UNHCR
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Haut Commissariat des Nations Unies pour les réfugiés

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Keynote Address by Volker Türk, Assistant High Commissioner for Protection

Ladies and Gentlemen,

Distinguished members of the IARLJ,

I am pleased to be here with you today, as the IARLJ has long been a close partner to UNHCR and an important voice for the protection of some of the most vulnerable people in the world. You play a pivotal role in ensuring that the legal systems designed to protect them are steadfast in their compliance with the obligations and fundamental principles enshrined in international and regional instruments for refugee protection. It is with this in mind that I would like to share with you some reflections on the principles underlying the international refugee protection regime, how they have evolved to address contemporary situations of displacement, and how you, as members of the judiciary, play a crucial role in advancing them.

But first, let me provide a picture of the world of displacement today, which reveals the stark realities and considerable challenges we face in our efforts to ensure the protection of refugees. While conflict and violence are hardly new phenomena, they are now proliferating and becoming protracted. This has resulted in a breakdown in the social fabric, an erosion of systems of law and order, and ultimately the displacement of millions of people, mostly within their countries, but also across borders. More than 65.6 million people are displaced around the world, including 22.5 million refugees and 43.1 internally displaced people. Most refugees fled to countries neighbouring situations of conflict, primarily in the global south where 84 per cent of the world's refugees live. In addition, some 10 million people around the world are stateless.[1]

Such numbers are a wake-up call to the international community – a signal that something is fundamentally awry. We need to find ways to resolve conflicts peacefully and address the root causes of flight; and when flight becomes necessary for survival, we need to be better prepared and able to respond. In recognition of this imperative, the leaders of all 193 UN Member States adopted the New York Declaration last year,[2] which called for the development of a Global Compact on Refugees. We are now taking this forward in an effort to secure predictable support for those countries hosting the largest numbers.[3] Some countries have already gone further, translating words into action, and undertaking monumental efforts to welcome refugees into their communities.

Yet, at the same time, in other parts of the world, we are seeing a shirking of responsibilities and repeated efforts to contain, rather than resolve, refugee situations – efforts which are at odds with fundamental protection principles and which at times have resulted in violations of international refugee law. Deterrence measures, such as restrictive asylum policies, push-backs at borders, offshore processing arrangements, and even numerous instances of *refoulement* have unfortunately come to the fore. We have, for instance, received disturbing reports of raids, detention, extraditions, and even killings of terrified refugees by military personnel or security forces. We hear of civilians who attempt to flee situations of conflict and violence, but are unable to cross borders, and end up entrapped in life-threatening situations. We see how the grant of asylum has become politicized and misused to create tensions between States, levy populist agendas, and seek short-term political gains.

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[1] See UNHCR, *Global Trends: Forced Displacement in 2016*, 21 June 2017, available at: http://www.refworld.org/docid/594aa38e0.html.
[2] Available at: http://www.unhcr.org/57e39d987.
[3] See http://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html.

Against this backdrop, it is necessary that we recall and reclaim the essence of international protection. The right to seek and enjoy asylum has long been respected as a fundamental principle of humanity. The ancient Greeks developed the concept of *philoxenia*, which means hospitality and generosity or friendship to strangers. In the story of Odysseus, Homer captured this ethos, when Odysseus' basic needs for shelter and food were taken care of first by his hosts – and then, only then, in the safety of their extended hospitality, did they ask to hear the sorrowful story of the stranger before them. The concept of asylum cannot be easily discarded. It is enshrined in Article 14 of the Universal Declaration of Human Rights, and embodied in the 1951 Convention and 1967 Protocol and numerous regional instruments, and has been reinforced over many decades of State practice. It is a symbol of the best of the human tradition and an expression of fundamental respect for each and every human being.

Amidst the media chatter and debates of today, however, this long-held tradition often seems to get lost. We need to remember why the principle of asylum was conceived, to study how it has evolved over time, and to consider how it applies both now and in the future. In doing so, the responsibility is on us all to make the case for protection again and again. The seeds of the international refugee regime are, for instance, found in early attempts to find solutions for the 20 million Russians, Poles, Germans, Greeks, Hungarians, and Armenians displaced or subjected to population transfers during the decline of the Ottoman and the Tsarist Empires – numbers which are not so different from those we see today. The regime was first institutionalized during the inter-war period under the League of Nations High Commissioner for Refugees as the first international organization established to deal with forced displacement. This was followed by the adoption of the 1951 Convention relating to the Status of Refugees and the establishment of UNHCR following the Second World War. Since that time, the 1951 Convention has served as the primary source for guiding States in their treatment of refugees. Courts the world over have confirmed time and again that the Convention and its Protocol are living instruments that have saved millions of lives.

The 1951 Convention is as relevant today as it was at its inception. In the current climate where fearmongering, xenophobia, and deterrence are gaining traction, it is clear that the Convention is needed more than ever. Knowing this, it would be a risky undertaking to now question its relevance for contemporary refugee situations. Yet this is unfortunately what we have seen coming from some quarters of the political and academic worlds.

It is through judgments issued by decision-makers such as yourselves that we know the 1951 Convention is in actuality a resilient instrument, capable of adaptation to a changing world. Courts have used it as the basis for deciding on issues that may not have been explicitly set out when it was drafted. The 1951 Convention has been broadly understood to contain an inclusive, rather than restrictive, approach to the refugee definition, in the spirit of ensuring protection for all who need it. It has undergirded decisions on persecution related to gender, age, sexual orientation, serious public disorder, trafficking, the indiscriminate effects of violence, and the role of non-State actors such as gangs and criminal networks.

Also, the initial gap between UNHCR's mandate responsibilities and the obligations of States created space for the further development of international refugee law. As UNHCR has the legal mandate to supervise the application of the 1951 Convention, it establishes guidelines for States on international protection, based on international law, State practice, and jurisprudential developments over many years. The UNHCR Protection Manual is the repository of this protection policy and guidance.[4] UNHCR has further provided legal opinions for domestic and international courts in an effort to harmonize application of the law.

Most recently, drawing upon a comprehensive analysis of legal developments and State practice, UNHCR issued guidelines on the protection of people fleeing conflict and violence.[5] These guidelines advise States to consider individuals who fled armed conflict and other violent situations as refugees. The Convention has always recognized refugees fleeing war, but its application to such individuals has not always been

[4] Available at: http://www.refworld.org/protectionmanual.html.

[5] See UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, 2 December 2016, HCR/GIP/16/12, available at: http://www.refworld.org/docid/583595ff4.html.

applied consistently. This has resulted in some States, particularly in Europe and North America, either erroneously requiring a person to be individually targeted to be considered a refugee, or limiting the definition of persecution to State actors. When individual targeting cannot be demonstrated in these courts, asylum-seekers are granted subsidiary or other forms of protected status that do not contain all the rights normally attached to refugee status. However, most conflicts in today's world involve non-State actors and the targeting of whole groups of civilians for their ethnic, religious, political, or other affiliations. UNHCR's in-depth legal analysis, which is detailed in these guidelines, confirms that persons fleeing conflict or other violent situations fall squarely within the refugee definition.

Such advances in the interpretation of international refugee law have been hard won through years of reflection, analysis, and advocacy. They demonstrate that the 1951 Convention does indeed continue to apply to contemporary situations. The trick is in harnessing the political will to abide by the principles and humanitarian spirit contained within it. Reopening the 1951 Convention to debate or amendment in the context of today's shrinking global protection space poses considerable risks. Many of the advances made in international refugee protection over decades would be revisited and, in the process, risk being undermined. This would occur at great cost to the millions who rely upon the international protection system for their survival.

In a similar vein, there are some who argue that refugees should be subsumed within the category of migrants. While this may have begun with the intention of making the case for the rights of all people on the move, it has regrettably achieved precisely the opposite effect and has muddied the waters unnecessarily. It has provided fodder for those who wish to undermine obligations to protect refugees by subjecting them instead to the logic of migration management and restricting their access to territory. This depiction of refugees is not only legally erroneous, but also inappropriate, as no human being should be referred to as a subset of any others. Going forward, it would be a costly mistake to be unclear about legal definitions.

The legal framework and accountabilities for refugee protection are clear. The definition of migrants is less clear and not internationally agreed, although there is of course a clear human rights basis for all people on the move. Both refugees and migrants may encounter similar hardships when on the move. Traveling side by side, they may be subject to abuse, exploitation, violence, detention, smuggling, or trafficking. They may have specific needs as unaccompanied children or survivors of torture, or have disabilities or serious medical conditions. To address these needs, UNHCR has updated its *10-Point Plan* on the asylum/migration nexus.[6]

As we look to the future, there are some concerning trends that merit our attention and careful thinking, with a view to ensuring that the 1951 Convention remains the bedrock of the international refugee protection regime, that it is consistently applied, and that it can serve a catalyst for addressing broader questions of protection in situations of forced displacement.

A primary worrying trend is the increasing restriction of family reunification for refugees. We are seeing legislation, regulations, and judicial interpretations that narrow the definition of 'spouses' or prohibit unification with children who have 'aged out'. Some require age assessments despite the lack of a sound evidentiary basis for the accuracy of such tests. Others attach different rights to families that are formed post-flight, or to individuals who have been granted subsidiary protection rather than refugee status. Many impose onerous evidentiary requirements or financial hurdles. For example, some require refugees to cover the prohibitive costs of DNA testing to prove their family relationship. Others have either shortened timelines to apply for reunification or require refugees to wait for inordinate periods of time – sometimes for years – before they can apply. This can have the effect of undermining the basic human right to family unity. It also does not make economic or practical sense, particularly when we know well that family reunification is essential to effective support and successful integration in the new host country, and that without it, refugees may move onward irregularly. Many refugees who crossed the Mediterranean Sea in 2015 and 2016, for example, told us that they did so in an attempt to reunite with family members, as there were no other realistic or regular avenues available to join them. In light of this, UNHCR will shortly be issuing international protection guidelines on this issue.

[6] Available at: http://www.refworld.org/10pointplaninaction2016update.html.

A second trend is the narrow reading of some of the 1951 Convention grounds. There has been progress in the harmonization of judicial interpretations of the ground of political opinion. Courts have increasingly recognized that it is sufficient for political opinion to be imputed to an individual for that person to be a refugee. However, others still require the individual to hold the political opinion. This is particularly problematic in the context of armed conflicts and violence where whole groups are compelled to flee because of political opinions attributed to them by others. Their experience of terror, insecurity, and persecution on this account is no less than those who actually hold such opinions.

With regard to other Convention grounds, some courts require that individuals who are fleeing persecution for reasons linked to their identity be discreet or conceal it. Most courts in Europe, North America, Australia, and New Zealand now accept that an individual who is fleeing persecution on the basis of sexual orientation or gender identity cannot be denied international protection on the basis that they can be 'discreet' or can conceal their identity in their country of origin. However, the question of discretion is again raising its head in the context of claims based on religious persecution, where some decision-makers are asserting that as long as an individual can practice their religion in private, then they can be required to conceal their religious identity publicly. We need to ensure that on such legal questions, the inclusive conception of the refugee definition in the 1951 Convention guides the inquiry.

A third trend relates to the continued practice of prolonged, arbitrary, and indefinite detention of asylum-seekers and refugees in a number of countries, which is not in keeping with the spirit of the 1951 Convention. We have fortunately seen the use of detention decrease in some countries as a result of judicial decisions. Yet in other countries, including in so-called 'regional processing centres', the practice of detention is on the rise. UNHCR has issued reports on detention practices in over 25 countries. It is well-known that detention has an adverse impact on mental and physical well-being, and there are numerous reports of self-harm, Post-Traumatic Stress Disorder, anxiety, and depression that result. Such practices turn a blind eye to the immense hardship and suffering already experienced by asylum-seekers and refugees as they fled persecution. UNHCR continues to pursue its global strategy to end detention,[7] and to encourage alternatives to detention, particularly for children, as detention cannot be in their best interests. It is here that courts can play an important role, through finding detention of asylum-seekers and refugees as unlawful, granting habeas corpus applications, or ordering the release of long-term detainees.

A fourth trend is the growing tendency in both law and State practice to approach refugees from a strictly security perspective. We must remember that asylum procedures are already amongst the most carefully scrutinized channels for entry into a country, to make sure that those who are not in need of international protection do not get through. Despite this, at times, we have seen refugee protection concerns get subsumed within the larger debate about security, and refugees have often been demonized or blamed in the process. Yet we know that it is precisely insecurity that drives refugees to flee. No one knows better than refugees what it means to live in fear of violent conflict, extremist groups, and organized crime, particularly in situations of massive inequality and the breakdown of the rule of law. Refugees are often the first victims of terrorism. They are not the instigators of terror. They must be protected from terror and insecurity, which is the fundamental objective of the 1951 Convention. Ensuring security requires that we protect people from insecurity – that we not conflate the perpetrators with their victims. The judiciary can be instrumental to ensuring that legal frameworks to address security concerns are complementary and compatible with those designed to protect refugees.

A final trend is the differential treatment of the same kinds of asylum claims across different States. We see individuals who are in similar circumstances treated differently, depending on which jurisdiction is considering their case. This is evidenced by often widely varying recognition rates. We need an effective remedy and to make a concerted effort to harmonize interpretations in accordance with international standards. Otherwise, legal systems risk being incoherent, which in turn can lower public confidence in

[7] UN High Commissioner for Refugees (UNHCR), *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2019*, 2014, available at: http://www.refworld.org/docid/536b564d4.html.

asylum systems. Asylum-seekers may also feel compelled to move onward in search of a positive decision on their claims.

These are all areas where the judiciary can play an incredibly important role, and I would like to offer some thoughts on how members of the judiciary contribute not only to preserving the long-held tradition of asylum and sanctuary, but also to taking a broader protection agenda forward. The judiciary is critical to the effective functioning of governance systems that respect the rule of law. You form one pillar of the State. You are pivotal to the administration of justice and the protection of human rights. Your independence is key to upholding the rule of law in the face of challenges and crisis.

With respect to refugees, your independence helps to ensure that decision-making is guided by the humanitarian spirit of the 1951 Convention and other instruments, and is not compromised by political agendas or populist debates. When legal interpretations are at variance with the fundamental principles enshrined in the Convention and the broader international protection regime, we rely upon the judiciary to intervene to ensure consistency with international standards. In short, the judiciary is the body that gives effect to these principles in the lives of refugees.

Your decisions are crucial to developing a consistent interpretation of the 1951 Convention that is in line with its object and purpose. Through judicial dialogue, between first instance decision-makers and judges sitting in review – something in which the IARLJ excels – it is possible to achieve more consistency in the correct application of the law and in the process, improve the quality of decisions on asylum and related rights. Also, greater interaction between national courts and supranational courts can facilitate the harmonious application of regional law and general protection principles. In this respect, the preliminary reference procedure of the Court of Justice of the European Union is a welcome example. It serves as a useful tool for clarifying EU law and allows for its consistent application throughout the European Union. National courts have an excellent opportunity before them to make greater use of this tool. Also, exchanges amongst the judicial and lawyer communities are invaluable to considering how it might best be put into practice.

Through your engagement and decision-making on issues of legal interpretation and States' responsibilities to refugees, you can move the protection agenda forward. When there is consistency in decision-making across jurisdictions and at the highest levels, legal systems are strengthened and less vulnerable to political objections made on the grounds that decisions represent the views of a particular judge. This of course does not mean that judges blindly follow previous rulings. Rather, it creates the space for developing legal reasoning to ensure that the scope and application of the principles are clear. This in turn provides a strong foundation and sets the stage for future thinking about how the Convention and the international protection regime may apply to new or emerging situations of forced displacement, and invites us to consider whether new issues of customary law could be considered.

The legal community needs to be well equipped for this task, and we rely upon bodies such as the IARLJ and others to ensure that judges and lawyers are well versed in international refugee law – an area where UNHCR also continues to offer its support and expertise. As part of its supervisory capacity and responsibility and to support and inform decision-making, UNHCR, together with lawyers in many countries, provides courts with legal analyses and opinions on key issues of international refugee law. In 2016, UNHCR filed 21 amicus curiae or court interventions on points of law and doctrine in 15 jurisdictions in Europe, North America, Latin America, and Africa, including in regional courts such as the European Court of Human Rights and the Inter-American Court of Human Rights, and superior national courts, such as the US Supreme Court and the UK Supreme Court. UNHCR's engagement with the judiciary helps to preserve the integrity of the asylum system. It helps ensure that refugees are recognized and protected. It also helps promote both national security – through the prosecution of individuals involved in terrorist crimes – and refugee protection – through ensuring that the victims of such crimes have access to justice.

As we look ahead to new displacement-related phenomena, a well-informed judiciary, while needing to remain independent from the vagaries of politics or short-term thinking, is central to the creation of and promotion of legal frameworks that reflect the spirit, object, and purpose of the 1951 Convention and the

broader international protection regime. The judiciary is key to ensuring that our legal institutions are robust while being able to adapt to changing circumstances.

As world's leaders agreed last year, the New York Declaration is a recognition that longer-term support is needed for host countries to implement fundamental principles of international protection. This requires sustained engagement in developing the rule of law, fair, effective, and efficient asylum systems, and the capacities of the legal system and the judiciary to respond to refugee situations in their territories. The judiciary can foster the necessary connections between legal institutions and policy makers to ensure the appropriate kinds of approaches are put in place from the start.

For instance, in States, which are not party to the 1951 Convention or do not have a domestic legal framework for refugees, we can make the case that the Convention nonetheless remains the basis for recognizing refugees under UNHCR's mandate. We have done so already in countries such as Bangladesh, where I recently went on mission and saw first-hand the unmistakable aftermath of persecution and ongoing trauma experienced by the Rohingya who fled from Myanmar. In keeping its borders open, Bangladesh has saved hundreds of thousands of lives, and it is our obligation to support the Government in finding ways to meet their needs while ensuring the host community is able to bear the impact. This includes helping to build the legal institutions and frameworks that can both guide the response in Bangladesh and address the root causes in Myanmar, where resolving the statelessness of the Rohingya is central to addressing their plight. Statelessness, in particular, is a driver of flight in many countries around the world, and UNHCR launched in 2014 the #IBelong Campaign to End Statelessness.[8] This global campaign encourages States and the legal community to find ways to address legal and practical obstacles to obtaining a nationality and legal identity.

Also, the international protection regime can inspire our collective thinking about how to protect new groups of people who have been forcibly displaced. More and more, we witness displacement related to natural hazards, humanitarian crises, pandemics, or famine linked to conflict, as in South Sudan and Somalia. We need to think through the kinds of protection frameworks needed to enable people to live in safety and dignity in both their host communities and upon return. This work has already begun with the former Nansen Initiative, and UNHCR is closely engaged in this analysis.[9] It further requires that we think through our collective obligations to future generations.

These are just some areas where the judiciary can play a constructive, proactive, and progressive role. In this respect, it is important to bear in mind that refugee protection is an international responsibility. Nowhere in the world is the impact of conflict and displacement not felt in some way. No country can say that this issue is not of concern to them. We all have a responsibility to respond with empathy and compassion, based on a solid legal and deep moral tradition which you uphold. We need to build upon this now and anticipate the questions that will be asked of us in the future, to ensure that the spirit of the 1951 Convention and the sacrosanct tradition of asylum that it embodies, not only prevail, but endure.

Thank you.

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[8] See http://www.unhcr.org/ibelong-campaign-to-end-statelessness.html.

[9] See UNHCR, *UNHCR and Climate Change, Disasters, and Displacement*, May 2017, available at: http://www.refworld.org/docid/59413c7115.html; UNHCR, *UNHCR Quick Guide - Climate Change and Disaster Displacement,* May 2017, available at: http://www.refworld.org/docid/591c0b324.html; and UNHCR, *Climate change, disaster and displacement in the Global Compacts: UNHCR's perspectives*, November 2017, available at http://www.refworld.org/docid/5a12e0c94.html.