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Standards, Supervision of the 1951 Convention and the 1967
Protocol and Other International Instruments**

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**UNHCR's Role in Supervising International Protection
Standards in the Context of its Mandate**

Keynote Address by Volker Türk

UNHCR's Role in Supervising International Protection Standards in the Context of its Mandate

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Colleagues and friends,

It is a great pleasure for me to engage with such an eminent gathering of scholars and legal practitioners. This Conference is indeed timely. As you know we are on the eve of marking the anniversaries of the 1951 Refugee Convention and the 1961 Convention on the Reduction of Statelessness, as well as the founding of UNHCR – and it is therefore opportune to revisit one of the bedrocks of the international refugee protection regime – UNHCR's role in supervising international protection standards.

Background

Allow me to share with you a number of examples that shed practical light on what we are going to discuss at a more abstract level over the next few days. Imagine you have just been forced to flee your country because you defended the rights of women. But some groups, including the local authorities, view your activities as undermining their power base and they want to find a pretext to arrest, imprison and torture you. You manage to cross the border but are caught and detained. You do not speak the language and do not have access to a lawyer. By gesticulating, you try to convey that you cannot be deported. From others in detention, you learn that the United Nations will visit the centre. Indeed, a UNHCR official interviews you eventually, obtains your release from detention and manages to find a safe haven for you in a new country.

Or you arrive at the border along with thousands of others fleeing intensive fighting in your province but can not cross because the military from the country to which you are trying to escape has blocked the border post and will not allow anyone through. Suddenly, things change, the border opens and people are permitted to cross. You see UNHCR officials talking to the local military and guiding you to a nearby camp.

Or you are in court facing extradition and UNHCR intervenes with a formal legal opinion that sways the court in your favour. Or you are a child on the brink of being

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recruited into an armed group when an education programme run by UNHCR saves you from that fate. Or you are the victim of a xenophobic attack and your friends manage to take you to the nearest UNHCR office for help. Or you are a stateless person who needs a document certifying your status and the only body that you can turn to is UNHCR. Or you are a first-time delegate representing your country during the negotiation of an Executive Committee Conclusion and you become increasingly annoyed by the active role played by the Secretariat until you become aware that UNHCR plays a formal role in the process, unlike in other UN bodies.

What all these examples have in common is a unique feature in international law: an international institution interceding directly on behalf of distinct individuals and groups of people. Some would say this is a concrete manifestation of what the “Responsibility to Protect” concept seeks to encapsulate. The effective functioning of the UN system both presupposes and is underpinned by the commitment from states to cooperate in ensuring a stable international order based on peace, security and the dignity of the human person. This commitment to international cooperation lies firmly at the heart of the purposes of the United Nations.² Finding an appropriate response to an issue of international character is directly linked to the willingness of states to adhere to international obligations. Collective experience in the 20th century has shown that respect for international law is best facilitated by establishing an institution independent from states that monitors state practice, reports on it and intervenes as necessary.

As part of the UN family, the need for cooperation also extends in a special way to UNHCR in its work for refugees, stateless persons and others of concern. Forced displacement and statelessness issues are unquestionably a matter of concern to the international community. This has manifested itself in the establishment of a universal legal framework providing for refugees and stateless persons and the creation of UNHCR, mandated to deliver international protection by, *inter alia*, supervising the application of this international legal framework. There is clear international consensus that states cannot manage or resolve forced displacement or statelessness problems unilaterally and in isolation from each other.

This brings us to the very crux of this Conference – UNHCR’s supervisory responsibility. The concept of ‘supervision’ in international law has a long history. In fact, it touches upon the very essence of the international rule of law and international relations, and the concept of state sovereignty, with its boundaries, not least because of the recognition that sovereignty has its obvious limits in a highly connected and interdependent world. Supervisory responsibility attempts 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

² See United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Articles 1(1), 1(3), 55, 56, <http://www.unhcr.org/refworld/topic,459d17822,459d179e2,3ae6b3930,0.html>.

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 to which they have agreed to be bound will indeed be respected.

I firmly believe that 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, for that matter, of national or local elections; quite the contrary. This explains the special nature of an international institution such as UNHCR and its international protection function.

As for some basic facts and figures against which UNHCR's supervisory role needs to be examined, it is important to bear in mind that over 34 million people are of concern to UNHCR: 11 million are refugees and asylum-seekers, 6.5 million are stateless (possibly an estimated 6 million more), almost 2 million are returnees and 14 million are internally displaced people for whom the Office plays a particular coordinating or operational role.³ UNHCR works in over 267 locations in some 120 countries with approximately 6,880 staff. Based on a Global Needs Assessment initiative launched last year, our budget for 2010 amounts to some 3 billion US dollars. UNHCR, however, continues to depend largely on voluntary contributions from Governments and other donors.

What is the legal basis of UNHCR's supervisory role?

The competence of UNHCR to supervise the application of international protection instruments and standards⁴ is based on its "constitution", that is, its Statute, as amended through subsequent UN General Assembly and ECOSOC resolutions in accordance with the Statute.⁵ This competence, as it has evolved, is also reflected in state practice.

³ UNHCR *Statistical Yearbook 2008*, Chapter II: Population Levels and Trends, 31 December 2009, p. 23, <http://www.unhcr.org/4bcc59559.html>.

⁴ As regards the scope of application of UNHCR's supervisory responsibility *ratione materiae*, see Volker Türk, *UNHCR's Supervisory Responsibility*, *Revue Québécoise de Droit International*, vol. 14.1 (2001), pp 143-145, <http://www.sqdi.org/volumes/pdf/14.1 - turk.pdf>.

⁵ See General Assembly Resolution 428 (V) of 14 December 1950, *Statute of the Office of the United Nations High Commissioner for Refugees*, <http://www.unhcr.org/3b66c39e1.html> (hereinafter UNHCR Statute). For background on subsequent General Assembly resolutions relating to UNHCR's mandate, see generally, Mike McBride, *Anatomy of a Resolution: the General Assembly in*

UNHCR's supervisory responsibility is embedded in the general competence of the High Commissioner to provide international protection and is laid down explicitly in paragraph 8 of the UNHCR Statute: "*The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto; ...*" (underlining added).⁶

The Statute does not elaborate on UNHCR's supervisory responsibility nor provide the Office with any enforcement powers. This can be explained by the fact that the creation of UNHCR preceded the development of human rights treaty monitoring bodies a decade later. However, UNHCR has an inherent (implied) competence to define and adopt such measures that are reasonably necessary in order to achieve the purpose of the international legal framework governing the protection of people of its concern.

Mirroring these responsibilities,⁷ states have recognised and repeatedly reaffirmed the need for cooperation within the international community to achieve international protection goals. In the words of the preamble of the 1951 Convention, they have, for instance, acknowledged that:

the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation.⁸

The Convention thus presupposes that states need to cooperate to uphold their obligations, but the form this should take is not clearly formulated in the main body of the Convention, except for an obligation on the part of states to cooperate with UNHCR. This is set out in Article 35(1) of the 1951 Convention which reads:

The Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions,

UNHCR history, PDES Working Papers, Research Paper No. 182, December 2009, <http://www.unhcr.org/4b192a069.html>

⁶ UNHCR Statute, *supra*, para 8.

⁷ In cases where UNHCR is not explicitly referred to in an international instrument or where states are not party to an instrument, Articles 1(3), 2(2), 2(5), 22, 55 and 56 of the UN Charter in conjunction with para 8(a) of the UNHCR Statute form the legal basis for an obligation of the state to cooperate with UNHCR. Article 2(7) of the UN Charter is not a legitimate argument against an intervention by UNHCR in the fulfilment of its mandate.

⁸ General Assembly Resolution 2198 (XXI), Convention relating to the Status of Refugees, 28 July 1951, Preamble para 4, <http://www.unhcr.org/3b66c2aa10.html> (hereinafter 1951 Convention).

and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.⁹

In short, Articles 35 and 36 of the 1951 Convention,¹⁰ Article II of its 1967 Protocol and Article VIII of the 1969 OAU Refugee Convention¹¹ contain the corresponding treaty obligations of states in this area. In essence, states parties to these international refugee instruments undertake to cooperate with UNHCR in the exercise of its functions, and, in particular, to facilitate its duty of supervising the application of the provisions of these instruments.

This is specified further in Article 35(2) and Article 36 of the 1951 Convention. Pursuant to Article 35(2), states undertake to provide UNHCR, in the appropriate form, with information and statistical data concerning the condition of refugees and the implementation of the 1951 Convention, including laws, regulations and decrees relating to refugees. Article 36 requires states parties to communicate to the UN Secretary-General the laws and regulations which they may adopt to ensure the application of this Convention. While Article 36 nominally mentions the UN Secretary-General, in practice these communications are directed to UNHCR as the principal body within the UN system responsible for refugee matters and as a subsidiary organ of the UN General Assembly.¹²

Moreover, a reflection of UNHCR's supervisory responsibility is contained, *inter alia*, in recommendation (e) of the 1984 *Cartagena Declaration*¹³ and the *Preamble* to the 1957 *Agreement relating to Refugee Seamen*¹⁴. Furthermore, European Union law also demonstrates the commitment of its member states to cooperate with UNHCR in the implementation of the international refugee instruments, which extends to UNHCR's supervisory role, for example in Article 28 of the 1990 *Schengen Implementation Convention*.¹⁵ Article 78(1) of the Treaty on the Functions of the

⁹ 1951 Convention, Article 35 (1).

¹⁰ See also the Preamble of the 1951 Convention.

¹¹ African Union, Assembly of Heads of State, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, Sixth Session, 10 September 1969, Article VIII (1), <http://www.unhcr.org/45dc1a682.pdf> ("Member States shall co-operate with the Office of the United Nations High Commissioner for Refugees.").

¹² See Article 22 of the UN Charter.

¹³ *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, <http://www.unhcr.org/refworld/docid/3ae6b36ec.html> ("To support the work performed by the United Nations High Commissioner for Refugees (UNHCR) in Central America and to establish direct co-ordination machinery to facilitate the fulfilment of his mandate.")

¹⁴ UN High Commissioner for Refugees, *Agreement relating to Refugee Seamen*, 23 November 1957, <http://www.unhcr.org/refworld/docid/3ae6b3614.html> ("Desirous of ... maintaining co-operation with the United Nations High Commissioner for Refugees in the fulfillment of his functions")

¹⁵ European Union, *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the*

European Union¹⁶ stipulates that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Convention. Further, Declaration 17 to the Final Act of the *1997 Treaty of Amsterdam*, which foresees consultations with UNHCR in the area of harmonisation of refugee law and policies, can be seen as a concrete implementation by European Union member states of their responsibility to cooperate with UNHCR in the exercise of its supervisory responsibility. In addition, Article 18 of the Charter of Fundamental Rights of the European Union states that the right to asylum shall be guaranteed with due respect for the rules of the 1951 Convention and its 1967 Protocol.¹⁷ During the EU harmonization process UNHCR provided detailed policy and legal opinions on the various draft texts, as well as substantive background documentation both on state practice and on relevant international refugee law standards.¹⁸ UNHCR is also specifically mentioned in the EU Qualification Directive¹⁹ and the EU Procedures Directive²⁰ which are at the core of the Common European Asylum System (CEAS). The EU Regulation establishing the European Asylum Support Office foresees an important role for UNHCR, including respect for its guidelines and being able to nominate its representative on the Management Board of the Office.²¹ Further, the concluding observations of human rights treaty monitoring bodies reveal a trend that emphasizes the need of states parties to cooperate and coordinate with UNHCR.²²

Turning to the international statelessness instruments, UNHCR is neither explicitly mentioned in the 1954 Convention on the Status of Stateless Persons nor in the 1961 Convention on the Reduction of Statelessness. However, the UN General Assembly has subsequently designated UNHCR as the appropriate “body” under Article 11 of

French Republic, on the Gradual Abolition of Check at their Common Borders (“Schengen Implementation Agreement”), 19 June 1990, <http://www.unhcr.org/refworld/docid/3ae6b38a20.html>.

¹⁶ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C115/01, <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

¹⁷ European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), available at: <http://www.unhcr.org/refworld/docid/3ae6b3b70.html>.

¹⁸ See UN doc. A/AC.96/930, para 42.

¹⁹ See *Council Directive 2004/82/EC*, of 29 April 2004, Preamble para 15, Official Journal L 304, 30/09/2004 P. 0012-0023.

²⁰ See *Council Directive 2005/85/EC*, of 1 December 2005, Article 21, Official Journal L 326, 13/12/2005.

²¹ See Commission of the European Communities, 2009/0027 (COD), *Proposal for a Regulation of the European Parliament and the Council establishing a European Asylum Support Office*, of 18 February 2009 {SEC(2009) 153} {SEC(2009) 154}.

²² See, for example, Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Uzbekistan*, CRC/C/15/Add.167, para 60, of 7 November 2001, (“The Committee recommends that the State party ... [c]ontinue and strengthen its cooperation with UNHCR.”).

the 1961 Convention of Statelessness and recognized UNHCR more generally as the UN institution with an international protection mandate for stateless persons.²³

In relation to the internally displaced, the only binding international instrument is the Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa adopted by the African Union in October 2009. The Convention refers specifically to UNHCR's role and expertise in its Preamble.²⁴ In its work for the internally displaced, and in the absence of a global convention, UNHCR relies on the UN Guiding Principles on Internal Displacement as the primary legal framework for their protection.

As is evident from this brief legal analysis, it is impossible to separate the supervisory responsibility from the international protection function of the Office and broader cooperation obligations.

To whom does UNHCR's protection mandate, and by consequence its supervisory responsibility, apply?

UNHCR's functions and responsibilities are set out in the Statute and subsequent UN General Assembly resolutions.²⁵ They are also embedded more broadly in international law. It is axiomatic to point to the two global refugee and statelessness instruments and to a number of regional ones. Yet our functions go beyond that. They are equally enshrined in broader concepts of public international law, such as in the surrogate function of diplomatic and consular protection, and in international human rights protection concepts.

Over the years, the range of individuals and groups of people for whom UNHCR has been granted (legal) responsibility to provide protection and assistance, as well as to promote durable solutions, has evolved and expanded. Broken down into

²³ See Article 33 of the *1954 Convention relating to the Status of Stateless Persons* (the Secretary-General is nominally mentioned but it means in practice UNHCR); Article 11 of the *1961 Convention on the Reduction of Statelessness* and both instruments in conjunction with General Assembly resolutions 3274 (XXIX) and 31/36 (where UNHCR was designated as the appropriate "body" under Art 11 of the 1961 Convention on the Reduction of Statelessness); see further *General Assembly resolutions* 49/169 (para 20); 50/152 (para 14 where it was clarified that UNHCR's activities on behalf of stateless persons are part of the Office's statutory function of providing international protection, and para 15); 61/137 (para 4) and subsequent resolutions, as well as Executive Committee Conclusions (in particular Conclusions No. 107, 106, 96, 90, 78, 68).

²⁴ African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* ("Kampala Convention"), 22 October 2009, Preamble para 12, <http://www.unhcr.org/refworld/docid/4ae572d82.html>.

²⁵ See paras 3 and 9 of the UNHCR Statute which allow for a dynamic evolution of the mandate of the Office.

different categories, the Office's mandated responsibilities extend to the following groups of people:²⁶

1. Refugees qua paragraph 6 of the UNHCR Statute and subsequent UN General Assembly resolutions either:
 - i. as individuals in need of international protection as a result of persecution, generalized violence or public disorder or
 - ii. on the basis of a *prima facie* determination of group eligibility based on UNHCR's objective assessment of conditions in the country of origin on account of persecution and/or the general risk of serious harm from generalised violence or other circumstances which have seriously disturbed public order;
2. Convention Refugees, as well as those benefiting from complementary or subsidiary forms of protection determined by application of the 1951 Convention and/or other regional refugee instruments, such as the OAU Refugee Convention, the Cartagena Declaration or the EU Qualification Directive;²⁷
3. Asylum-seekers on the basis that they may be in need of international protection, pending the determination of their claims;
4. Returnees, that is, refugees, internally displaced persons and stateless persons of concern wishing to return voluntarily to the countries and places of origin;
5. Non-refugee Stateless Persons;

²⁶ The legal authority for UNHCR's responsibility for these individuals and groups can be found in its constituting Statute and in a number of subsequent General Assembly resolutions. See in particular UNHCR's Thematic Compilation of General Assembly and Economic and Social Council Resolutions, DIP, 1 February 2003 <http://www.unhcr.org/3e958fc4.html>; Volker Türk, *Freedom from Fear: Refugees, the Broader Displacement Context and the Underlying International Protection Regime*, in Vincent Chetail (ed.), *Globalization, Migration and Human Rights Law under Review, Volume II*, (Brussels: Collection of the Geneva Academy of International Humanitarian Law and Human Rights, 2009), pp 475-522.

²⁷ See UNHCR, *Providing International Protection Including Through Complementary Forms of Protection*, 2 June 2005, EC/55/SC/CRP.16, <http://www.unhcr.org/refworld/docid/47fd49.html>; see generally, Ruma Mandal, *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, Department of International Protection, June 2005, <http://www.unhcr.org/refworld/pdfid/435e198d4.pdf>; European Council on Refugees and Exiles, *Complementary Protection in Europe*, 29 July 2009, <http://www.unhcr.org/refworld/docid/4a72c9a72.html>.

6. Internally displaced persons in certain circumstances, and as part of broader cluster responsibilities emerging from the UN Humanitarian Reform;²⁸
7. Persons threatened with displacement or otherwise at risk in certain circumstances (including on a good offices basis).

All persons falling within the aforementioned categories are considered to be “of concern to UNHCR”, and the Office exercises international protection in relation to all of them. However, its *supervisory role* differs, depending on the legal context and the group of persons involved.

UNHCR is authorized and, in fact, obliged to declare which individuals or groups may be of concern to the Office under its mandate. This may be in relation to a specific individual(s) or to a wider group within the above categories. The effect of UNHCR exercising its mandate in this way puts other external actors “on notice” of the Office’s interest in and legal responsibilities (albeit to varying degrees depending on the context) towards persons covered by the designation. Specifically, it requires other actors:

- (i) not to act in any way that might undermine the Office’s international protection function towards such people; and
- (ii) to cooperate fully with UNHCR in discharging its international protection mandate, including monitoring and oversight responsibilities related to its supervisory role.

As can be seen, the international protection concept has evolved both in terms of who UNHCR covers and how and in terms of what the Office undertakes to fulfill this mandate.

What is UNHCR’s current practice in the exercise of its supervisory function and how is it reflected in state practice?²⁹

UNHCR – as an international organization formally accountable to the UN General Assembly – is a multi-faceted actor. It is, therefore, important to take into account the operational context within which we work and UNHCR’s own responsibilities as

²⁸ On UNHCR’s policy framework and implementation strategy for the internally displaced, see the Standing Committee document, UN doc. EC/58/SC/CRP.18 of 4 June 2007, <http://www.unhcr.org/refworld/docid/4693775c2.html>. UNHCR’s competence is derived from paragraphs 3 and 9 of the Statute and a number of subsequent UN General Assembly resolutions.

²⁹ For a detailed analysis of UNHCR’s supervisory responsibility see Volker Türk, *UNHCR’s Supervisory Responsibility*, *Revue Québécoise de Droit International*, vol. 14.1 (2001), pp 135-158, <http://www.sqdi.org/volumes/pdf/14.1 - turk.pdf>.

well as the responsibilities of others.³⁰ After all, it is primarily states that are responsible for upholding the human rights of everyone subject to their jurisdiction, including non-nationals. Because of the special character of the categories of people of concern, UNHCR has often stepped in, substituting, *de facto*, for the state.³¹

If one were to draw up a typology of the different operational contexts of UNHCR's work, the following categorization may best encapsulate its various dimensions: i) a fully established and functioning protection system, seen mainly in the industrialized world; ii) an emerging protection system; iii) a strong operational role in the host country (divided into urban, camp or mixed, and degree of necessity for the *de facto* state substitution role); iv) a strong operational role in the country of origin (focusing on the internally displaced, returnee, stateless or mixed populations).

In operational contexts where UNHCR is one of the main providers of protection and assistance, particularly in camps or non-Convention states and where we take on a state-substitution role, core protection interventions would, for instance, include life-saving measures such as the provision of basic relief; registration, status determination and documentation (e.g. as a precursor to prevent *refoulement*); protection arrangements, such as SGBV prevention and response; and core child protection measures.

At the same time it has always been important for UNHCR to work on systemic change, meaning that a considerable part of our efforts are devoted to generating social change so that governments, civil society actors and others take on the responsibilities that squarely lie with them. In established systems in the industrialized world, where our activities are primarily advocacy-based, implementation of our supervisory responsibility helps to sustain the functioning of established systems and revolves around the question of how to strengthen implementation of international and regional instruments, and how to develop a consistent interpretation and application thereof. If the latter fails, we are eventually confronted with a deteriorating asylum situation in a particular country.

In order to achieve the purposes of the international protection regime, the Office has established a certain practice over the past 60 years – 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

³⁰ See Michael Kagan, *The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination*, International Journal of Refugee Law 1, 14 (2006) ("The United Nations, UNHCR included, has emphasized that refugee protection is ultimately a state responsibility... UNHCR, in its Notes on International Protection, has been clear that it can assist governments, but cannot take over for them.")

³¹ *Ibid.* at 28 ("UNHCR's RSD activities appear explained by an inclination to fill gaps left by governments").

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 state practice, as reflected in regional instruments and mechanisms, national laws and administrative measures, Executive Committee Conclusions, as well as other indications 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.

While not exhaustive, current practice which has broadly met the acquiescence of states and been conceptualised by the Executive Committee³² could be described as follows:³³

- UNHCR is entitled to monitor state practice, report on it³⁴ and follow up its interventions with governments and other actors regarding the situation of persons of concern. Making representations to governments and other relevant actors on protection concerns is inherent in UNHCR’s supervisory function.³⁵
- In general, UNHCR is granted, at a minimum, an advisory-consultative role in national asylum, refugee status or statelessness determination procedures. For instance, UNHCR is notified of asylum applications, is informed of the course of the procedure and has guaranteed access to files and decisions that may be taken up with the authorities, as appropriate.³⁶ UNHCR is entitled to intervene and submit its observations on any case at any stage of the procedure.³⁷

³² See UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, August 2009, where the pronouncements by the Executive Committee in relation to the various components of UNHCR’s practice can be found.

³³ See also paras 3-5 of the summary conclusions on supervisory responsibility in the context of the second track of the Global Consultations on International Protection, confirming this viewpoint, available in Erika Feller, Volker Türk, Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge, 2003), pp 668-669, <http://www.unhcr.org/4a1ba1aa6.html>.

³⁴ See, for example, UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, March 2010. This report is the result of a research project on the application of key provisions of the EU Asylum Procedures Directive in selected member states.

³⁵ A good practice example is the “Further Developing Quality” project, which started in 2006 in six Central European and four Southern European EU member states, involving also three North-Western European countries sharing good practice and experience. The project is led by UNHCR and co-financed by the European Refugee Fund (ERF).

³⁶ See, for example, *Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals* [Hungary], Act II of 2007, 1 July 2007, Ch. VIII, Sec. 81, <http://www.unhcr.org/refworld/docid/4979cae12.html>. “The representative of the Office of the

- The Office is also entitled to intervene and make submissions to quasi-judicial institutions or courts in the form of *amicus curiae* briefs,³⁸ statements or letters.³⁹ UNHCR's engagement with the judiciary and the legal community more broadly

United Nations High Commissioner for Refugees may participate in any stage of the proceedings for the recognition of stateless status, and:

- a) he may be present when the petitioner is interviewed;
 - b) he may provide administrative assistance to the petitioner;
 - c) he may gain access to the documents of the proceedings and make copies thereof;
 - d) the immigration authority shall send the administrative resolution or court decision to him.”;
- Refugee Act*, 1996 (last amended in 2003) [Ireland], 15 July 2003, <http://www.unhcr.org/refworld/docid/3ae6b60e0.html> (“(3)(a) The Commissioner shall notify the High Commissioner in writing of the making of an application and the notice shall include the name of the applicant and the name of his or her country of origin and such other information as the Minister may specify by notice in writing addressed to the Commissioner.”); *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* [Belgium], 29 May 2009, Article 57/23 bis, para 1, <http://www.unhcr.org/refworld/docid/4a41dc4c2.html> (“Le représentant en Belgique du Haut Commissaire des Nations Unies pour les Réfugiés, ou son délégué, à condition que le demandeur d'asile soit d'accord peut consulter toutes les pièces, y compris les pièces confidentielles, figurant dans les dossiers de demande de reconnaissance de la qualité de réfugié pendant tout le déroulement de la procédure, à l'exception de la procédure devant le Conseil d'Etat.”)

³⁷ See, for example, *Jabari v. Turkey*, Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 8, 11 July 2000, <http://www.unhcr.org/refworld/docid/3ae6b6dac.html>. In this case, the Court wrote: “The Court for its part must give due weight to the UNHCR's conclusion on the applicant's claim in making its own assessment of the risk which the applicant would face if her deportation were to be implemented.”

³⁸ By way of example, in her opinion in the Bolbol case (Opinion Advocate General Sharpston, 4 March 2010, C-31/09, para 16), concerning Article 1D, before the Court of Justice of the European Union the Advocate General considered: “The UNHCR occasionally makes statements which have persuasive, but not binding, force. (19) His Office has published various statements which relate to the interpretation of Article 1D of the 1951 Convention: a commentary in its Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol, a note published in 2002 (and revised in 2009) and a 2009 statement (also subsequently revised) which relates expressly to Ms Bolbol's case. I intend to treat this last as an unofficial *amicus curiae* brief”.

³⁹ For in depth discussion of UNHCR *amicus curiae* briefs see *I. v. The Minister for Justice, Equality and Law Reform, On the Application of the United Nations High Commissioner for Refugees*, [2004] 1 ILRM 27, Ireland: Supreme Court, 14 July 2003, <http://www.unhcr.org/refworld/docid/42cb9ac34.html> (holding “In the present case, an issue of public law arises and the judgment of the court may affect parties other than those now before the court. The court was satisfied that the UNHCR might be in a position to assist the court by making written and oral submissions on the question of law certified by the High Court and, accordingly, appointed it to act as *amicus curiae* and, for that purpose, to make oral and written submissions.”); see, for example, *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2006] UKHL 46, United Kingdom: House of Lords, 18 October 2006, <http://www.unhcr.org/refworld/docid/4550a9502.html>.

is reflected in various litigation 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 the International Association of Refugee Law Judges.

- Persons of concern are granted access to UNHCR and vice versa, either by law⁴⁰ or administrative practice.
- To ensure conformity with international law and standards relating to persons of concern, UNHCR is entitled to advise governments and parliaments on legislation and administrative decrees affecting them during all stages of the process. The Office is therefore generally expected to provide comments on and technical input into draft legislation and related administrative decrees.
- UNHCR's advocacy role, including the issuance of public statements, is well acknowledged as an essential tool of international protection and in particular the Office's supervisory responsibility.
- UNHCR is entitled to receive data and information concerning asylum-seekers, refugees, stateless persons and other persons of concern.
- UNHCR is entitled to issue legal positions on international law matters relating to its populations of concern,⁴¹ 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 on 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* (1979, reedited 1992),⁴² for example, is a case in point. It is quoted in numerous court decisions as an important source of reference.⁴³ In the same vein, borrowing from the human rights treaty monitoring bodies and their issuance of "general comments", UNHCR has gazetted "Guidelines on International Protection" complementing the Handbook. These Guidelines provide advice on the interpretation of

⁴⁰ See, for example, Migration Act 1958 (as amended up to Act No. 91 of 2009) - Volume 1 [Australia], Act No. 62, Part 3, Division 3, Sec. 91N para 3, of 1958 as amended, 8 October 1958, <http://www.unhcr.org/refworld/docid/4afad9682.html>

⁴¹ See Volker Türk, *Introductory Note to UNHCR Guidelines on International Protection*, International Journal of Refugee Law, 2003; vol. 15, pp 303 – 306. UNHCR Guidelines on International Protection are available on <http://www.unhcr.org>.

⁴² See *Executive Committee Conclusion No. 8*, para (g).

⁴³ See, for example, *R v. Asfaw*, Opinion of the Lords of Appeal for Judgment in the Case [2008 UKHL 31], <http://www.unhcr.org/refworld/docid/4835401f2.html> (citing UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* in the context of UNHCR's supervisory role); see also Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted By States Parties under Article 9 of the Convention: Australia*, CERD/C/304/Add.101, para 17, of 19 April 2000.

provisions of the international refugee instruments and other international protection matters. Their release is often preceded by expert consultations similar to the second track roundtables of the Global Consultations on International Protection.

- UNHCR has the competence to develop progressively international law and standards relating to populations of concern.⁴⁴ It is broadly recognised that the international legal framework is generally adequate to cover the various forms of forced displacement, but there is a continuing need to supplement and substantiate some of its aspects, to identify normative gaps and to fill those through the progressive development of law and standards.

As can be seen from this inventory, a rich practice exists that transcends in many ways traditional human rights treaty monitoring bodies and mechanisms, as well as other supervisory models existing in different contexts of international law. The lack of precision on how UNHCR would implement its supervisory role has been turned into an advantage, since it did not circumscribe narrowly the powers of the institution but enabled it to develop them organically. The Office makes for an interesting case study for international lawyers and experts in international institutions, given the highly operational nature of UNHCR's work, the unprecedented involvement of a UN organ in national procedures, mechanisms and arrangements, and in law-making and standard-setting. UNHCR is not only an operational human rights agency but also a treaty monitoring body in relation to various international and regional instruments covering the different groups of concern. As a result, the Office is an actor on the international plane in its own right. Our closest sister is the ICRC, but we are also related to the ILO and the tradition created after UNHCR's birth that you can find in the human rights treaty monitoring bodies.

It would be wrong to deny that there are not practical difficulties associated with the implementation of UNHCR's supervisory role in some instances. Strong operational involvement and the way we work, for instance, through quiet diplomacy, may implicate the institution in that it would be perceived to have lost the necessary distance from government policies. There is the perennial issue in some quarters of a perceived lack of independence because UNHCR's budget hinges largely on the voluntary contributions of donor countries.⁴⁵ In a number of operations we have also

⁴⁴ See Volker Türk, *The Role of UNHCR in the Development of International Refugee Law*, in Frances Nicholson & Patrick Twomey (eds.), *Refugee Rights and Realities: Evolving Concepts and Regimes* (Cambridge 1999), pp. 153-173. See also UN doc. A/AC.96/830 of 7 September 1994, para 68.

⁴⁵ Compare *K.R.S. v. United Kingdom*, Application no. 32733/08, Council of Europe: European Court of Human Rights, 16, 2 December 2008, <http://www.unhcr.org/refworld/docid/49476fd72.html>. ("The Court notes the concerns expressed by the UNHCR whose independence, reliability and objective are, in its view, beyond doubt.")

faced obstacles preventing us from implementing some of the aforementioned activities, for instance, when UNHCR's access to detention centres is curtailed or when we are not properly involved in a legislative process affecting persons of our concern.

How has the discussion evolved over the last ten years?

It is interesting that the debate on UNHCR's supervisory role rekindles every couple of years. In the run-up to the 50th anniversary of the 1951 Convention in 2001 a number of NGOs and academics were particularly vocal in pressing for enhanced international supervision of the international refugee instruments. One concrete proposal by a number of NGOs⁴⁶ was that the High Commissioner should have available to him a group of "eminent advisers" who would report to him. This remains an interesting proposal. Obviously the mandate and the exact role of such a group would need to be examined carefully so as to ensure that its work would not overlap, for instance, with that of the Division of International Protection or undermine more generally the authoritative voice of the High Commissioner.

The topic of UNHCR's supervisory responsibility was also a subject of discussion in the context of the second track of the Global Consultations on International Protection. Walter Kälin drafted a background document on UNHCR's supervisory role, which was structured around a dynamic interpretation of Article 35 of the 1951 Convention.⁴⁷ The emphasis of the study was on a comparative analysis, including different supervisory models in the current system of international law, their effectiveness, as well as relevance to the international refugee protection framework. He set out different and interesting proposals to make supervision of implementation of the Convention/Protocol more effective.⁴⁸

The debate in the Global Consultations framework, including during the Ministerial Meeting in December 2001, revolved, among other suggestions, around the issue of inter-state review mechanisms. These were, however, considered to be problematic for a number of reasons. Inter-state mechanisms of such a nature could politicise an issue which is more effectively addressed in a non-political manner that does not

⁴⁶ The proposal had the following title, *Refugee Protection: Strengthening the supervisory role of UNHCR*.

⁴⁷ See Walter Kälin, *Supervising the 1951 Convention relating to the Status of Refugees: Article 35 and Beyond*, in Erika Feller, Volker Türk, Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge, 2003), pp. 613-666, <http://www.unhcr.org/4a1ba1aa6.html>.

⁴⁸ His paper was discussed during an expert roundtable in Cambridge in July 2001. The interesting summary conclusions of this roundtable can be found in Erika Feller, Volker Türk, Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge, 2003, pp 667-671, <http://www.unhcr.org/4a1ba1aa6.html>.

lead to divisive debates. It was also felt that such mechanisms would need to be established in the form of a Protocol to the Convention, which was not deemed to be feasible. Equally, such peer reviews would not necessarily strengthen supervision of the Convention and could undermine UNHCR's supervisory role.

Other suggestions were of a more traditional nature and replicated models taken from the human rights treaty monitoring mechanism, such as state reporting and individual complaint procedures. These suggestions, however, need to be looked at against the effectiveness of the existing human rights monitoring system which underwent major change after 2005, with the creation of the Human Rights Council and the introduction of universal periodic reviews of the human rights performance of states. An important consideration is that state reporting is considered burdensome, resource-intensive and not necessarily the most effective means of ensuring norm compliance. Granting individuals or groups a right to lodge a complaint would require the drafting of an optional protocol to the Convention. This could lead to a fragmentation of the Convention regime in that it would be up to each state individually to opt for and accept such an enforcement mechanism.⁴⁹

In terms of concrete outcomes of this reflection process, the *Declaration of States Parties*, adopted on the occasion of the first Ministerial Meeting in December 2001, reaffirmed the need for close cooperation with UNHCR, including with regard to its supervisory role.⁵⁰ Similarly, the Agenda for Protection contained a number of action points related to UNHCR's supervisory role.⁵¹ The Convention Plus initiative, the High Commissioner's Dialogue on Protection Challenges, as well as Executive Committee Conclusions No. 105⁵² and 107,⁵³ can be considered in direct follow-up to this portion of the Agenda for Protection.

The last ten years have also seen greater focus on accountability issues for UNHCR itself. The Age, Gender and Diversity Mainstreaming (AGDM) strategy is the bedrock of an organizational shift to achieve equitable outcomes for women and men, boys and girls, older persons, persons with disabilities, and people of different origins or belonging to sexual or ethnic minorities. This strategy has changed the way the Office conducts its operations through participatory planning and needs assessment involving persons of concern, as well as by making the needs, their assessment and the rights of the various populations under the mandate the central concern of our work. Coordination between protection, community services and programme units has improved through the creation of multifunctional teams under

⁴⁹ See Kälin, *supra*, pp 655-656.

⁵⁰ See paras 8 and 9 of the Declaration (UN doc. A/AC.96/965/Add.1 of 26 June 2002, available at <http://www.unhcr.org/3e637b194.html>).

⁵¹ See Goal 1, Objective 5 of the Agenda for Protection (UN doc. A/AC.96/965/Add.1 of 26 June 2002, available at <http://www.unhcr.org/3e637b194.html>).

⁵² See *Executive Committee Conclusion No. 105 on Women and Girls at Risk*.

⁵³ See *Executive Committee Conclusion No. 107 on Children at Risk*.

the AGDM approach. In addition, UNHCR has moved towards a results-based management system, mandatory code of conduct training, institutionalized complaints and oversight mechanisms, as well as the creation of a Global Management Accountability Framework. As a result, through the SCHR Peer Review on Accountability to Disaster-Affected Populations (January 2010), UNHCR was able to confirm that it has procedures in place to ensure the Office acts in an accountable manner towards those it serves.

What is the way forward?

As we can see, the spectrum of engagement has broadened over the last sixty years both in terms of people of concern, actors, legal instruments and international standards but also in terms of issues and complexities. Key to strengthening the implementation of the international protection regime, and in particular of the international instruments underlying it, is a robust exercise of UNHCR's monitoring and supervisory responsibilities. This Conference offers a valuable forum to revert to this issue, especially in view of the anniversaries we shall be marking next year.⁵⁴ It is good to revisit the various ideas and suggestions that have been made over time and to examine them in the light of today's challenges. In so doing, it is crucial to build on past experience, on achievements to date and to bear in mind the overall purpose of further advancements in this area. I would like to stimulate the debate on the basis of seven sets of questions around which I throw out a number of ideas for further discussion.

First, what have we achieved? Do we need to learn lessons? Yes, we do – that's how we progress. Can we share lessons? Yes, we can. And can others learn from us? Yes, they can, for example, in operationalizing human rights or in the area of protecting the rights of migrants.

Second, what remains to be done and what are the challenges? For example, while we need to speak out forcefully (including publicly) on violations of treaty obligations, we must not fall into a "name-and-shame" logic that is not necessarily effective and can even be counterproductive. We need to remain the voice of reason, work constructively and cooperatively, and be guided by effectiveness, impact and results, as well as deep commitment to accountability towards populations of our concern.

Third, which other techniques and models are available to international organisations, also from a comparative perspective? Could those be of use in the forced displacement and statelessness realm?

⁵⁴ 2011 marks the 60th anniversary of the 1951 Convention and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness.

Fourth, what do we need to avoid? What are the pitfalls? For instance, a proliferation of various supervisory mechanisms may lead to duplication, unnecessary competition and coordination problems, thus undermining effectiveness and possibly even achievements to date. Any new proposals must not weaken UNHCR's international protection mandate nor its legal authority stemming from its supervisory role.

Fifth, do we need to revisit reporting? Would it, for instance, make sense for an expert or a group of experts appointed by the High Commissioner to draw up regular reports on the implementation of international instruments on a country, regional or thematic basis? The purpose of these assessments could be to identify legal and practical impediments to full and effective implementation, draw lessons, and make recommendations, including, if necessary, in regard to burden-sharing arrangements or comprehensive approaches.

Sixth, is there value in establishing an Advisory Committee on the implementation of international instruments the composition of which would be determined by the High Commissioner? Such an Advisory Committee could be composed of experts drawn from governments, non-governmental organizations, academia and other civil society actors. It would discuss and make recommendations on issues of implementation in regard to which UNHCR would like to seek advice.

Seventh, would there be value in reconstituting a special committee of the Executive Committee focusing exclusively on international protection, building on the valuable experience gained through the High Commissioner's Dialogues on Protection Challenges? Such a committee could follow the format of the Global Consultations meetings with capital-level representation and broader-based participation from NGOs, academics and experts. It could ensure focused and global discussion on international protection matters; assist UNHCR in exercising its supervisory role; address issues of lack of compliance and operational protection concerns on the ground; act as a forum to design burden-sharing arrangements and regional approaches, as well as to negotiate and conclude substantial Conclusions on international protection matters. Could such a committee also entail a follow-up mechanism to ensure that Executive Committee Conclusions are actually observed by states? What might it look like?

I look forward to a rich and interesting discussion that will help us advance this important topic in the years to come.