

**Advanced Course on International Criminal Law
Special Focus: International Criminal Justice, Migration and Human Trafficking
The Hague Academy of International Law**

**Keynote Address by Volker Türk
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Secretary-General, Professor Stahn, distinguished colleagues, ladies and gentlemen,

It is my pleasure to be with you today, and to offer some observations on International Criminal Justice, Migration and Human Trafficking, from UNHCR's vantage point. I would like to express my thanks to the organisers, and particularly to Professor Stahn, for inviting me to be here, and also my congratulations for selecting such an important theme.

I must say at the outset that it is particularly gratifying to be invited to share some thoughts on the refugee-protection dimension of this theme, which can all too easily become obscured in discussions of migration, law enforcement, and security.

Indeed, some of you may be slightly puzzled. UNHCR's mandate, of course, relates to refugees, asylum-seekers, 'returnees' [that is, refugees returning home], stateless persons and—in certain circumstances—internally displaced persons. UNHCR is a humanitarian organisation with specific legal responsibilities, but obviously not one with a law-enforcement or security mandate.

Nonetheless, the challenges lying at the intersection of international criminal justice, migration and its governance, and international cooperation to address trafficking in human beings and the related but distinct crime of migrant smuggling have a direct impact on persons of UNHCR's concern and on the institution of asylum itself.

This is so for at least five interrelated reasons, to which I will return in the course of my remarks:

- First, law enforcement or security considerations and international refugee protection are not opposites. If there is one lesson to be learned from our experience, it is that security and protection need to go hand in hand – they **complement each other**, and one is not possible without the other. The international refugee protection regime acknowledges and reflects this. International refugee law provides for safeguards and mechanisms to protect those fleeing persecution, conflict, and violence while bearing in mind the security needs of host countries and their communities.
- Second, when this complementarity is poorly understood, or when the political will to enact it is absent, legitimate security and migration-management concerns can find their expression in **punitive and restrictive border-management policies and strategies**. This not only carries the risk of frustrating access to international protection for those who desperately need it [and of criminalising or punishing asylum-seekers and refugees]—it is counter-productive also from a law enforcement and security perspective, as it results in the diversion of refugee movements along other routes, and the aggravation of already precarious situations in regions embroiled in conflict. Worse still, these measures compel even more people who have nothing left to lose to risk more dangerous journeys in the hope of finding eventual safety and stability. This creates an environment in which smuggling and trafficking can thrive.
- Third, refugees and stateless people are often particularly **vulnerable to human trafficking**, or to other forms of abuse, reckless endangerment, or exploitation—whether because of exclusion in their country of origin, dependency on unscrupulous facilitators when seeking to flee across borders, or exposure to precarious living conditions in a host country or place of arrival.

- Fourth, people who have survived human trafficking may—for reasons connected or not with their experiences as victims of trafficking—require **international protection as refugees**.
- Fifth, the logic of exclusion can reinforce the perception of refugees as a burden, greatly increasing the risks that refugees may be **subject to xenophobia, prejudice and discrimination**, rather than be assisted to rebuild their lives and participate fully in their host communities.

I hope, as you progress through the programme over these eight days, that you will keep in mind the following question: How can we move from the pernicious symbiosis between smuggling and trafficking, on the one hand, and restrictive or ‘deterrent’ border policies on the other, to an **integrated approach**, where **complementary and mutually reinforcing measures** ensure access to safety and protection for those in need, while safeguarding the security of transit and host countries and communities?

Background

To put this question and related issues in context, it is important to recall where we stand today. We are confronted with unprecedented movements of forcibly displaced people from Syria, Iraq, Yemen, Afghanistan, South Sudan, the Central African Republic, Somalia, Myanmar, Nigeria, and Burundi, among many others. More than 60 million people worldwide have had to leave their homes due to armed conflict, persecution, violent extremism and religious or political intolerance, and human rights abuses. Just to give an example, between them, the closely linked conflicts in Syria and Iraq account for some 14 million of those forced to flee their homes.

The vast majority of those compelled to flee remain in regions of origin. Indeed, most are not even able to leave their own countries and remain trapped in situations of internal displacement or even in hard-to-reach and besieged areas. A small number of host countries shoulder a disproportionate share of responsibility for harbouring those who flee across international boundaries. Consequently, and despite the generosity shown by leading host countries, as major conflicts drag on and new ones erupt, large numbers of asylum-seekers and refugees subsist in extremely dire conditions with limited prospects for improvement in view.

Criminal justice, security concerns, and the 1951 Convention

The starting point for any discussion of points of intersection between criminal justice and refugee protection must be that escaping from conflict or persecution and crossing an international border in order to claim international protection in accordance with the human right to ‘seek and enjoy’ asylum is not a crime.

At the same time, international refugee instruments do not provide cover or safe haven for those involved in serious criminality or otherwise posing a threat to the national security of host countries and communities. The 1951 Convention contains specific provisions which provide a system of checks and balances and ensure that the rights of refugees are protected in a way that takes full account of the security and law-enforcement interests of States and host communities.

This begins with the very definition of a ‘refugee’ set out at Article 1 of the Convention, which establishes criteria for determining who is a refugee and entitled to international protection, and which provides for the exclusion of persons believed to be responsible for certain serious crimes or heinous acts, and who, therefore, are not eligible to benefit from the protection afforded under international refugee law.

Exclusion from refugee status raises a range of complex legal and procedural issues. Accordingly, UNHCR advocates for questions of exclusion to be dealt with in regular asylum procedures, allowing for full factual and legal assessment of all relevant circumstances by qualified personnel of each individual case, in procedures ensuring rigorous procedural fairness. In this connection, let us, however, not forget that exclusion from refugee status does not affect a person’s entitlement to protection under other international instruments against forcible removal that would give rise to a real risk of being subjected to torture or other forms of serious harm.

International refugee law also makes it clear [in Article 2 of the 1951 Convention] that refugees are bound to abide by the laws and regulations of their host country. They are not immune from prosecution for crimes committed on the territory of their host country, and their status does not preclude appropriate measures where an individual is found to pose a security risk. Moreover, the 1951 Convention includes express provisions which permit expulsion in the individual case on grounds of national security or public order under certain circumstances. Of course, the serious consequences which may flow from improper application of these provisions mean that stringent procedural safeguards are crucial.

Access to international protection

As I have said, seeking asylum itself is no crime, but rather a universal right enshrined in international and regional human rights instruments.

Yet the realities of refugee flight today include visa requirements and entry conditions which are impossible to meet for most of those seeking international protection. This reality exists in addition to border controls; carrier sanctions; walls, oceans and other physical barriers; interception measures; and very limited possibilities for asylum-seekers to travel by safe and regular means. This means that many are compelled to resort to irregular travel and unauthorised entry, often with the assistance of smugglers, in order to seek protection. Many flee their country of origin without valid identification documents.

The 1951 Convention recognises these realities. Not only is irregular entry or use of facilitators no bar to refugee status—the Convention also protects asylum-seekers and refugees, under certain conditions, from penalisation for doing so.

There is also a broader issue at stake here. As I suggested earlier, the increasing use of barriers to entry, extraterritorial ‘non-entrée’ measures, and deterrence policies and practices—in combination with the distinct lack of regular avenues—in a very real sense places refugees at the mercy of smugglers, and creates the very conditions in which the smuggling industry can thrive. The more restrictive controls on entry become, the more we can expect that asylum-seekers and refugees will have no choice but undertake increasingly dangerous crossings of sea or desert, while the smugglers they turn to become all the more reckless, exploitive, and clandestine.

This observation points directly to my next one. The lack of viable pathways to access international protection through safe and regular travel places asylum-seekers in a situation of reliance on smugglers. This, in turn, increases their vulnerability to becoming victims of human trafficking, kidnapping for ransom, or related forms of abuse, exploitation, or endangerment—not least because migrant smuggling, which begins as a simple transaction by which a service is provided for a fee, can in practice shade into a situation involving levels of constraint and exploitation more akin to human trafficking.

Before addressing this issue in greater detail, I would like to acknowledge that asylum-seekers and refugees are not the only people on the move and liable to be affected by the risks inherent to irregular travel. One characteristic of refugee flight today, along many but not all routes, is that asylum-seekers and refugees typically travel side-by-side with people moving for reasons that would place them outside the scope of the 1951 Convention or other refugee-protection instruments, and who use the same routes and smugglers to do so.

For UNHCR, this raises a number of important considerations:

- Importantly, the human rights of all people on the move, whether migrant or refugee, deserve to be respected, protected and fulfilled. Some—such as unaccompanied children, victims of trafficking, or stateless persons—will have specific needs and require appropriate forms of assistance and/or protection.
- Refugees travelling in mixed flows are in a special situation: they cannot return home, and cannot rely on the protection of their country of origin. Accordingly, they are covered by a specific international legal regime which affords them specific protections against, for instance, *refoulement*

or penalisation for unauthorised entry or stay. [Confusion and conflation between ‘refugees’ and ‘migrants’ can place refugees at risk by obscuring the specific protections refugees require.]

- The phenomenon of ‘mixed migration’ poses a number of significant challenges for States. These relate, on the one hand, to security and law-enforcement concerns, including the need to implement suitable security checks and identification procedures. [Such procedures must be conducted in conformity with the principles of necessity, proportionality, and non-discrimination, and be subject to judicial control. Profiling based solely on a person’s presumed nationality, “race”, religion or ethnicity would, in UNHCR’s view, be discriminatory and inappropriate.] Equally, the arrival of refugees, migrants, and others in mixed flows requires adequate systems for identifying persons with likely international protection needs [and others with specific needs], and for referring them to appropriate procedures and services.

Almost ten years ago, UNHCR developed a *10 Point Plan on Refugee Protection and Mixed Migration*, which remains highly relevant today and provides practical suggestions for implementing ‘protection-sensitive’ entry-management policies and practices. Adequate capacity to receive, assist, register, and screen arrivals is vital for enabling States to distinguish between different categories of arrivals and to ensure that refugee and asylum-seekers are identified, protected against *refoulement*, and given access to asylum procedures.

Best practices in this context include:

- registration, including appropriate use of biometrics
- referral of those who wish to submit a claim for international protection to asylum procedures
- identification of people subjected to human trafficking or at risk of being trafficked [or re-trafficked] to ensure that they have access to safety, protection, and support.

When asylum-seekers and refugees are promptly registered and have their status determined in a fair and efficient manner, States can be more confident of who is on their territory. They can make the necessary distinctions between those arriving, and identify early on people who may constitute a security risk. As a part of this system, States are encouraged to embrace the principle of non-detention of asylum-seekers except under exceptional circumstances, and to explore actively alternatives to detention.

Refugee protection and human trafficking

The growing number of people forcibly displaced across the globe—and more generally, the increased numbers of people travelling in mixed flows with the assistance of smugglers—means an increasing number of individuals who are at heightened risk of trafficking. This situation requires intensified efforts to protect those at risk, to hold perpetrators to account, and to assist survivors. For survivors of trafficking with a possible well-founded fear of persecution in their country of origin, systems for assisting victims need to incorporate referral pathways and support services so that they can access asylum procedures and, if needed, be afforded international protection.

The link between trafficking and refugee protection runs in two directions, as it were: refugees and asylum-seekers [and, for that matter, IDPs and stateless persons] may be particularly vulnerable to becoming victims of trafficking, because the fact of their persecution, membership of a marginalised group, forced displacement, or need to flee renders them susceptible to being targeted by traffickers. On the other hand, some—but of course not all—survivors of trafficking may have a claim to international protection falling within the refugee definition in the 1951 Convention. This would be so, for example, when a victim of trafficking outside his or her own country fears re-trafficking, recriminations by traffickers or their associates following an escape, ostracism or punishment by family or community, or other treatment amounting to persecution linked to a Convention ground, where the authorities of the person’s country of origin are unable or unwilling to provide protection.

International instruments which address migrant smuggling and trafficking in persons [notably the two Protocols to the Palermo Convention] include provisions relating to the rights of migrants and refugees who have been targeted by such activities. In addition, both Protocols include savings clauses to the effect that law enforcement measures must be undertaken in a manner consistent with other rights, obligations and responsibilities under international law, including international humanitarian, human rights, and refugee law—notably the principle of *non-refoulement*, as set out in the 1951 Convention.

Victims of trafficking should not be held criminally responsible, nor should they be excluded from international refugee protection. Access to international protection, where needed, should not in any way be contingent upon the willingness or ability of a victim of trafficking to assist with criminal investigations or to give evidence against his or her traffickers.

Efforts to hold perpetrators of trafficking accountable for their crimes, in line with the existing international legal framework governing efforts to combat trafficking, are also an essential element in an integrated approach to address protection needs as well as security and law-enforcement concerns. The ‘protection-sensitive’ border management and entry systems I described earlier reinforce these, as they may assist States in identifying perpetrators.

Fostering inclusion, preserving asylum

I would like to make a brief comment touching not so much on the relationship between criminal justice and migration or refugee protection *per se*, but on the conjuncture in which current challenges must be met.

A combination of

- i. the increasing scale of movements across international borders in many parts of the world—some overwhelmingly consisting of people fleeing conflict or persecution, and others more ‘mixed’ in composition—including in parts of the world which had been largely sheltered from the impacts of forcible displacement in recent times;
- ii. recent upsurges of populist and xenophobic political rhetoric; and
- iii. legitimate fears in the wake of recent security incidents, as well as uninformed or opportunistic channelling of those fears against refugees and migrants

has in some quarters contributed to a hostile environment for asylum-seekers and refugees that has at times exacerbated risks to their safety and protection, up to and including violent attacks against them.

These trends—which have often, of course, been matched by countervailing demonstrations by governments and civil society of support and welcome to those forced to flee their homes—have produced a very difficult and increasingly polarized climate in which to advance refugee protection.

Resolute and principled leadership is urgently needed to counter harmful narratives that do great damage to individual refugees and to the institution of asylum at a time when it is needed more than ever.

Protection and prevention: regular avenues to safety

Before I conclude, I would like, for a moment, to widen still further the lens on the issues to be discussed over the coming days.

Let us not forget that when asylum-seekers and refugees need to leave an intolerable situation, they will take the best option available to them, particularly if the risks of staying outweigh the risks of leaving.

Effective law enforcement plays a critical role both in making inroads against the prevailing impunity enjoyed by those who take advantage of vulnerability and desperation to profit from the misfortune of forcibly displaced people.

At the same time, in order to be comprehensive and effective over the longer term, responses to smuggling, trafficking, and broader crime-control and security concerns, need to be accompanied by measures that provide safer possibilities to those who might otherwise feel compelled to place themselves in the hands of smugglers. For some, this means increasing their security, access to protection, and opportunities where they are. For others, it means access to humanitarian pathways to safety and protection [such as resettlement or humanitarian visas] or to complementary pathways to admission [such as expanded family reunion opportunities, academic scholarships, or labour mobility schemes]. Increasing regular pathways to admission for asylum-seekers and refugees can pay dividends both in terms of protection, and in terms of law enforcement, security, and migration management, by allowing States to have in place proper procedures for identifying and screening refugees arriving on their territory.

In short, one of the most viable responses to the smuggling industry, which gains so much from exploiting the tragic undersupply of safe routes to international protection, is to offer individuals with credible alternatives.

Substantial progress towards an integrated approach to meeting the needs of the forcibly displaced—including those at risk of human trafficking and other forms of exploitation—cannot be hoped for without international cooperation and responsibility sharing on a significantly increased scale. The high-level plenary of the UN General Assembly on the issue of large-scale movements of refugees and migrants in September this year offers a great opportunity for commitments in that direction, which UNHCR strongly supports. Indeed, we fervently hope that the international community will subscribe to a predictable and truly Global Compact on Responsibility-Sharing for refugees.

Thank you for your attention. And I wish you productive exchanges in the coming days.