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Mr President, members of the Court, excellencies, ladies and gentlemen,

Thank you for inviting me to address this distinguished gathering, marking the opening of the judicial year. It is an honor for me as United Nations High Commissioner for Refugees, as a former member of the Parliamentary Assembly of the Council of Europe, and – most of all – as a citizen of Europe.

Mr President, the origins of the Council of Europe, of my Office and of this Court are intertwined. All were born out of the ruins of the Second World War, and all share a joint mission, and a joint vision, of respect for the rule of law and for human rights. My Office maintains a Representation here in Strasbourg in order to cooperate in the accomplishment of this mission, on behalf of refugees and stateless people in Europe.

UNHCR was established on 14 December 1950, just a few weeks after the European Convention on Human Rights was signed, and two years to the day after proclamation of the Universal Declaration of Human Rights. Article 14 of that Declaration affirms the right of every person to seek and enjoy asylum from persecution. And although this right is not explicitly contained in the European Convention on Human Rights, your Court plays an indispensable role in ensuring protection from return to persecution or serious harm – in other words, in ensuring respect for the principle of *non-refoulement*.

That principle, contained in Article 3 of the European Convention on Human Rights, is also the cornerstone of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, which together now have 147 State Parties. All European countries¹ have acceded to the Refugee Convention, but not all have national asylum systems which meet regional or international standards, and there are unfortunately still major situations of displacement in Europe. Yet when UNHCR was created, the United Nations General Assembly gave it just a three-year term to resolve refugee problems in Europe remaining from the Second World War, and thereafter to disband. The hope that UNHCR would rapidly become redundant was short lived. Late last year we marked our 60th birthday, and this year we commemorate the 60th anniversary of the Refugee Convention.

In Europe alone, the 1951 Convention has provided a framework for the protection of millions of refugees, guaranteeing them not only safety but also the social and economic rights necessary to start new lives. However, the human rights agenda out of which UNHCR was born, and on which we depend, is increasingly coming under strain. The global economic crisis has brought with it a populist wave of anti-foreigner sentiment, albeit often couched in terms of national sovereignty and national security. At the same time, the changing nature of armed conflict is increasingly limiting the space for humanitarian action.

In this difficult environment, I am concerned about the emergence of protection gaps with respect to persons of concern to my Office. By protection gaps, I mean areas where existing provisions of international refugee law – and human rights law – are either not adequate in scope or are not applied in a sufficiently broad or inclusive way to protect victims of forced displacement. Our ability to address these gaps is complicated by the fact that, unlike other international human rights instruments, there is no treaty body to supervise the application of the 1951 Refugee Convention. And although Article 38 of that Convention allows parties to submit disputes relating to its interpretation or application to the International Court of Justice,

1. With the exception of Andorra and San Marino.

this has never happened. Thus we must rely on UNHCR's supervisory role under Article 35 of the Refugee Convention, and on coherent legal interpretation and guidance from judicial bodies, whose role is to remain above the vagaries of public opinion, including in times of economic and social difficulty.

Mr President, you have pointed out that a large proportion of this Court's caseload concerns asylum issues. This highlights the unsettling fact that even in States party to both the 1951 Refugee Convention and the European Convention on Human Rights many asylum-seekers, refugees and other displaced people consider that their rights are not adequately respected. The volume of requests for interim measures, in particular from individuals who have fled conflict situations, reveals a gap in Europe's approach to the protection of victims of generalised violence.

Today we are witnessing some of the most intractable armed conflicts of modern history, creating displacement on a practically global scale, along with steadily diminishing space for humanitarian action. It has been reported that there were more than 300 armed conflicts in the second half of the twentieth century, involving a proliferation of State and non-State actors, causing around 100 million deaths and countless millions of refugees and displaced persons.

It is therefore not surprising that one of the most important questions which European asylum authorities are grappling with today concerns the approach to be taken to persons seeking protection from the indiscriminate effects of generalised violence. Although it is now clearly recognised that persecution can emanate from non-State as well as State actors, a narrow interpretation of the refugee definition as well as of Article 3 of the European Convention on Human Rights and Article 15(c) of the European Union Qualification Directive often leaves persons who have fled situations of violence without the protection they deserve. There is a certain irony in the fact that while European instances meticulously examine whether the intensity of an armed conflict or the individual level of risk is sufficient to justify granting protection, in Africa and Asia, States are taking in hundreds of thousands of persons fleeing precisely the same situations.

In Europe last year, nearly 25% of asylum applicants came from just three countries in conflict: Afghanistan, Iraq and Somalia. I would like to dwell for a moment on the effects of the conflict in Somalia, which has been ongoing for twenty years. At the end of 2010, there were around 700,000 Somali refugees in more than 100 countries around the world, though more than 90% were in six countries in the East African region. Every month, 8,000 more flee Somalia. Within the country, one and a half million people are displaced and live in conditions so miserable that it is hard to find words to describe them. Those who try to flee risk drowning in the Gulf of Aden, perishing in deserts or being shot at trying to cross borders. Outside Somalia, they are often subject to security crackdowns, or face racism and xenophobia. Yet many are denied protection because decision-makers and national courts are not persuaded that they are *individually* at risk.

In the *Salah Sheekh v. the Netherlands* case², your Court addressed the degree of individual risk required in order to be protected under Article 3 of the Convention, and dismissed the restrictive interpretation put forward by the respondent State. The national court had rejected the asylum application of a Somali man, *inter alia*, because he failed to show that he was personally targeted by the violence in Mogadishu. Your Court found that belonging to a minority clan which was systematically at risk was sufficient to enjoy protection from *refoulement* under Article 3 of the European Convention on Human Rights, without having to demonstrate further distinguishing features.

Persons fleeing violence are also often told by European asylum authorities that they could have found safety in another part of their own countries – the so-called internal flight or relocation alternative. Your

2. No. 1948/04, 11 January 2007.

Court has also set out important safeguards for application of this concept, which refers to a specific part of an asylum-seeker's country of origin where he or she has no well-founded fear of persecution and can reasonably be expected to establish him or herself. The safeguards developed in the *Salah Sheekh* case have been incorporated by the European Commission in its proposal for recast of the European Union Qualification Directive, thereby demonstrating that your guidance is also crucial to addressing some of the normative gaps in the emerging common European asylum system.

This decision goes some way toward filling the protection gap which relates to persons fleeing conflict situations, but there are still a number of open issues. Our own research reveals great differences in the approach taken by European countries to asylum applications from persons fleeing internal or international armed conflict, and in particular disparities in the criteria used to assess the nature and intensity of violence and the resulting risks. We will follow with great interest the development of the case-law in this respect, and will remain available to provide information to the Court, based on our field experience, to help in your assessment of the risks against which human rights protection must be granted.

I should also note that the narrow approach taken by many States to the protection needs of persons fleeing conflict situations results in a growing number whose applications for protection are turned down, but who cannot be returned to their countries of origin. Such persons frequently end up in a situation of illegality and destitution, without access to basic rights. This in turn generates social tensions and criticism of government policies.

Alongside the problem of how to ensure protection of persons fleeing generalised violence, we also observe ongoing – I might even say expanding – efforts by States to deflect their protection obligations to other countries. Within Europe, the Dublin II Regulation establishes a system for identifying the State responsible for examining an asylum application. That system is based on the assumption, which is unfortunately not a reality, that an asylum-seeker's chances of finding protection are equivalent in all Dublin participating States.

Your Court has already clarified that the *non-refoulement* obligation under Article 3 of the European Convention on Human Rights also extends to indirect *refoulement* – that is, to return to a country from where there is a risk of onward return to ill-treatment. A little over three years ago you confirmed that the operation of the Dublin Convention (now the Dublin II Regulation) did not affect States' responsibilities under the ECHR³. Your recent judgment in *M.S.S. v. Belgium and Greece*⁴ reiterates this fundamental principle, and at the same time provides a vivid reminder of just how much still needs to be done to achieve a truly common European asylum system, in full respect of human rights.

We also observe that States are increasingly acting outside their territories in order to prevent irregular migration. Border management and the territorial scope of States' refugee protection and human rights obligations are issues which will no doubt require this Court's attention in future. It is UNHCR's long-held view that the obligations of States under international human rights treaties, including the 1951 Refugee Convention, prevail wherever the State exercises its jurisdiction, including outside its borders.

Mr President, this Court has addressed a number of issues not explicitly covered by the 1951 Refugee Convention – in particular with regard to how asylum procedures should be conducted. For example, the Eritrean journalist Asebeha Gebremedhin turned to this Court⁵ after his asylum application was rejected at the French border. By virtue of the interim measures of your Court, he was allowed to enter France and, a

3. See *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III.

4. [GC], no. 30696/09, 21 January 2011.

5. See *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, to be reported in ECHR 2007-II.

few months later, the authorities recognised him as a refugee in the sense of the 1951 Convention. In that case, the Rule 39 mechanism compensated for the absence of automatic suspensive effect of an appeal made in the accelerated asylum procedure at the border. In its judgment on the merits of the case, the Court found that such a procedural gap violated the right to an effective remedy guaranteed by the European Convention on Human Rights. This is extremely important, as a growing number of asylum applications are being dealt with in accelerated procedures, often at borders and frequently involving asylum-seekers who are held in detention.

It remains a matter of serious concern to me that persons seeking entry into Europe for the purpose of claiming protection are increasingly detained on immigration grounds, irrespective of their specific situation. Asylum-seekers who are detained for illegal entry or illegal stay benefit from fewer safeguards than persons suspected or convicted of criminal acts, for instance with regard to judicial review and to their conditions of detention. The safeguards set out by your Court against unlawful and arbitrary detention, as well as regarding conditions of detention, are therefore of great importance to asylum-seekers deprived of their liberty in Europe⁶. It is not unreasonable to expect that your Court will be called upon to provide further guidance regarding detention of asylum-seekers for the purpose of preventing their irregular entry.

I would be remiss if I did not also mention the situation of persons who flee, but remain within the borders of their own countries. As of the end of last year, there were still more than two million internally displaced persons in Europe – and more than 27 million worldwide. In the context of collaborative arrangements among United Nations agencies, UNHCR already plays the lead role with respect to the protection of persons internally displaced by conflict, and we are now also called upon to intervene when displacement is caused by natural disasters.

The United Nations Guiding Principles on Internal Displacement were derived from relevant international human rights instruments. However, no specific international instrument protects the rights of persons displaced within the borders of their own countries, whether by war or by natural disaster. In an encouraging development, the African Union recently adopted the Kampala Convention for the Protection and Assistance of Internally Displaced Persons. There is no similar regional instrument in Europe, although internally displaced persons on this continent enjoy protection of their fundamental rights through the European Convention on Human Rights. Your Court has on several occasions been called upon to address issues concerning the rights of internally displaced people, including the right of return as well as housing and property rights. While the number of cases brought to the Court by IDPs is still relatively low⁷, in view of the protracted nature of internal displacement in Europe and the mounting frustration of the internally displaced, this number could rise.

Finally, let me mention a further area where protection gaps emerge, and where the complementarity of different bodies of law can help to fill them. Although it is not widely known, UNHCR has a global mandate for the prevention and reduction of statelessness and for the international protection of stateless persons. At the end of 2010, there were some six million persons known to be stateless worldwide, of whom around 600,000 in Europe. The real number may be much higher, as statelessness often goes unrecorded. And while the Refugee Convention enjoys broad ratification, only sixty-five States are party to the 1954 Convention relating to the status of stateless persons, and just thirty-seven to the 1961 Convention on the reduction of statelessness. Only twenty member States of the Council of Europe are party to both instruments.

6. See *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, 22 September 2009.

7. See, among a few others, *Saghinadze and Others v. Georgia*, no. 18768/05, 27 May 2010, or more recently *Soltanov and Others v. Azerbaijan*, nos. 41177/08 et al., 13 January 2011.

A person who is not regarded as a national by any State clearly faces a particular risk of human rights violations. Your Court has already dealt with a number of applications from stateless persons⁸ and found that some of their rights under the European Convention on Human Rights had been violated. The Court may be called upon in future also to examine, under the Convention, the responsibility of the State for deprivation of nationality or for failing to resolve situations of statelessness.

Mr President, it is well known that this Court is the busiest international judicial body. Conscious of your workload, I sincerely hope that it will continue to be possible for individuals to continue to have effective access to the Court, as it is an important source of guidance on issues of principle as well as of legal protection for vulnerable people, including many to whom my mandate extends. The authority and the prestige of the Court have been reinforced both by its accessibility and by its ability to interpret and apply the European Convention on Human Rights as a “living instrument ... in the light of present-day conditions”⁹.

Before concluding, I also wish to say how positive it is that the Court remains open to the views of others. Engagement with the judiciary, at national and regional levels, is a central part of my Office’s work. The practice of your Court to authorise and even to invite third-party interveners such as UNHCR, allows broader perspectives to be brought to the Court. We appreciate this opportunity and are humbled by the responsibility it carries. It is also a source of great encouragement to us in the exercise of our supervisory role, and for the purpose of filling the protection gaps highlighted above, that the Court gives due weight to our views.

Mr President, ladies and gentlemen, it is nearly seventy years now since Hannah Arendt, in the middle of the Second World War, published her seminal essay entitled “We Refugees”, in which she developed the notion of “the right to have rights”. By working over the past fifty years to define and defend the rights of refugees, internally displaced and stateless people, your Court has helped to make this notion a reality. For this, we remain very grateful.

Thank you.

8. See list of cases at <http://www.unhcr.org/45179cbd4.html>.

9. See *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I.