OPENING ADDRESS

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This is the 3rd of your biennial Conferences I have the privilege to address. It gives me great pleasure to do so. My experience of these meetings in the past - and indeed my contacts with the International Association of Refugee Law Judges - confirms me in the view that the judiciary is one of the more important partners of UNHCR in its central mission of protecting refugees.

It was this belief that led, in August 1999, to the signature by your Association and UNHCR of our joint Memorandum of Understanding. This Memorandum took as its starting point that judges, together with quasi-judicial decision makers in all regions of the world, have a special role to ensure that persons seeking and in need of protection outside their country of origin are effectively able to access it, in accordance with their rights and in full respect for the applicable principles of international law. The MoU recognises that the IARLJ and UNHCR have a mutual interest in seeing the basic principles of legal protection applied without discrimination, fairly, consistently, humanely and subject to the Rule of Law. This mutual interest is heightening day by day as refugee protection, as a concept and as a reality, is today being challenged on a number of different fronts.

The tradition of granting asylum liberally to those fleeing persecution and conflict is on the wane. Asylum countries are worried about receiving refugees without the prospect of their early repatriation; large-scale arrivals, seen as a threat to political, economic or social stability, tend increasingly to provoke hostility and violence. Refugees are returning to countries emerging from long, drawn out war, where peace is fragile, infrastructure weak, the human rights situation not yet stabilised and the basic necessities of life in uncertain supply. Return may as much follow inhospitable, even hostile, conditions in host countries as any durable changes at home.

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With asylum space shrinking, preserving access to and the quality of asylum is a continuing challenge, worldwide. So too is the dilemma of how to address the distinctive needs of refugees in the context of modern migration policies of many States. Concerns about costs, about the clarity of the refugee concept in today's migratory flows and the newer dimension of human smuggling, trafficking and terrorism - have led to a major re-shaping of asylum systems in countries with a long tradition of active political support for refugee protection. 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.

This is the "bigger picture" reality confronting refugee protection. At its heart is, for a range of different reasons, the waning quality of asylum. We see this manifest at a number of levels - at this global level of international trends or regional developments; at the country level in our camps, but also at the level of the individual case. This last is, perhaps, where you as adjudicators are most likely to confront asylum dilemmas - not in the settlements, or at the closed borders, but rather in the individual experiences which create refugees out of normal people and their families.

Let me share with you just one from the list of many examples recently brought to UNHCR's attention. I do so for what it shows about the quality of available asylum. A woman - a writer with several children - outspoken in her criticism towards the dictatorial regime of her own country, was arrested and brutally abused before she managed to escape, but without her family. Her only way out of the country was the illegal path, through resort to smugglers. After a perilous journey, she reached a country of asylum. Because of her mode of entry, she was automatically detained for a long period without legal assistance. She was in fact recognised as a refugee – her fears were held well founded -, but she was only granted temporary stay, with no right to reunion with her young children, or to travel rights. As a result, at this moment, she is cut off from her family, with no prospect of return, much less of earning a living or establishing a new life in the asylum country. Her physical and mental health is naturally seriously deteriorating.

It seems that the woman in question, whose claim, I repeat, was positively adjudicated, has been doubly victimised. Circumstances in her home country turned her into a refugee. In her asylum country a combination of laws and the concerns that generated them - concerns about rising tides, the taint of association

with criminality, the need to deter - has meant that she is now denied the full benefits of her new status.

Mode of travel, legality of entry, or even the situation and status of other groups of migrants that may have arrived alongside an asylum seeker should not limit the right to present a claim and have it properly processed, nor should these facts be allowed to substitute for the refugee definition itself. Our joint MoU calls upon the IARLJ and UNHCR to promote a common understanding of asylum principles and to encourage fair practices as regards enjoyment of refugee status. In this individual case, it is certainly, in our assessment, a moot question as to whether the asylum principles have been given full sway, as to whether the practice has been fair, indeed whether "effective protection" is what has been accessed. One can - regrettably - multiply the individual cases of this sort many times, in many countries. It is here that you have a correcting and balancing role to play.

Lest there be any doubt, either, about the significance of the responsibility to judge accurately, fairly and expeditiously the protection needs and to provide thereby for "effective protection", let me mention, also as an illustration, another individual case which has recently attracted a lot of media attention in this part of the world. It is the case of Mr Alvaro Morales, a Colombian asylum seeker in Australia, whose claim was rejected. As we understand it, one of the bases for rejection was the assumed availability of protection in another country, Argentina. Mr Morales returned to Argentina, where his efforts to access this protection proved fruitless. His claim to asylum was rejected and he was deported to Colombia where, reportedly he was killed by para militaries near his parent's rural home.

Mr Chairman, this Conference has a two-fold title "Stemming the tide - Keeping the balance". The developments I have very generally described deserve analysis against this aptly chosen focus for today's Conference. Flood imagery, alarmist and defensive at the same time, is very much part of the atmospherics within which asylum systems now operate, particularly but not exclusively in the developed world. A sense on the part of governments of not being in sufficient control of borders, their growing frustration about so-called "asylum migration", about abuse of asylum systems by "queue jumpers", "abusers" and criminals, has fuelled restrictive laws and practices designed to keep arrivals, costs, people smuggling and domestic backlash to the minimum. There is, though, a growing concern that these various barriers, while contributing to some decline in arrival rates, is now encouraging the rise of ever more innovative smuggling networks - a

phenomenon which represents a threat both to the interests of States and to the welfare of asylum seekers.

To return to the flood analogy which the Conference organisers have asked us to reflect upon, do the facts support it? We doubt it, based not least on the 2001 survey of recent statistical trends released recently by UNHCR.

Fact number 1: The global refugee population, which stands at an estimated 12 million people, has remained virtually unchanged between 1997 and 2001;

Fact number 2: When compared to the early 1990's, refugee arrivals during these later years have actually declined some 24%;

Fact number 3: Some half of the world's refugees originates from just seven (7) States, principal among them Afghanistan, from which close to 4 million people had been displaced. This refugee producing country is now the main receiver back of its own citizens.

Fact number 4: The largest number of asylum applications in industrialised countries in 2001 were received by the United Kingdom (92,000), Germany (88,000) and the United States of America (83,000). These figures are notably lower than comparable figures for the early 1990's when, for example, Germany received in one year more than 450,000 applications.

In parenthesis, and taking this also as one basis for comparison, Australia is recorded by as having received 12,366 asylum applications in 2001, and New Zealand 1,601.

Numbers of course are far from the full story. I have though put some selectively on the table to suggest that, with actual numbers declining, the "flood" notion is unnecessarily alarmist. I want now to turn to the issue of balance.

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. A refugee, classically defined, is a persecuted person, denied security of person, unable to exercise the right to freedom of expression, to freedom of association, to freedom of belief, to pursue political convictions, or just even to be who she is born to be. A refugee is also someone unable to continue to live in safety where she is, due to the discriminate, or even indiscriminate, dangers of war or serious civil disturbance. Flight and seeking asylum is the only realistic option for her and her family, to protect their right to life, security or freedom of person.

The foundation rights of the international protection regime are set out in the 1951 Convention and its 1967 Protocol. They are, certainly for us, as relevant to the protection of refugees in this contemporary context as they were in 1951. They include:

- The right not to be returned to persecution or the threat of persecution (the principle of non-refoulement);
- The right not to be discriminated against in the grant of protection;
- The right not to be penalised for having entered into or being illegally in the country where asylum is sought, given that persons escaping persecution cannot be expected to always leave their country and enter another country in a regular manner;
- The right not to be expelled, except in specified, exceptional circumstances to protect national security or public order;
- The right to minimum, acceptable conditions of stay.

On December 13th 2001, in the Convention's 50th anniversary year, the first ever meeting of States Parties was held at Ministerial level in Geneva. That meeting adopted a Declaration which stands as a strong statement of political commitment to upholding the values and principles of the Convention, and to implementing its provisions fully. It is, therefore, all the more strange that UNHCR increasingly hears from certain States that the protection regime of which we have been made the guardian no longer fits the problem, that its essential tenets are increasingly marginalised. These States have become disillusioned about their capacity to manage contemporary population movements using existing tools, particularly the 1951 Convention, and increasingly view refugee protection as a burden, not a shared responsibility. UNHCR's response has been clear and unqualified. Rather than holding the 1951 Convention accountable for limits in relation to problems it was never envisaged to deal with, the challenge is to clarify its place in the modern world, in particular as regards the asylum-migration nexus. It does have a place within the larger body of principles affecting the treatment of migrants, broadly defined, but as a rights protection instrument, to safeguard the security of a particularly vulnerable group of non-citizens. It is not, and was never intended to be, a migration control tool. This fact does not lessen the importance of the 1951 Convention, or render it peripheral. To the contrary, given the mixed population movements of today, without the Convention the likelihood is that the needs of asylum-seekers and

refugees will become ever more marginal, perhaps totally subsumed to overriding local interests, with disastrous consequences for the persons concerned.

This being said, we have also agreed that the Convention does not hold all the answers. If the Convention is clear in terms of rights, it is close to silent about whose responsibility it actually is to protect them in the context of modern displacement situations and population movements. A State is clearly in violation of its Convention obligations if, by its own actions, a situation is created whereby protection, where needed, is not available. But there is a rights versus responsibilities dilemma, particularly in mass-influx situations. The key to ensuring protection for those who genuinely need it lies, urgently, in the development of approaches which will achieve that balance, which will better apportion responsibilities, share burdens and, ultimately, which will allow States to identify to whom they owe protection responsibilities, with what content, and to whom they do not.

Participants were clear at the Ministerial meeting in this regard that the protection principles cannot be viewed in isolation of the broader framework in which they will be applied. There are costs - financial, social, political or security - that the grant of asylum may entail for States. In fact UNHCR has long acknowledged the importance of seeking accommodation between the legitimate interests of States and their international humanitarian responsibilities to protect refugees. This is not impossible. Far from it, UNHCR's experience is that respect for refugee rights is fully compatible with upholding the interests and concerns of domestic populations, even in a post September 11 environment.

In this regard, though, the Convention does not hold all the necessary answers. When is a state party to the Convention required to provide for the rights to which an asylum-seeker or refugee is entitled; when is another state the more appropriate provider; what are the criteria for determining when responsibilities are engaged and when they can be refused? The answers to these questions are only partially to be found in the instruments which we have. It was, also recognised in the Ministers' Declaration that protection today demands a complement to the Convention, in the form not least of progressive development of the law, and additional strategies and tools.

I THE GLOBAL CONSULTATIONS AND THE AGENDA FOR PROTECTION

UNHCR's process of Global Consultations on the International Protection has recently been completed. This process was in part a response to criticism of the

Convention, but perhaps more importantly to the bigger challenges confronting refugee protection - how to protect refugees better in mass influx situations, how to make asylum systems work better, how to find solutions particularly in the protracted situations, how to share the responsibilities more equitably, how to address the waning quality of asylum. The goals of the process included, to shore up support for the existing international framework for protection, as well as to explore the scope for enhancing protection through new approaches which respect both the rights at stake and the concerns and constraints of States and other actors.

The First Track of the process was designed to reaffirm the centrality of the 1951 Convention as the basic rights protection instrument. It culminated in the Ministerial Declaration which, at least on paper, did just that. The Third Track allowed States to consolidate understanding of "extra Convention" problems and explore areas where new approaches are required. This, essentially, generated the Agenda for Protection. The Second Track, which is perhaps of most interest in the present context, had as its purpose, clarifying the scope of application and the interpretation of aspects of the 1951 Convention, particularly the definition Article, in its modern context. Our purpose in seeking this clarification was to promote greater consistency in decision making among refugee adjudicators and more harmonisation of State practices as regards the Convention. We are in the process of reproducing the results of Second Track discussions in the form of a book containing the background papers and the round table conclusions. We are also now issuing new or revised guidelines on exclusion, cessation, gender-persecution, the ground of membership of a particular social group, the internal flight alternative concept and interpretation of Article 31 (non-penalisation for illegal entry). These guidelines will be offered to adjudicators as a complement to UNHCR's Handbook.

Among other positions, they will reinforce the understanding:

- That the exclusion clauses are not static but have to be interpreted in a more "evolutionary way", drawing on developments over recent years in international criminal law, extradiction law and human rights law;
- That *non-refoulement* is incontestably a principle of customary international law and that it is breached by measures that have (or even could have) the effect of returning a refugee to the frontiers of where life or freedom would be threatened; such measures including rejection at the frontier, interception or indirect "chain" return;

- That the refugee definition, properly interpreted, can encompass gender-related claims without the need for an additional Convention ground; also that a gender-sensitive interpretation of the Convention is required;
- That a social group is constituted both by the "inherent, inalienable characteristics test" and, on occasion, by the social perception test;
- That internal flight possibilities have a relevance to assessing the validity of the claim, but that the mere absence of risk of persecution is not enough, in itself, to establish the existence of an internal protection option;
- That the Art 31 protections are not precluded in the case of individuals who have genuinely only transited countries en route from their country of origin or threat;
- And, that there is an obligation on States not only to refrain from decisions that result in family separation but also positively to take measures which respect and promote the right to family unity.

The foregoing is a selective and rather unsophisticated rendition of some outcomes of Track 2, for which I apologise. I have taken the liberty of presenting them so on the basis that you will be going into much greater detail on these issues in the course of the deliberations of this Conference. There will be a more elaborate contribution from UNHCR at the appropriate point. For my purposes now, I wanted only to flag to you a process which we hope, over time, will indeed find its reflection in your own deliberations in the individual case.

Let me now, though, return to the more strategic aspect of the Global Consultations process, crystallised in the Agenda for Protection, which has just been endorsed by UNHCR's Executive Committee. It sets as the central goals for refugee policies for UNHCR and, more important, for States:

- Strengthened implementation of the 1951 Convention and the 1967 Protocol
- Protecting refugees within broader migration movements
- Sharing of burdens and responsibilities more equitably and building of capacities to receive and protect refugees
- Addressing security-related concerns more effectively
- Re-doubling the search for durable solutions

- Meeting the protection needs of refugee women and refugee children.

Although not a legally binding document, the Agenda does represent a broad consensus on areas for action. Realising many of its objectives hinges on resolute follow-up by protection partners, including the judiciary.

As lawyers, you might have a particular interest in one area for follow-up, which the High Commissioner, Mr Lubbers, has termed "Convention Plus".

The Global Consultations had, as I mentioned, a particular focus on the "tools" of protection, those presently available (notably the Convention) and those in need of development for better global management of refugee problems. In this context, the High Commissioner has foreshadowed, in effect, a new drafting process to generate issue specific "special agreements," to build on the Convention regime in very particular areas. Paragraph 8(b) of UNHCR's Statute in fact envisages such special agreements "calculated to improve the situation of refugees and reduce the numbers requiring protection". They would not be new treaties as such, but rather executive commitments of a contractual nature. Whether at all, and if so to what extent, these agreements will be justiciable will be one question we will have to address early in the process.

The so-called "irregular movement" problems - or the problem of asylum seekers moving on from countries where they have or could have accessed effective protection is one of the protection challenges which might lend itself to a special agreement of some sort. UNHCR is examining how to strengthen the hosting capacity of first asylum countries, while creating incentives for the so-called "secondary movers" to return to them, or even not to leave in the first place. Such incentives might, among others, include, joint refugee status screening arrangements in first asylum countries, contributed to by, and with the political and financial backing of "destination" countries in Western Europe and elsewhere. We are also examining how UNHCR can play a more substantive role, both in countries of first asylum and in destination countries which would not exclude a more elaborate role in the refugee status determination processes, for example at points of entry. UNHCR's participation in the RSD manifestly unfounded airport procedures in Switzerland and Austria are two positive models we are now exploring further to see how they could apply in other countries. Another possible option might be an agreement on burden and responsibility sharing in relation to the processing of asylum applications for a particular region, or even for a particular caseload. At some point there may be important implications for the work of national asylum adjudicators.

II CONCLUSION

In conclusion, let me briefly recap my key message.

Keeping the balance to me means, above all, keeping the balance between refugee rights and states' interests and responsibilities. The imbalance or the disconnection between rights and responsibilities in a globalised world of large-scale migration of various sorts, is perhaps, the challenge confronting the viability of asylum today. In mixed migration movements there will be people who are refugees, with the right to have their situations properly adjudicated and protection made available. There are now some quite complicating factors in this regard, revolving around notions of secondary movement, "safe country," internal flight alternative, even now "external flight alternative," as well as the imperative of combating smuggling and trafficking which can well lead to an asylum seeker with a well founded claim not being able to access any protection mechanism, absent a system for designating the responsible parties. UNHCR's role here is clearly and unequivocally to uphold the principles of protection for those who fall within the "protection gap" between international refugee law and state practice. I hope that, consistent with letter and the spirit of the MoU we have with the IARLJ, we can count on the membership of this Association to support and assist us in this endeavour.