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Opening lecture

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"International Protection: The Arab Spring, Modern Movements and the Decades Ahead"

It is very nice to be here again, I trust that you will have a very good course, and I look forward to the Q&A session. My presentation will be in two parts: the first part will provide an overview of the state of international protection for refugees and asylum-seekers since the end of the Cold War and present some of the challenges that lie ahead; the second part will outline five inter-related trends in the responses of States to global migration processes and their impact on the delivery of international protection and the right to asylum.

Former UN High Commissioner Sadako Ogata called the 1990s, the first decade after the end of the Cold War, the "turbulent decade", marked by inter-ethnic and separatist wars and massive outflows of refugees. In her book by the same name, she recounts the rise in civil and community-based conflicts and the lack of effective formulas to deal with uprisings dominated by nationalism and localism.¹ The conflicts and genocides in Rwanda and the former Yugoslavia are examples of these "new wars" of the late 20th century.²

The first decade of the millennium and the second since the end of the Cold War, in contrast, could be characterized as an era of increasing securitization, counter terrorism and fear of the "other" in the post-9/11 context. Politics rather than international law became the governing principle.³ Refugees and asylum-seekers became increasingly perceived by states as destabilizing to their national borders and security, as criminals and terrorists and, collectively, as threats to international peace and security.⁴ During the Cold War, borders were erected to stop the departure of persecuted individuals and groups. In the 2000s, borders are constructed instead to prevent entry.⁵ "Fortress Europe", the "Pacific Solution", and the failure of the "Convention Plus" Initiative to garner improved burden-sharing for refugee emergencies, symbolize the increasingly restrictive climate in which refugee protection needs to be delivered. Ironically, States furthest from the epicenter of the crisis tend to adopt the most restrictive regimes. By comparison, States "in the neighbourhood" continue to admit refugees into their territories, sometimes in the millions, albeit usually accompanied by lower standards of treatment, including at times encampment policies and limited opportunities for local integration. Some of the largest and most protracted refugee situations occurred during this decade.

¹ Sadako Ogata, *The Turbulent Decade: Confronting the Refugee Crises of the 1990s* (2005), at 18.

² Mary Kaldor, *New and Old Wars* (1999).

³ Alice Edwards and Carla Ferstman, "Humanising Non-Citizens: The Convergence of Human Rights and Human Security", in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (2010), at 14.

⁴ *Ibid.*

⁵ *Ibid.*, at 16.

Having now entered the second decade of the 21st century and the third since the end of the Cold War, the chaos and instability of the 1990s seem to have re-appeared (or perhaps continued), albeit in different regions and arguably with different root causes and manifestations. Against a backdrop of weak governance and an absence of political opportunities, near economic collapse or, at a minimum, serious economic grievances, in many countries as well as globally, the Arab Spring has been a rallying cry to new beginnings. From the perspective of forced migration studies, it has been noted by the University of Oxford's Refugee Studies Centre that

"Migration in its various forms has been a key part of the popular uprisings that spread across North Africa and the Levant in 2011. The columns of vehicles escaping from cities and villages under siege in Libya, the boats crammed with Tunisians crossing the Mediterranean Sea and landing on the island of Lampedusa, and the numerous Egyptian émigrés and university students returning to Cairo to join the protests in Tahrir Square are a few examples of the ways in which human mobility intersects current events in North Africa and the Levant."⁶

Over 650,000 migrants and refugees escaped the fighting during the Libya crisis. The humanitarian airlift organized jointly by UNHCR and the International Organization for Migration – as well as by States – shepherded home some 144,000 migrants to their countries of origin in a few short months. Tunisia and Egypt generally kept their borders open. Tragically, while the reception centres on the Italian island of Lampedusa filled to the brim, over 1,000 asylum-seekers and migrants lost their lives trying to cross the Mediterranean in a few short weeks.⁷ While NATO sent air cover over Libya with the aim to protect civilians from Gaddafi's guns, the European Union failed to activate its temporary protection directive, which it had arguably created for this exact situation, being unable to reach consensus on burden-sharing within the Union. Meanwhile, certain Member States of the EU considered for the first time suspending the Schengen free movement zone as approximately 25,000 Tunisians and third country nationals arrived on their shores. The situation in North Africa and the spread to the East, remains fragile, as fledgling democracies take hold. Other hotspots in the last decade and in the last year causing internal and external displacement include Côte d'Ivoire, the Democratic Republic of Congo, Eritrea, Mali, Myanmar, Somalia, Sri Lanka, Sudan, Afghanistan, Iraq, and Syria.

Stephen Castles and other social scientists have long explained that persons move for mixed motives, including social, political and economic vulnerability as well as opportunity.⁸ UNHCR, too, has acknowledged both the mixed movements of persons, involving both those with protection risks and others; as well as the mixed purposes for movement.⁹ The exodus from Libya not only confirmed these views but also captured the modern challenge to states – the blurring of the lines between refugee and migrant as legal categories, and the perceived bluntness of the 1951 Convention, an instrument borne of a previous era, to deal with such crises. In the years ahead, the conflation of protection deficits with population pressures, climate-related changes, and sluggish economic performance and limited growth, may give rise to more movement. At the same time, rising education standards in the developing world and the opening up of world markets means that regular and irregular migration is set to continue to increase. It is also likely that there will be a growth in movement from the global north to the global south, as well as south-south migration.

⁶ University of Oxford, Refugee Studies Centre and International Migration Institute, "The Arab Spring and Beyond: Human Mobility, Forced Migration and Institutional Responses", International Symposium, May 2012, flyer, <http://www.rsc.ox.ac.uk/pdfs/ev-arab-spring-beyond-310112.pdf>.

⁷ UNHCR, *Note on International Protection: Report of the High Commissioner for Refugees*, 28 June 2011, A/AC.96/1098, para. 47, available at: <http://www.unhcr.org/refworld/docid/4ed86d612.html>.

⁸ Stephen Castles, *Environmental Change and Forced Migration: Making Sense of the Debate*, UNHCR, New Issues in Refugee Research, Working Paper No. 70 (2002).

⁹ UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, January 2007, Rev.1, available at: <http://www.unhcr.org/refworld/docid/45b0c09b2.html>.

Meanwhile, protracted displacement situations remain unresolved causing individuals to seek and find their own solutions abroad. In 2011, there were 7 million refugees, the highest figure in 10 years, and 27 million internally displaced persons, living in protracted displacement, in 25 different countries. A quick statistical comparison paints the picture: 9 million refugees returned to their homes between 1991 and 1996,¹⁰ amounting to nearly 2 million persons per year. In 2011, the global voluntary repatriation figure stood at only 197,000, the lowest in 20 years.

2012 and 2013 are set to witness the closure of at least three of the most protracted refugee situations in Africa with the implementation of the final phases of comprehensive solutions strategies and the related cessation of refugee status of Angolan, Liberian, and pre-1999 Rwandan refugees. The conflicts in the former Yugoslavia of the 1990s will also be largely brought to a close in 2012. In 2011, Bosnia and Herzegovina, Montenegro, Croatia and Serbia signed a joint declaration aimed at speeding solutions for 74,000 remaining refugees from the crisis of 1991-95.

Year-on-year voluntary repatriation figures worldwide have been dropping, highlighting the intractable and often cyclical nature of many of these modern conflicts based in deep-seated ethnic divisions and distrust, and the correlative failure of the international community alongside governments and warring parties to solve these crises and to put in place lasting peace. Afghanistan is a case study in point. While 118,000 Afghan refugees returned to Afghanistan in 2010, three out of ten refugees in the world were Afghans in the same period. According to Professor Theo Farrell of King's College London, "The traditional view of war as an activity undertaken by organized armed groups for political purposes no longer captures the complex reality of armed conflict." He refers in addition to economic and personal motivations for the continuation of armed violence, as well as its criminal and interpersonal dimensions.¹¹ Processes to end such conflicts will need to come to grips with these dynamics. In the meantime, offering organized migration solutions to persons in protracted exile – in addition to the more traditional resettlement and local integration options - needs to be examined further.¹²

Trying to unearth some logic to what seems to be a fluctuating state of affairs since the end of the Cold War is not easy. Nonetheless, in a modest attempt to do so, I would like now to turn to describe five inter-related trends in the responses of States to global migration processes, which carry both positive and negative ramifications for the international refugee protection system, and which will hopefully invoke questions and thoughts, and maybe even solutions, over the week's course.

The five trends are externalization and non-entrée policies, restrictionism, legalization/regularization, regionalism, and the asylum-migration nexus (migration management and control).

1. Externalization and non-entrée

It is regularly stated that in this era of globalization and the free movement of goods and services, the territorial border is in decline. At the same time, the free movement of persons has not yet found its place within this new global free trade system. As barriers to trade have been lifted, barriers to travel – except for the most privileged classes of migrants – have not followed suit. According to Ayelet Shachar, the border has not simply been reinforced but has in fact been reinvented when it comes to "uninvited" groups of travelers.

¹⁰ Gil Loescher et al., *The United Nations High Commissioner for Refugees* (2008), at 48.

¹¹ Theo Farrell, *The Causes, Character and Conduct of Armed Conflict, and the Effects on Civilian Populations, 1990-2010* (No. 24), UNHCR, Legal and Protection Policy Research Series, PPLA/2012/01, forthcoming March 2012, available at: <http://www.unhcr.org/pages/4a16b17a6.html>.

¹² See, e.g., Katy Long, *Extending Protection: Labour Migration and Durable Solutions*, UNHCR New Issues in Refugee Research 176, October 2009, available at: <http://www.unhcr.org/4ad334a46.html>.

She refers to the “malleable border”¹³ in which the “location of ‘our gates’ ... no longer stand at the country’s territorial edges” but instead – owing to clever cartography – they have either “[bled] into the interior or extend[ed] it beyond the territory’s exterior” in order to deter access by irregular migrants.¹⁴ She gives a number of examples to evidence this trend, referring particularly to US practices such as the US’ legal distinction between “entry” and “admission”, the procedure of “expedited removal” designed to take place at the border but which actually occurs in the interior, and pre-inspection procedures prior to arrival into the US. She also refers to the Australian practice of “excising” territory from the application of its Migration Act, in which by legislation the Australian government claims that asylum-seekers are not within Australian territory for the purposes of benefiting from the Migration Act if they land on “excised territories”. Such practices have also been called “non-entrée” policies, or in the words of James Hathaway, “legalized policies adopted by States to stymie access by refugees to their territories”.¹⁵ Like Shachar, Hathaway refers in particular to visa requirements prior to embarkation and the imposition of sanctions on carriers for carrying unauthorized entrants, including particularly airlines.

Regrettably, the 1951 Refugee Convention does not explicitly address the question of entry. Admission has always been one of the most contested aspects of refugee protection, yet without it, the rights in the Convention become illusory and inaccessible. While it has become accepted that the customary international law principle of *non-refoulement* includes non-rejection at the frontier,¹⁶ there remain questions about its full scope. The drafters of the Convention discussed, for example, exceptions to the *non-refoulement* principle in mass influx situations,¹⁷ precisely the types of situations in which it is clear that persons fleeing for their lives would need entry and sanctuary. While such limits might have been in the minds of the drafters, it is clear that the practice of granting sanctuary to civilian war victims is “well-documented and [-] impressive in its consistency and extent.”¹⁸

Recent rebukes to the exclusionary practices of States has been via the judiciary. The European Court of Human Rights this month ruled in *Hirsi v Italy* that the Italian practice of “push backs” in the Mediterranean to Libya – in other words, the turning back of boats carrying asylum-seekers and migrants (in this case including 22 Somali and 13 Eritrean nationals) – was unlawful. Italy was held to be in violation of its obligations under Article 3–the prohibition on *refoulement* to torture – because despite credible information of risks of torture and ill-treatment in Libya, the Italian government continued its policy. Their rescue on the high seas was immaterial as they were considered by the Court to fall under Italy’s jurisdiction at the flag State of the rescuing vessel. It was also held to be in violation of the prohibition on collective expulsion and the right to an effective remedy.¹⁹ Similarly, the Australian High Court held in 2011 that the transfer to Malaysia of asylum-seekers under a deal between the two countries was unconstitutional, inter alia, because Malaysia is not a

¹³ Ayelet Shachar, “The Shifting Border of Immigration Regulation” (2009) 30 *Michigan Journal of International Law* 809, at 813 (reprinted from (2007) 3 *Stanford J. C.R. & C.L.* 165).

¹⁴ *Ibid.*, at 812-3.

¹⁵ James C. Hathaway, *The Rights of Refugees under International Human Rights Law* (2005), 291, n. 70, referring to James Hathaway, “The Emerging Politics of Non-Entrée” (1992) 91 *Refugees* 40.

¹⁶ UN High Commissioner for Refugees, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, available at: <http://www.unhcr.org/refworld/docid/3d60f5557.html>.

¹⁷ U.N. Doc. A/CONF.2/SR.16, 6 and U.N. Doc. A/CONF.2/SR.35, 21, as referred to in Thomas Gammeltoft-Hansen, *Access to Asylum* (2011), at 50-51. The countries included France, Italy, Sweden, the Netherlands and the Federal Republic of Germany.

¹⁸ Joan Fitzpatrick Hartman, “The Principle and Practice of Temporary Refuge: A Customary Norm Protecting Civilians Fleeing Internal Armed Conflict”, in David Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980s* (1988) 87, at 87.

¹⁹ *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f4507942.html>. See, also, UN High Commissioner for Refugees, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Hirsi and Others v. Italy*, March 2010, available at: <http://www.unhcr.org/refworld/docid/4b97778d2.html>.

party to the 1951 Convention and did not have procedures in place to assess protection needs.²⁰

Conversely, however, some non-entrée policies have withstood judicial scrutiny. The United Kingdom's House of Lords in the *Roma Rights* case, for example, held that the principle of *non-refoulement* did not apply to persons of Roma ethnicity stopped by UK officials in the Czech Republic from boarding a plane to the UK where they wished to seek asylum.²¹ The Lords relied in part on the fact that the individuals had not yet left their country of nationality and so were not "outside" it in order to be treated as refugees and for the obligations under the 1951 Refugee Convention to become activated. Not dissimilarly, the US Supreme Court in the case of *Sale* found that the 1951 Convention obligation of non-refoulement did not extend to Haitians on the high seas as they were not within the jurisdiction of the US.²² Although subsequently criticized and disputed by the Inter-American Commission on Human Rights,²³ such non-entrée practices continue.

2. Restrictionism

The second trend is that of restrictionism - here I refer to two particular forms – first, restrictive interpretations of the 1951 Convention definition of a refugee, and second, restrictions on the enjoyment of rights of asylum-seekers pending the recognition of their status. In relation to the latter I will refer specifically to the increasing use of detention including its application in connection with accelerated procedures.

The 1951 Convention definition of a refugee, as someone at risk of persecution on account of their race, religion, nationality, membership of a particular social group, or political opinion, is not perceived to easily map onto the size, scale and character of many modern conflicts and refugee movements. According to UNHCR, this perception of the 1951 Convention definition tends to "obscure the facts" in at least two ways: first, even in war or conflict situations, persons may be forced to flee on account of a well-founded fear of persecution for Convention reasons; second, war and violence are themselves often used as instruments of persecution.²⁴ Nonetheless, as the Convention is interpreted and applied at the national level, there is a wide variation in State practice. Even in the EU, where there has been an attempt to harmonize interpretations, H el ene Lambert finds in her book on the limits of transnational law that "there is limited transnational legal activity".²⁵ By this she means

²⁰ *Plaintiff M70/2011 v. Minister for Immigration and Citizenship; and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship*, [2011] HCA 32, Australian High Court, 31 August 2011, available at: <http://www.unhcr.org/refworld/docid/4e5f51642.html>.

²¹ *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*, [2004] UKHL 55, United Kingdom House of Lords, 9 December 2004, available at: <http://www.unhcr.org/refworld/docid/41c17ebf4.html>.

²² *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al.*, 509 U.S. 155; 113 S. Ct. 2549; 125 L.Ed. 2d 128; 61 U.S.L.W. 4684; 93 Cal. Daily Op. Service 4576; 93 Daily Journal DAR 7794; 7 Fla. Law W. Fed. S 481, United States Supreme Court, 21 June 1993, available at: <http://www.unhcr.org/refworld/docid/3ae6b7178.html>. UNHCR, *Gene McNary, Commissioner, Immigration and Naturalization Service, et al. (Petitioners) v. Haitian Centers Council, Inc., et al. (Respondents). Brief Amicus Curiae of the Office of the High Commissioner for Refugees in Support of Respondents*, October 1992, available at: <http://www.unhcr.org/refworld/docid/3f336bbc4.html>.

²³ The Inter-American Commission found that the US' interception practices prevented the Haitian asylum-seekers from seeking asylum "in other countries" in violation of the right to asylum; and they also found violations inter alia of the rights to life and liberty under the Inter-American Declaration on the Rights and Duties of Man: *The Haitian Centre for Human Rights et al. v. United States, Case 10.675*, 10.675, Inter-American Commission on Human Rights (IACmHR), 13 March 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b71b8.html>.

²⁴ UNHCR, *Note on Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, April 2001, para. 20, available at: <http://www.unhcr.org/refworld/pdfid/3b20a3914.pdf>.

²⁵ H el ene Lambert, "Transnational law, judges and refugees in the European Union", in Guy S. Goodwin-Gill and H el ene Lambert (eds.), *The Limits of Transnational Law: Refugee Law, Policy*

that even in the same Union, judges do not routinely consider or refer to the judgments from each other's cases. This lack of consistent interpretation leads to variable rates of recognition of refugee status. In fact, the rates of recognition vary so considerably – both within and between states – that refugee status determination has been called “refugee roulette”.²⁶

In terms of rights enjoyment, a clear example of attempts to deter asylum-seekers is the rise in the use of immigration detention in many countries. Despite the fact that there is no empirical evidence that detention deters irregular migration or discourages persons from seeking asylum,²⁷ countries continue to detain asylum-seekers in increasing numbers and to invest in the building of expensive detention facilities. At any time, there are 33,000 migrants including asylum-seekers in detention in the US;²⁸ meanwhile in the UK between 2000-3000 migrants are in detention at any time with the most common category of detainee being “asylum-seeker”.²⁹

Mandatory detention in connection with accelerated asylum procedures has also become commonplace in Europe, although the practice is now being challenged. Despite the European Court's decision in *Saadi v Italy*, in which 7 days' detention for the purposes of expediting an asylum request was considered lawful, there are limits on treatment within accelerated procedures.³⁰ The same court recently criticized France – in the case of *I.M. v France* – for reducing the procedural safeguards to asylum-seekers in detention to the bare minimum. It held that lack of legal and linguistic assistance to asylum-seekers in detention alongside very short deadlines for submitting asylum claims denied the right to an effective remedy.³¹ Likewise, in the Grand Chamber's decision in *M.S.S. v. Greece and Belgium*, it was held that States could not return asylum-seekers to Greece under the Dublin II regulation which allows States to transfer asylum-seekers to their first country of entry to the European Union. The conditions in Greece were held to be in violation of the minimum standards required by the European Convention.³²

3. Legalization/regularization

Paradoxically, against this backdrop of exclusionary and restrictive policies and practices, there has been a growth in the formalization of asylum systems. The EU “asylum acquis” is a clear example of this, in which Member States of the European Union have sought to elaborate minimum standards relating to the qualification for refugee status, asylum procedures, and reception conditions. The underlying ethos of this harmonization of standards is to find a more equitable distribution of asylum-seekers within the EU and to

Harmonization and Judicial Dialogue in the European Union (2010) 1, at 9.

²⁶ Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (2009).

²⁷ Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, UNHCR, Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>.

²⁸ Statistics cited in Lutheran Immigration and Refugee Services, *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy* (2010).

²⁹ UK Home Office Statistics, cited in The Migration Observatory of the University of Oxford's website: <http://migrationobservatory.ox.ac.uk/briefings/immigration-detention-uk>.

³⁰ *Saadi v. Italy*, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: <http://www.unhcr.org/refworld/docid/47c6882e2.html>.

³¹ *I.M. c. France*, requête no 9152/09, Council of Europe: European Court of Human Rights, 2 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f2932442.html>. See, also, UNHCR, *Intervention orale du HCR devant la Cour européenne des droits de l'homme Audience dans l'affaire I.M. c. France*, 17 May 2011, available at: <http://www.unhcr.org/refworld/docid/4dd2b7912.html>.

³² *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>. See, also, UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of M.S.S. v. Belgium and Greece*, June 2010, available at: <http://www.unhcr.org/refworld/docid/4c19e7512.html>.

remove incentives for onward movement. Despite some issues with the rights included, the “asylum acquis” is a major achievement as the only supra-national asylum system in the world, imposing binding standards on the 27 EU Member States. A second major achievement is that the Qualifications Directive actually imposes an obligation *to grant* refugee status, which is missing from the 1951 Convention and the right to asylum in Article 14(1) of the 1948 Universal Declaration of Human Rights.

Another trend worthy of praise “on paper” is the growth in formalized systems for complementary protection. Australia, for example, recently introduced a system of complementary protection for persons at risk of torture or other forms of ill-treatment in their countries of origin. Such laws oftentimes move these non-refugee categories of persons in need of protection out of the realm of executive discretion and onto a proper legal footing. Nonetheless, it remains to be seen how the new law will work in practice, not least because examples in some other countries have shown that the existence of subsidiary categories of refugees can in fact move people who should be recognized as refugees from the more generous refugee to the less generous complementary categories.

4. Regionalism

The fourth trend that I wanted to speak about today is that of regionalism. This trend is not confined to the European Union, but it is happening in all regions. In fact, regionalism has always been there. The 1951 Convention was initially a European instrument responsive to the mass exodus of refugees from the Second World War, until the adoption of the 1967 Protocol which gave it universal scope. Other regions followed suit with the OAU Convention in Africa in 1969, the Cartagena Declaration on Refugees in Latin America in 1984, and the European “asylum acquis” in the 2000s. Regions outside these main instruments have also been exploring regional responses to modern migration movements, of which asylum movements are but one strand.

The “Bali Process”, for example, described on its website as a forum to discuss “practical measures to help combat people smuggling, trafficking in persons and related transnational crimes in the Asia-Pacific region and beyond”,³³ adopted in 2011 a non-binding Regional Cooperation Framework. The RCF, developed together with UNHCR, has at its heart the protection and recognition of asylum-seeker rights within broader strategies to combat irregular migration in the region. Significantly, the Bali Process will soon set up a Regional Support Office in Thailand to help States to pursue their objectives. Not dissimilarly, the EU has also set up the EASO – the European Asylum Support Office in Malta, in 2010, again to support countries in the region implement fair and consistent asylum systems.

Regional approaches are underway also in other regions, building on UNHCR’s *10 Point Plan on Refugee Protection and Mixed Migration*. While these are excellent innovations, and they will hopefully provide responses to intra- and extra-regional migration movements, they have become all the more important given the lacuna of global leadership and governance on international migration. On the one hand, Hettne has noted, “Regionalism is [-] one way of coping with global transformation, since most states lack the capacity and the means to manage such a task on the ‘national’ level.”³⁴ On the other hand, regional responses have become all the more pressing in the increasing divide between the north and south in asylum debates – between the donor and recipient states or between the donor and refugee producing-receiving states. While the 1967 Protocol to the 1951 Convention promised a global asylum policy without the traditional barriers of geography, as indicated earlier, this

³³ <http://www.baliprocess.net/>

³⁴ B. Hettne, “Globalization, the New Regionalism and East Asia”, in T. Tanaka and T. Inoguchi, *Globalism and Regionalism: Selected Papers Delivered at the United Nations University, 2-6 September 1996*, Hayama, Japan, 5, as cited in Susan Kneebone and Felicity Rawlings-Sanaei, “Introduction: Regional as a Response to a Global Challenge”, in Susan Kneebone and Felicity Rawlings-Sanaei (eds.), *New Regionalism and Asylum Seekers: Challenges Ahead* (2007) 1, at 3.

has not played out in practice, not least in regions – such as the Asia-Pacific - that have not signed onto the Convention except in a few countries.

The “containment”³⁵ of refugees in their regions of origin – including over the long-term – has also led to calls for localized approaches, and some would argue is in direct response to “Western strategies [– earlier described –] designed to constrain the movement of refugees,”³⁶ rather than to provide space for greater protection. Matthew Gibney refers to this phenomenon as “engineered regionalism”.³⁷

While Professor H el ene Lambert notes that “Asylum is a policy area that, by its very nature, demands inter-state cooperation”,³⁸ it can be seen that burden-sharing is one of the weakest elements of the international refugee regime. UNHCR has for a long time been attempting to achieve progress in this area. In 2010, for example, the High Commissioner for Refugees called for a “new deal” on responsibility and burden-sharing. In 2011, the Division of International Protection convened an expert meeting with States in Amman, Jordan, in which regional mechanisms and forums were again found to be a central feature of modern responses. Reaching consensus at the global level on burden-sharing remains elusive; and amongst other things, is likely to be negatively impacted by the global economic crisis as we move forward over the next few years.

5. Asylum-migration nexus and migration management and control

Finally, a core challenge of the 21st Century is the ability to develop and maintain protection sensitive migration policies, as well as asylum procedures that can cope with the challenges of mixed migration. Very much related to the preceding trends, the institutionalization of the asylum-migration nexus, and the increasing placement of asylum issues within migration – rather than or in addition to humanitarian – forums, is an inevitable trend in today’s world. This trend – as shown also in relation to regionalism - brings both positive and negative consequences.

On the negative side, the asylum-migration discourse risks diluting the rights of asylum-seekers and refugees as they become seen by States as part of the smuggling-irregular migration problem. The facts of the previously mentioned case of *Hirsi v Italy* bear this out. On the positive side, migration-related forums may just represent the key future opportunity to engage on asylum issues. While humanitarian forums will continue to be the main location for debate and coordination in relation to large-scale emergency crises and high profile situations, the teeth of these forums often lacks political bite. Moreover, leveraging the national interests of States is more likely done in respect of migration – than humanitarian – causes. Whether migration forums will be able to balance national interests with humanitarian needs - not least when migrant workers also find themselves in combat zones and where the distinction between the migrant and humanitarian victim or between forced and voluntary movement is ever more hazy. These complex emergencies will require new skills and new ways of thinking into the 21st century.

³⁵ Andrew Shacknove, “From Asylum to Containment” (1993) 5 *International Journal of Refugee Law* 516.

³⁶ Matthew Gibney, “Forced Migration, Engineered Regionalism and Justice between States”, in Kneebone and Rawlings-Sanaei, *supra n.* 34, 57, at 63.

³⁷ *Ibid.*

³⁸ Lambert in Goodwin-Gill and Lambert (eds.), *supra n.* 25, at 1.

Conclusion

In conclusion, “the Convention was never conceived of as an instrument of migration control.”³⁹ It is however clear that migration is a global phenomenon, and in lieu of lawful prospects to move, persons will opt to utilize whatever channels are available. The asylum-migration nexus is becoming the key challenge to asylum systems, and while it is clear that states cannot control their borders entirely, States are continuing to come up with innovative ways to circumvent them. At the same time, there are opportunities for renewed engagement on refugee protection matters, including through discussions on migration issues more broadly. The four other trends presented to you today – that of externalization and non-entrée, restrictionism, legalization/regularization, and regionalism – are each – in different ways - linked in to the migration challenge.

International migration as a phenomenon is here to stay. The test for the decades ahead – as evidenced in the Arab Spring – is whether the international community can come up with responses and solutions that apply to these variable scenarios – both as emergency action but also longer-term solutions. Reaching solutions to some of the world’s most intractable conflicts would be a good place to start.

Thank you.

³⁹ Presentation by Ms. Erika Feller, Director, Department of International Protection, UNHCR, at the Inaugural Colloquium of the Institute for Global Legal Studies, Washington University School of Law, St. Louis, Missouri: “The United Nations and the Protection of Human Rights - The Evolution of the International Refugee Protection Regime”, DIP Statements, 18 November 2000, available at: <http://www.unhcr.org/42a6b00f2.html>.