rather than seekers of the protection and safety they have lost at home.

UNHCR agrees, as stated in the Presidency's background paper for today's session, that counter-terrorism measures need to be implemented in a manner that is compliant with the rule of law and standards of international human rights and refugee law. This is consistent with the views of States as expressed in key Resolutions of the UN General Assembly and the UN Security Council since September 11, 2001, which expressly call upon States to comply with their refugee obligations when undertaking counter-terrorism measures.¹ Security and human rights are not mutually exclusive; indeed, when effectively applied, the principles underpinning the institution of asylum and refugee protection can yield important dividends for States.

UNHCR would like to stress that a fair and effectively managed system of asylum does not shield terrorists from prosecution. On the contrary, international refugee law does provide for the identification of those who have committed heinous acts or serious crimes and their exclusion from refugee protection². Although the 1951 Convention relating to the Status of Refugees (the Refugee Convention) is not an anti-terrorist instrument, it incorporates checks and balances that take full account of the security interest of States and host communities, while protecting the rights of persons who, unlike other categories of foreigners, no longer enjoy the protection of their country of origin.

¹ See, for example, Security Council Resolutions SC/RES/1269(1999) of 19 October 1999; SC/RES/1371 (2001) of 28 September 2001; SC/RES/1456 (2003) of 20 January 2003, SC/RES 1535 (2004) of 26 March 2004; and SC/RES/1624 (2005) of 14 September 2005. See also General Assembly Resolutions A/RES/49/60 of 9 December 2004; A/RES/51/210 of 17 December 1996; A/RES/60/43 of 6 January 2006; and A/RES/60/288 of 20 September 2006 on the United Nations Global Counter-Terrorism Strategy and the Plan of Action annexed thereto).

² The instruments of the refugee protection, when applied correctly, support the interests of States in areas where asylum obligations intersect with those of countering terrorism. These include the due determination of refugee status; grant of that status only upon clearly established criteria; exclusion from protected status of those who have committed egregious crimes; the cancellation of the status of those who subsequently exhibit invidious intentions or purposes; the ability of States to remove from their territories such persons, subject to due process; the proper management of borders; exchange of information with due regard to protection priorities and the rights of individuals; and capacity building.

In this respect, the Refugee Convention and the EU Qualification Directive provide a number of important legal and procedural safeguards for States' interests:

- ◆ First, they facilitate the identification and exclusion of persons where there are serious reasons for considering they have committed 'war crimes, crimes against humanity, crimes against peace, serious non-political crimes, as well as acts contrary to the purposes and principles of the United Nations'. These rules on 'exclusion', as they are known, are set out in Article 1F of the Refugee Convention, and also form the basis of similar exclusion clauses in Articles 12 and 17 of the Qualification Directive. Correctly and carefully applied, in accordance with international standards, these provisions can ensure that such persons do not abuse the institution of asylum at the expense of their host countries, or otherwise in order to avoid being held accountable for their acts. However, the effectiveness of these provisions depends on their scrupulous and limited application.
- ◆ Secondly, Article 32 of the Refugee Convention permits the expulsion of a refugee on grounds of national security or public order (albeit not to a country where the person concerned may be at risk of persecution). This provision, which is also the basis of relevant provisions in the Qualification Directive, contains specific procedural guarantees, including the right to be heard and the right to appeal, as well as the right to be allowed a reasonable time within which to seek legal admission to another country.
- ◆ Thirdly, the Refugee Convention and EU legislation also provide for limited exceptions to the key principle of *non-refoulement*. *Non-refoulement* refers to the prohibition on removal of a person to persecution. It is enshrined in Article 33(1) of the Refugee Convention, but also in the Qualification Directive and the EU Charter of Fundamental Rights, and has been endorsed many times by the European Council. Article 33(2) provides strictly-defined exceptions to this principle on national security grounds, or where the refugee has been convicted of a particularly serious crime and constitutes a danger to the community of the host country.³ The application of this provision requires an individual determination by the competent authorities of the host country that the refugee comes within the scope of Article 33(2). The decision must be reached in a procedure which ensures full respect for due process of law, and minimum procedural safeguards⁴ are required. As any other exception to human rights guarantees, it should be applied restrictively and with full respect for the principle of proportionality.

³ Article 33(2): 'The benefit [of Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.

⁴ As a minimum, the safeguards in article 32 must be respected. See "Factum of the Intervenor, UNHCR, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada, SCC No. 27790", in 19:1 International Journal of Refugee Law (2002), pp. 141-157. See also See E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of non-refoulement: Opinion", in E. Feller, V. Türk and F. Nicholson (eds.), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge University Press, Cambridge (2003), at paragraph 159(ii), 166 and 179.

It is important to note in the European context, however, that even people who may come under one of the exceptions or limitations stated above, may nevertheless be protected under the *non-refoulement* principle contained in the European Convention on Human Rights (ECHR), in other relevant human rights instruments, and which is part of customary international law. Article 3 of the ECHR forbids removal of any person to torture, inhuman or degrading treatment or punishment. This protection applies to all people, including those who may have committed crimes or be suspected of posing a threat to national security. The European Court on Human Rights has frequently reaffirmed, in judgments which are binding on all Member States, that this prohibition on removal to a risk of torture, inhuman or degrading treatment or punishment is absolute.

While acknowledging the need for legal safeguards to protect the interests of EU States, UNHCR is concerned that a number of legitimate policies, laws and practices have nevertheless been applied so broadly that they have reduced the protection space for people in need of international protection. Among UNHCR's main concerns are situations where:

- ◆ Some asylum-seekers find it difficult to gain access to territory or to asylum procedures. In this context, it is important to recall that the right to 'seek⁵ and enjoy asylum' is a fundamental principle, not only of international law⁶, but is also enshrined in the EU Charter of Fundamental Rights⁷.
- ◆ Asylum-seekers in some Member States are more frequently subject to measures of detention without minimum procedural safeguards or judicial review. UNHCR is also confronted to situations whereby refugees recognized under the 1951 Refugee Convention, when traveling outside their country of asylum holding Travel Documents issued under the terms of the Refugee Convention, are apprehended or detained, due to politically-motivated requests made by their countries of origin which are abusing of Interpol's "red notice system". Such persons are often left without access to due process of law, and may be at risk of *refoulement* or find themselves in 'limbo' if they are unable to return to their country of asylum.
- ◆ Some States have applied the aforementioned exclusion clauses of the Refugee Convention in a manner which has broadened their scope and narrowed the accompanying procedural rights. In particular, UNHCR is concerned that some States apply the exclusion clauses on collective basis, rather than based on individual assessment.⁸ The broad wording of the Qualification Directive itself has provoked questions about the risk of potential incompatibility with international law, where it

⁵ Qualification Directive, Article 14(4).

⁶ Universal Declaration of Human Rights, Article 14.

⁷ Charter, Article 18.

⁸ One example is the interpretation by one non-EU State of provisions on "material support" in national legislation. By virtue of this provision, anyone who has provided any form of assistance, however negligible or even under duress, to a group designated as "terrorist" by the relevant Government, will be denied asylum or admission to the country. For instances, the application of this provision has resulted in the denial of resettlement for UNHCR mandate refugees from Myanmar and Colombia.

purports to extend the concept of exclusion beyond the scope of the Refugee Convention.⁹

- ◆ Some States have begun to restrict the right to seek asylum, to establish low thresholds for the exception to the principle of *non-refoulement* (Article 33 (2) of the Refugee Convention) and to expand the scope of crimes deemed to be “particularly serious”¹⁰. This article is also being improperly used in the eligibility process, to exclude persons from refugee status. National and global security concerns have led to the categorization by States of offences as being linked to terrorism in broad and ambiguous terms. This has the potential to result in injustice, especially to non-citizens, including asylum-seekers and refugees. Asylum-seekers could find themselves labeled or viewed as terrorists on account of their political, ethnic or religious affiliations or ties.¹¹ UNHCR is concerned by the use made by several EU countries of the list of terrorist organizations elaborated in relation to Council Regulation (EC) No. 2580/2001 of 27 December 2001. As an example, one particular organization has been added by a Member State at the request of the country of origin. Members, as well as people with near or remote links, former sympathizers or former members of that organization, or relatives of members of this organization are denied refugee status, or are not accepted for resettlement consideration or for family reunification, in the EU, on the basis of their past or imputed link with that organization. Both the European Court of Justice¹² and a domestic court in one Member State¹³ have raised serious questions about due process considerations in the drawing-up and the use of this list.

- ◆ Another State practice that gives rise to concern is the increasing use of so-called “diplomatic assurances” in the return of some individuals. Diplomatic assurances as they have been used so far, have been fraught with risks, and they may lead to *refoulement* and create serious security problems not only for the individual concerned, but also for his/her relatives in his/her country of origin.¹⁴

⁹ See UNHCR’s Annotated Comments on the Qualification Directive, <http://www.unhcr.org/protect/PROTECTION/43661eee2.pdf>, particularly on Article 12(2), notably the extended concepts of ‘serious non-political crimes’ (Article 12(2)(b) and ‘principles and purposes of the United Nations’ (Article 12(2)(c)), contrasted with Article 1F of the 1951 Refugee Convention.

¹⁰ This is illustrated by the national legislation of one Member State, which states that a crime which carries with it a sentence of two years or more is considered “particularly serious”. It has categorized several offences, such as shoplifting and graffiti as such crimes; it includes crimes committed abroad; and it has no time limitation.

¹¹ The abovementioned legislation extends the definition of “terrorist” as anyone who has “links” with an international terrorist group. Links are defined as existing if the person supports or assists such group. The ambiguity of such term could lead to categorize asylum-seekers as terrorists on the above grounds.

¹² Judgment of the Court of First Instance of the European Communities, *Organisation des Modjahedines du peuple d’Iran v. Council of the European Union*, Case T-228/02, 12 December 2006, <http://curia.europa.eu/en/>.

¹³ Proscribed Organisations Appeal Commission (POAC), *Lord Alton of Liverpool & Others (In the Matter of The People’s Mojahadeen Organisation of Iran)*, PC/02/2006, 30 November 2007, http://www.siac.tribunals.gov.uk/poac/Documents/outcomes/PC022006_PMOI_FINAL_JUDGMENT.pdf.

¹⁴ See also ‘UNHCR Note on Diplomatic Assurances and International Refugee Protection’, August 2006, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=44dc81164>.

UNHCR would also like to underscore that asylum-seekers do not come before asylum countries and host populations only as the holder of rights. They also bear important duties towards those States and communities, most notably to comply with national laws and regulations established for the public good and public order.¹⁵ The record shows that the overwhelming majority of refugees and asylum-seekers are law-abiding members of their host communities. Those who violate the laws should indeed feel the full force of the law, as anyone else.

UNHCR urges States to place greater priority on stemming the vilification, criminalization or stereotyping of asylum-seekers and refugees. It should be acknowledged that in most cases, they are themselves escaping persecution and danger. They need and deserve the full scope of rights which international and EU law confer upon them – subject to the limits and exceptions also provided for in those laws, and the procedural safeguards which attend them.

Finally, I wish to say a word on the subject of Eurodac, which is on your agenda for discussion tomorrow. UNHCR sounds a note of caution on the proposal to extend access for law enforcement authorities to the Eurodac database which had been established as part of a framework for refugee protection. While UNHCR accepts the need for such authorities to have the tools to investigate crime, we believe that access to information that will lead to the circulation of asylum seekers' personal data must be handled with the utmost care. Any such access should be subject to rigorous safeguards, limiting its use to cases where it is necessary for a legitimate purpose, proportionate, and subject to oversight. Moreover, access to Eurodac will increase the likelihood that asylum seekers will be investigated, far beyond those odds which apply to the general population. This creates the risk of increased stigma and prejudice, and could fuel public misperceptions about links between asylum and crime. In addition, under no circumstances should data about an asylum seeker be passed, inadvertently or otherwise, to his or her country of origin. This is a step which could seriously endanger lives of refugees and their families.

To conclude, I would like to say that human rights and the rule of law, as core European values, must remain at the heart of the war on terrorism. While fully understanding and recognizing today's security imperatives, a proper balance has to be found which acknowledges and protects the rights of those who deserve international protection. Counter-terrorism measures should not undermine the core principles of the international refugee regime, including the right to seek asylum and the principle of *non-refoulement*.

UNHCR remains committed to helping States to comply with their human rights and refugee law obligations.

Thank you very much for your attention.

¹⁵ Article 2 of the 1951 Refugee Convention obliges a refugee 'to conform to the laws and regulations, as well as to measures taken for the maintenance of public order, of the country in which he or she finds him or herself'.