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Between border control, security concerns and international protection: a judicial perspective

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“Displacement in the Twenty First Century: Global Issues and Challenges -- UNHCR’s Perspective”

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This year has witnessed a succession of dramatic events and developments. The “people’s revolutions” in parts of North Africa and the Middle East, the political crisis in the Ivory Coast and the immense misery caused by drought and conflict in the Horn of Africa are among the more striking examples. More than 1,500 people died while trying to cross the Mediterranean this year alone, in desperate search for safety. And then there are the ongoing violence and protracted conflict situations in Iraq, Afghanistan, Sudan and Colombia, for example, not to mention the financial crisis and various climate change-related disasters. The year has therefore been marked by political, social and economic turmoil, as well as violence, humanitarian crises and emergencies.

These events have also sparked off refugee movements and displacement. They are visible manifestations -- sometimes as consequences, other times as warning signals -- of deep-rooted ills. We are confronting protection challenges of staggering proportions. More than a quarter million Somalis have sought refuge in neighbouring countries this year owing to the situation inside Somalia. In a matter of months, some 1.2 million have fled the conflict in Libya. Internal displacement is increasing not just in these situations but also in others. Refugees and internally displaced often end up in the poorest parts of countries already undergoing transition processes and suffering from rising food prices and underdevelopment.

When faced with such challenges, we all have to ask ourselves -- what is the contribution we can make in our respective disciplines and areas of expertise?

These events come at a time when we are also marking two anniversaries: the 60th anniversary of the 1951 Refugee Convention, which emerged from the strong “never again” commitment prompted by the horrific experience of the Second World War; and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness, which

was born out of the same sentiment and sought to eliminate the plight of an otherwise legally invisible population -- stateless people. Both instruments have adapted and endured through decades of significant changes, but their implementation continues to hinge upon tolerant, open and compassionate societies, with a devotion to the fundamental worth, inherent dignity and rights of each and every human being.

It is against this backdrop that I would like to develop a number of ideas about the importance of the rule of law and, in particular, about international law. I would also like to highlight some of the legal issues that have preoccupied us recently and that I look forward to discussing with you.

On the importance of the rule of law, this year's World Development Report¹ conveyed two key messages. First, some 1.5 billion people live in countries affected by repeated cycles of political and criminal violence, causing human misery and disrupting development. Second, the report concludes that, to break these cycles, it is crucial to strengthen legitimate national institutions and governance in order to provide citizens with security, justice and jobs, as well as to alleviate the international stresses that increase the risks of violent conflict. In particular, the report emphasizes the centrality of the rule of law, functioning justice systems and government effectiveness.

Indeed, the essential functions of a state are to provide a safe and secure environment, to guarantee the functioning of efficient institutions and basic services, including the safeguarding of human rights and the rule of law, and a capable administration. But a need for international protection may arise if a state cannot deliver or can only partially deliver these core functions -- for instance, by being unable to control all its territory, or because of weak or fragile state structures -- and as a result is either unable or unwilling to exercise effectively its core *raison d'être* in part or the whole of its territory.

Similarly, on the international plane, if an agreed code of conduct, crafted through international treaties, custom and general principles, is not respected or only partially respected by some, it affects all the others, even if this may not be apparent at first. The international refugee instruments -- and the international protection regime they reflect and express -- form such a code of conduct. As noted in its Preamble, the main object and purpose of the 1951 Convention is "*to assure refugees the widest possible exercise of their fundamental rights and freedoms*". The 1951 Convention and its 1967 Protocol were drafted to become the global, multilateral, standard-setting agreement providing for the protection of individuals at risk. It is an instrument of a general, comprehensive character which, by its very nature, requires its application between all the contracting parties [this is, in fact, an essential condition of the consent of each party to be bound by the treaty]. It is interesting in this connection to bear in mind that international standard-setting agreements providing for the protection of individuals [such as the

1 The World Bank, The World Development Report 2011: Conflict, Security, and Development, available at <http://wdr2011.worldbank.org/fulltext>

1951 Convention] are instruments with an almost “constitutional” character. These instruments lay down rules of objective validity with inseparable obligations.²

In connection with this, I would also like to mention the particularly important role played by an independent judicial system within a state structure, including in relation to the law covering refugees, the internally displaced and the stateless. I have found Ronald Dworkin’s comments on this point especially powerful. In an article on US Senate Judiciary Committee hearings on Supreme Court nominees Dworkin affirms, “It is crucial to the role Supreme Court Justices play in our constitutional system that they be free and able to *reject* popular opinion—to overrule the wishes of the majority in order to protect individual rights. The individual rights that need protection are often unpopular; it would compromise that crucial role were the public able to defeat a nominee because he or she proposed to defend such rights.”³

What Dworkin says applies equally to refugee law. Public opinion may not be favourable to seeing the country as a haven for people fleeing persecution and violence. There may be emotional debates, for example surrounding boat arrivals, since they may resonate with a country’s old fears of invasion.⁴ In such situations, the judiciary must serve as the enlightened bulwark against populist politics, short-term political gains and emotional public debate -- its role is to protect the minority against the majority. The International Association of Refugee Law Judges and similar groupings have a crucial role to play in this regard.

But let me develop this a little further and see what the future holds for us lawyers when it comes to the progressive development of the rule of law. In the 20th Century it became clear that there was a need to develop a sense of responsibility for our actions, both in terms of their global implications but also in relation to future generations. This sense of responsibility was expressed in a number of international instruments, such as the 1997 UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations.⁵ The build-up of nuclear arms during the Cold War, for example, was [and continues to be] a very real threat. For the first time in history, human beings possessed the capacity and power to destroy our planet and to wipe out future generations. In the 21st Century, climate change is comparable to last century’s nuclear arms race, and calls for an acceptance of responsibility, which in turn needs to be translated into concrete and collective action. Yet I notice that too many scholars and practitioners are restricting the debate by resorting to “traditional” analysis: by thinking inside an old box. I often ask myself what type of international, regional and national governance and rule of law structures we would need today to take into account global

2 See C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, BYIL 1953, pp. 426, 451.

3 Ronald Dworkin, *The Temptation of Elena Kagan*, *The New York Review of Books*, 19 August 2010, available at <http://www.nybooks.com/articles/archives/2010/aug/19/temptation-elena-kagan/>

4 See, for instance, David Marr and Marian Wilkinson, *Dark Victory*, Allen&Unwin, 2003.

5 See http://portal.unesco.org/en/ev.phpURL_ID=13178&URL_DO=DO_TOPIC&URL_SECTION=201.html

responsibilities and inter-generational rights and justice.⁶ The effects of climate change and government responses are perhaps our biggest future challenges in the displacement arena.

Now back to some nuts and bolts and a number of pressing legal issues which I would like to set out before you to stimulate further discussion.

First, the issue of legal interpretation: In industrialized countries with established asylum systems, we have observed differing legal interpretations of the various components of refugee law, in particular the refugee definition, as well as widely diverging recognition rates that have led some to refer to refugee status determination as “refugee roulette”.⁷ Refusal to recognize non-state agents of persecution, specific forms of gender-related persecution or persecution on account of sexual orientation or gender identity have, for instance, been areas of contention in a number of jurisdictions. While we have seen a lot of progress in these areas, challenges remain. Notable among them are interpretation of certain aspects of membership of the particular social group ground, deciding whether gang-related violence fits within a traditional understanding of persecution, the recognition of child-specific forms of persecution or detention and family unity provisions.

As for actual state practice, we have undertaken a number of in-depth studies,⁸ mostly in European Union countries, and found that refugee recognition rates for the same asylum-seeking populations can vary from between 1% to over 50%. This is not a new phenomenon but it highlights an important function of an international system and an institution vested with the necessary authority under international law. UNHCR is mandated to provide international protection to asylum-seekers and refugees, and this is a responsibility which cannot be delegated. Not least owing to its statutory function to supervise the application of international refugee instruments,⁹ UNHCR’s role is to ensure observance of the principles of international protection and particularly those embodied in the 1951 Convention.

The concept of “supervision” in international law has a long history. Not least because of recognition that sovereignty has its obvious limits in a highly connected and

6 See Richard P. Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*, Cambridge University Press, 2009.

7 Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*, New York University Press, 2009.

8 UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, available at: <http://www.unhcr.org/refworld/docid/4c63e52d2.html>; UN High Commissioner for Refugees, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007, available at: <http://www.unhcr.org/refworld/docid/473050632.html>

9 For more information on UNHCR’s supervisory role, see Volker Türk, *UNHCR’s Supervisory Responsibility*, *Revue Québécoise de Droit International*, vol. 14.1 (2001), pp 143-145, available at http://www.sqdi.org/volumes/pdf/14.1_-_turk.pdf

interdependent world, supervision touches upon the very essence of the international rule of law and international relations, and the concept of state sovereignty. Supervisory responsibility strives to promote common understanding of rules and their application by states parties in a consistent manner through the actions of an entity different from the state -- an entity that rises above national perspectives and seeks to reconcile competing interests. The exercise of supervision is a self-regulatory mechanism that states have set in place precisely with a view to addressing cooperatively an issue of a fundamentally international character, ensuring that rules which they have agreed to be bound by will indeed be respected. This links back to what I said earlier about the importance of an international rule of law system.

The international protection regime would not function effectively for special classes of non-nationals were there not an institution supporting it -- vested with requisite authority -- that is authorized, obligated and expected to make interventions on their behalf. Apart from the legal reasoning behind the need for international protection of refugees and stateless persons, there are also practical, pragmatic reasons. This has to do with politics. Concern for non-nationals is often not at the forefront of national politics or governance nor of national or local elections, for that matter; quite the opposite. This explains the special nature of an international institution such as UNHCR and its international protection function. But it also highlights the importance of the role of the judiciary generally, and of transnational networks such as the IARLJ, in particular. Nonetheless, despite the best efforts of UNHCR, the EU harmonization process and the IARLJ, recent literature notes that “[refugee law] judges rarely *use* each other’s decisions within the EU.”¹⁰ Hélène Lambert notes that there are two basic reasons for this lack of cross-fertilization of refugee decision-making across national jurisdictions. The first is a rational reason, deriving from the language, time constraints and difficulty in access and training. The second is a cultural reason, which “emphasizes social perceptions about the (non) usefulness of foreign decisions resulting in default rejection of foreign jurisprudence.”¹¹ She finds that this is as much explained within the common-civil law divide as within other aspects, such as a “judges’ ‘mentality’”.¹²

In order to achieve the objectives of the international protection regime, UNHCR has established a certain practice over the past sixty years. This is, in essence, a constructive and broad engagement with the executive, judicial and legislative branches of the state [so that they can fulfil their international obligations], with civil society in all its manifestations and the various groups of concern. The Office’s work is also embedded in a broader partnership and inter-agency framework both of an intergovernmental and non-governmental nature. This includes cooperation with human rights bodies. This organizational practice -- a collective and collaborative endeavour -- is directly linked to

10 Hélène Lambert, “Transnational law, judges and refugees in the European Union”, in Guy Goodwin-Gill and Hélène Lambert (eds.), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, 2010), at 8.

11 *Ibid.*, at 12-13.

12 *Ibid.*, at 13.

state practice, as reflected in regional instruments and mechanisms, national laws and administrative measures, Executive Committee Conclusions, as well as other manifestations of state practice. The competence of UNHCR to develop such a practice is an “implied power” and determined by the very object and purpose of the Statute, of the corresponding refugee and statelessness instruments, as well as the rationale for establishing the Office in the first place.

In response to the phenomenon of differing legal and factual interpretations, UNHCR has issued legal positions on international law matters relating to its populations of concern, as well as eligibility guidelines on how the situation in countries of origin relates to refugee and other international protection criteria. An important way to resolve differences of interpretation about disputed concepts is to increase respect for the legal authority of UNHCR’s positions on international protection matters. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, for example, is a case in point. It is quoted in numerous court decisions as an important source of reference. In the same vein, borrowing from the human rights treaty monitoring bodies and their issuance of “general comments”, UNHCR has issued “Guidelines on International Protection” that complement the Handbook. These Guidelines provide advice on the interpretation of provisions of international refugee instruments and other international protection matters. Their release is often preceded by an analysis of state practice and expert consultations. UNHCR has also increased its engagement with the judiciary by intervening and making submissions in the form of *amicus curiae* briefs, statements or letters. UNHCR’s engagement with the judiciary and the legal community more broadly, is reflected in various protection strategies, an increased number of invitations by Courts to provide information and present our views, in particular by the European Court of Human Rights, and our cooperation with this Association.

Second, the changing nature of conflict and the issue of generalized violence: We have not only seen an increase in the number of armed conflicts throughout the world over the last twenty years, but there have also been major changes in the nature of such conflicts. Most significantly, civilians are playing an increasingly important role, both as participants in armed conflicts and as victims of their impact and consequences.

This raises important questions under international refugee law, most significantly for the European refugee protection system, in relation to persons fleeing the discriminate and indiscriminate effects of violence. The situation in Central Iraq, Central and Southern Somalia and certain parts of Afghanistan¹³ are obvious examples. In Afghanistan, for example, the fluid and volatile nature of conflict and the worsening security situation has led to an increased number of civilian casualties, more frequent security incidents and significant population displacement. In many parts of the country

13 UN High Commissioner for Refugees, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, 17 December 2010, HCR/EG/AFG/10/04, available at: <http://www.unhcr.org/refworld/docid/4d0b55c92.html>

this is compounded by sustained large-scale military operations and the struggle for territorial control. Yet some host countries have returned people to these situations after rejecting their international protection claims, whereas others have not.

The changing nature of conflict and, just as importantly, the changing character of violence itself, are phenomena we need to grapple with. In many situations, where a seemingly perpetual cycle of violence has been part of the daily reality for people and communities for a long time, it is not only protracted, but may also appear intractable in the absence of a broad-based political resolve to put an end to it. Sadly, this reality is not always reflected in the protection provided to those fleeing such situations.

The transformation in the character of violence is linked to a number of factors, not least the relationship between state fragility and violence. Shifts in power in fragile states are evident -- from the state to *de facto* authorities, who exercise control over territory and people and who have a sense of responsibility towards them -- to a myriad of private actors with no such sense of responsibility. The demobilization of paramilitary or guerrilla forces in some countries in Latin America, Asia or Africa, for example, has often led to the emergence of an array of violent criminal organizations that are not only involved in trafficking drugs, arms and people, but also in the control of land for economic exploitation. These groups operate outside formal command structures, are dispersed, opportunistic and do not necessarily follow any particular objective. They may, in some instances, be linked to or act in collusion with the authorities. Their activities are more concentrated in border zones or areas where civilian state presence is weak. However, there is also a spill-over effect into the urban environment with intra-urban violence on the rise, resulting in further displacement.

Some of these actors have been able to take root in the space between the people and the state, acting in effect as a “state within the state”, offering a social order based on violence, fear and archaic forms of feudalism. It is this inter-connectedness between violence perpetrated by non-state actors and lack of state capabilities for protection that creates the need for international protection under certain circumstances, especially when no internal flight alternative is available.

This has not so much been an issue in Africa and the Americas given the reach of regional refugee instruments, but it has preoccupied us in other parts of the world, including in industrialized countries. By way of example, UNHCR has just published comparative research on the interpretation of Article 15(c) of the EU Qualification Directive.¹⁴ What we have found is an exceedingly narrow interpretation, one which defies common sense in many cases. The research has indicated an extremely high threshold for indiscriminate violence and identified disparities in the measures and criteria which are used to assess the character, impact and intensity of violence; lack of clarity on the interpretation of various terms; as well as a reluctance to declare that

14 UN High Commissioner for Refugees, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011, available at: <http://www.unhcr.org/refworld/docid/4e2ee002.html>

conflict zones engage Article 15(c) unless the courts determine otherwise. State practice varies significantly in this area and has -- in some states -- rendered this provision an empty shell in protection terms. Disagreement on the need for protection in some country situations seems to dominate, rather than a much needed common understanding of the nature and substance of this type of protection.

In response to this challenge, we have embarked on a global research project that, we hope, will help us issue international protection guidelines on generalized violence, conflict and the changing character of violence in 2012.

Third, protection and national security: The concept of security permeates the whole international refugee law framework, both from the perspective of refugee security as well as from the perspective of national or public security considerations. The refugee definition itself establishes this link in that persons fleeing threats to their physical security because of one of the Convention grounds are considered to be refugees.

Security issues arise not only as a cause of flight but also feature prominently during flight: for instance, as a result of unsafe travel routes, attacks by bandits and pirates, ongoing war in border areas or when refugees have no choice but to resort to criminal smuggling rings as a means of flight. Even when refugees reach the relative safety of a host country, other threats to their physical security often emerge. Such threats include sexual exploitation and abuse, the infiltration of armed elements, inadequate criminal law enforcement measures, exposure to trafficking, forced recruitment, and even armed attacks targeting refugee settlements. Security threats also hamper durable solutions, for example, in the context of premature return resulting from asylum fatigue and other push factors. Returning refugees often have to grapple with serious security challenges in the form of landmines, recurring conflict or hostile and violent reactions on the part of the local population. Addressing such threats is part of international protection obligations.

At the same time, the 1951 Convention expressly authorizes states to take certain measures in circumstances where the presence of a refugee, or refugees, poses a threat to their national security. I am referring here to Articles 9, 32 and 33(2) of the 1951 Convention. Also, Article 2 of the 1951 Convention makes it clear that refugees are bound to abide by the laws of their host country. They are not immune from prosecution for any crimes committed on its territory. The *travaux préparatoires* of the 1951 Convention show very clearly that the international refugee protection regime was conceived from the outset as a system which ensures a proper balance between the protection needs of individuals and legitimate security concerns of states. Finding the right balance is, however, a constant challenge, especially in the context of intensified efforts to counter threats related to terrorism.

As you can see, the various security dimensions I have mentioned have a strong legal content. It is therefore not surprising that a number of countries have revisited their asylum systems from a security angle. Much of this is justified from an international law

perspective, but some is not. Many countries have, for instance, tightened procedures and introduced substantial modifications, including in terms of broadening grounds for detention or reviewing claims for the purpose of detecting potential security risks. In a number of situations, the post-September 11 environment has been used to broaden the scope of provisions of the Convention to allow refugees to be excluded from refugee status and/or expelled. Several states have stepped up the degree of collaboration between immigration and asylum authorities on the one hand and intelligence and criminal law enforcement branches on the other. We have seen instances of expulsion or extradition without minimum procedural safeguards or judicial review, sometimes in breach of the principle of *non-refoulement*. Some states have also introduced amendments to their legislation affecting access to asylum procedures or resettlement opportunities or with the effect of even potentially criminalizing humanitarian engagement.

We in UNHCR have similarly revisited our own systems and processes, notably as regards our own refugee status determination processes which we are carrying out in 57 countries. Last year, for example, UNHCR directly received 89,500 individual applications for international protection. It is clear that UNHCR cannot conduct refugee status determination in isolation but requires sustained engagement with the authorities of the countries concerned. We are also currently revisiting our guidelines on the application of the exclusion clauses which we hope to issue next year.

Security concerns are obviously a serious matter which merits a serious response, including by an institution such as UNHCR. We believe that concerns which arise directly at the interface between refugee protection and national security can be addressed adequately within the existing international refugee law framework and through active collaboration.¹⁵ Nevertheless, there are also areas and issues that lie outside the remit of international refugee law. While some of these may require further development of standards, others could be addressed through policy and operational responses by states.

One such issue is to ensure that criminals are brought to justice through the effective prosecution of those involved in terrorist crimes. In the past, states traditionally focused on expulsion of terrorists or other individuals deemed a threat to national security. This was considered the preferred option, not least because it gave national prosecutors a means of avoiding the difficulties involved in thoroughly investigating and prosecuting such crimes in domestic courts. Criminal law enforcement is hampered by a range of legal obstacles, such as jurisdictional loopholes, for instance, when crimes were committed abroad. While this gap is being narrowed through provisions requiring states to criminalize certain acts -- including those proscribed in various conventions and protocols pertaining to aspects of terrorism and establishing an obligation to extradite or prosecute those responsible for such acts -- the practical problems encountered when trying to piece together the facts of complex cases continue to pose significant

¹⁵ See UNHCR, *Addressing Security Concerns without Undermining Refugee Protection*, November 2001.

challenges. Expulsion in such cases has, however, become more problematic with the growing realisation that such measures fail to adequately address potential future threats, particularly of a terrorist nature, or the question of impunity.

Fourth, maritime protection: Hardly a day goes by without reports about boat arrivals, including refugees and asylum-seekers, dramatic rescue scenarios and people perishing at sea. Over the last few months we have seen dangerous crossings of the Mediterranean as a result of the Libya crisis and the events in Tunisia -- with an estimated 1,500 people having lost their lives at sea. But irregular movements by sea, including refugees, are a global phenomenon, as the continuous flow of Somalis, Ethiopians and Eritreans across the Gulf of Aden, increasing numbers of boat arrivals in Australia and regular boat incidents in the Caribbean, amply demonstrate.

The protection of refugees and asylum-seekers moving by sea [maritime protection], often within larger irregular maritime movements, is one priority area we are working on. It raises a number of complex legal and practical challenges. These include, for example, questions around jurisdiction and state responsibility, both for the fulfilment of obligations under the international law of the sea as well as international human rights and refugee law; the need for a proper balancing between legitimate concerns about border security and refugee protection; and the need for proper mechanisms for international cooperation and predictable burden and responsibility sharing.

Another aspect of maritime protection we have been working on is maritime interceptions. Last year we issued a protection policy paper on *“Maritime Interception Operations and the Processing of International Protection Claims”* which sets out UNHCR’s views on extraterritorial processing of claims for international protection in the context of maritime interception operations, assesses the existing legal and operational frameworks and analyzes the role of UNHCR. We will also hold two expert meetings in autumn to discuss international cooperation and burden sharing in the specific context of rescue at sea and sea arrivals. We hope that this will contribute to the development of practical proposals to implement existing standards and facilitate rescue and disembarkation of asylum-seekers and refugees in distress at sea.

Fifth, statelessness: Apart from our mandate for refugees, UNHCR also has core responsibilities to protect stateless persons as well as to prevent and reduce situations of statelessness. It is strange to think of a world of nation states and of individuals who are considered not to belong to any such state. This seems to be a contradiction in terms. Despite globalization and the acceptance of multilateralism, today’s world is still plagued by the anachronism of statelessness. It is not that stateless people don’t have bonds to a particular country. They do. But for reasons of conflicts of law, gender, race or ethnic discrimination, or the politics of state succession, they have fallen through the cracks through no fault of their own, sometimes because of deliberate state action or inaction, because of ignorance of laws and procedures, or simply as a result of the unfortunate convergence of circumstances.

I remember interviewing a stateless woman in one of the Gulf States who was not registered as a citizen during a crucial period of that country's independence because her father thought that his only sons required registration. While all her male siblings are citizens, she is still stateless. I also remember when the Soviet Union or Yugoslavia ceased to exist as states. When all the successor states started drafting their citizenship legislation, we found that some people were not included in the initial body of citizens despite their long habitual residence in the territory. Many of them are still stateless, twenty years later. This year we have witnessed the break-up of Sudan, with fears that some populations could again end up not being citizens of either state. The consequences of statelessness are dire. It often means a denial of rights, of documentation, of a normal life. It means life in the shadows, no travel and uncertainty. It also means being shunned and discriminated against for life, and passing that stigma on to future generations.

Over the past couple of years, and not least owing to important advocacy efforts during this anniversary year, there has been an appreciable increase in UNHCR's operational engagement on statelessness with a positive impact on the lives of people affected by it. As an example, while only 28 UNHCR operations were working on statelessness in 2009, 56 were doing so in 2011. Yet counting stateless persons is fraught with difficulties for a variety of reasons, but we estimate that there remain up to 12 million stateless persons worldwide. This is not a negligible number by any reckoning.

We in the legal community are particularly called upon to help find solutions to this often invisible and forgotten problem. In terms of our legal work in this area, we are at the moment engaged in clarifying the doctrinal framework on statelessness, notably the international definition of who is a stateless person and how persons can be determined to be stateless and granted a legal status. Guidance is also being developed on the interpretation of important 1961 Convention standards that seek to prevent statelessness among children. Over the last few years, we have also intensified the provision of technical advice and promotion of legal reforms to address gaps in nationality and related legislation in 56 states, notably from a gender equality and child protection perspective. We are in discussions with 39 states about the need to institute simple but effective statelessness determination procedures. We also carry out legal aid programmes which assist stateless persons with civil status and identity documentation, provide access to services and support efforts to litigate for changes in laws and policies in 25 countries.

While we have made some progress in terms of accessions to the two international statelessness instruments, the number of states parties is still low compared to other human rights instruments. Sixty six states are party to the 1954 Convention and 38 to the 1961 Convention. Panama was the latest state to accede to the Conventions on 4 June 2011. We are confident that the number of accessions will further increase during this anniversary year as we have been informed that several states have completed the

domestic procedures for accession. This is important because it sends out a signal that the international community cares about this issue.

In addition to the principles contained in the two Statelessness Conventions, the right to a nationality, the principle of non-discrimination and the right to enter one's own country are of particular relevance to the situation of stateless persons and firmly entrenched in universal human rights treaties.

When you are confronted with cases of stateless persons in your legal practice, we hope that you will carefully consider this aspect of their situation. UNHCR would like to see stateless persons enjoy a legal status and the full spectrum of fundamental human rights. The ultimate solution for stateless persons is to acquire a nationality. However, where this is only a remote possibility, we hope that more and more of them will be granted a legal residence status -- similar to the one granted to refugees -- and access to basic services. We would like to see you join us as advocates on behalf of the world's stateless people.

Sixth, climate change and displacement -- clearly, a 21st Century challenge that goes well beyond UNHCR's remit: Paragraph 14 (f) of the Cancun Agreements of December 2010 is an invitation for all of us working on displacement and migration issues to contribute in whatever way we can, within our respective organizations and disciplines, to finding solutions. We need to be prepared to move forward on the normative side, in more creative ways than ever before.

This topic has therefore been an area of expert reflection during this commemorations year. We organized an expert roundtable on climate change and displacement in February in Bellagio, Italy. The discussions confirmed that there is indeed a normative gap affecting people who may be forced to cross an international border owing to the impact of rapid-onset meteorological events linked to climate change. In June, the Government of Norway convened in Oslo the Nansen Conference on Climate Change and Displacement in the 21st Century as a contribution to marking the anniversary of the Refugee Convention. I found it a sobering event in that the various presentations portrayed the potential challenges of human mobility as a result of climate change to be of unimaginable magnitude. The Nansen Conference also developed the so-called Nansen Principles on Cross-Border Displacement, which we hope will be a source of inspiration and guidance and a good basis for further discussions on the displacement dimension of climate change.

We in the protection community will need to rise to this challenge. But it is of such magnitude and complexity that it is likely to require us to reorient some of the underlying premises of international protection. In particular, as I mentioned earlier, any concept of responsibility that we know today will need to take into account not only the global implications of human action but also the intergenerational impact of climate change. Human rights law offers some legal responses to these issues. Yet, we may also need to further explore concepts such as common heritage of humanity and of

intergenerational solidarity, which have been used in other areas of international law, including the UN Framework Convention on Climate Change.¹⁶ In particular, we are convinced of the importance of developing a more coherent and consistent approach to anticipate and address the need for protection and solutions for people displaced across borders, even if their numbers may not be large for the time being.

Given UNHCR's core mandate to assist with the progressive development of international law related to forced displacement, our entry point is clearly not *migration* but rather *displacement*. A normative gap exists in relation to the protection of people displaced across international frontiers, and for those abroad who are unable to return home, owing to the impacts of climate change-related processes on their places of origin. In certain circumstances, it is true that existing instruments, such as the 1951 Refugee Convention at the universal level, or at the regional level, the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa or the 1984 Cartagena Declaration on Refugees, will be applicable. This would, for instance, be the case where the impact of climate change-related processes act as exacerbating factors on armed conflict, violence or public disorder. We share the view of the experts who predict that armed conflict will increase as natural resources such as water and arable land become scarce or disappear in some places. There is also a case for refugee protection in situations where harmful action or inaction by a government to deal with the humanitarian consequences of climate-related events is related to one or more of the Convention grounds and can, as a result, be considered persecution.

But it is clear that the current scope of international and regional refugee instruments is limited and would not cover many persons displaced externally by climate-related events. This is most evident in the context of sudden onset disasters, such as typhoons and floods. The trigger for movement in such cases is unambiguous, as is the compulsion to move: people leave because they have no other option. One could, for instance, think of circumstances where a sudden onset disaster has rendered an area unsafe or uninhabitable due to the lack of clean water, lack of adequate shelter, or destruction of basic infrastructure and even a breakdown in law and order. In these situations, there are important differences with "classical" refugee flows, particularly as regards the required nexus to one or more of the Convention grounds or the nature and duration of the need for protection, both of which must be further examined.

Against this background, a case can be made for the need to develop a global guiding framework or instrument for situations of external displacement which are not covered under the current applicable legal framework. We are ready to support states in undertaking such a process. This might, for example, take the form of a temporary or interim protection regime. There are many examples of state practice granting permission to remain or at the very least a stay of deportation to persons whose country of origin is hit by a natural disaster or other extreme event. These precedents support the view that such persons are in need of international protection, even if only

¹⁶ See Article 3.1

temporarily. Scenarios could be developed to identify the circumstances in which temporary protection would be activated. Apart from the scope of protection, it will also be important to clarify the contents and duration of such protection schemes. Procedures and standards of treatment could be developed to guide their implementation.

In relation to slow onset climactic events, the equation is more complex. Movements occur along a continuum where the most enterprising and mobile individuals are likely to *migrate* in search of better opportunities and thereby anticipate and forestall the risk of forced displacement at a later stage. Others, including the more vulnerable among the population, will only move at a later stage, once the impacts worsen -- when remaining where they are ceases to be viable. Still others, the least mobile and most vulnerable, may not be able to move at all.

To address human mobility resulting from climate-related processes, national laws, policies and institutions clearly provide the first level of protection. However, these need to be bolstered by regional cooperation frameworks, particularly to strengthen national capacity; and by fundamental universal principles. Existing regional and sub-regional arrangements need to be examined for their scope and ability to manage and address climate-induced migration and displacement.

In conclusion, law is but the manifestation of social phenomena. Yet it fulfils an important stabilizing role amidst the vagaries and turmoil of daily life and rapid technological and social developments. It is meant to be a voice of reason, especially in times of turbulence. To be true to its founding ideas of justice and equality, international law also requires progressive thinking, anticipating, interpreting and developing. This is no different in the context of displacement and the situation of those who are not formally recognized to be protected by any particular state. It is incumbent upon us -- as lawyers -- to rise to the challenges of today's world and to find the narrative, informed by the values and principles of humanity, which will guide society in meeting these challenges. I look forward to an inspiring discussion with you.