

**International Conference  
“Martens Readings”  
“65 Years After Nuremberg: Drawing Lessons from Past Conflict”**

**“Current International Humanitarian Law Issues  
at the United Nations”**

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President Zorkin,  
Judge Tuzmukhamedov,  
Judge Meron,  
Mr. Bugnion,  
Ladies and Gentlemen,

I am delighted to be here today to address you and to discuss with you current International Humanitarian Law Issues at the UN, 65 years after Nuremberg.

As testified by the events which continue to unfold in Libya, the application of IHL in non-international armed conflicts continues to be of great relevance. It is of relevance not only to the States concerned, but also for third States and the United Nations. This morning I will focus on the role of the United Nations in protecting civilian populations, in preventing

violations of international humanitarian law and in promoting the application of IHL.

Many of you will be familiar with the extreme violence that has occurred in recent times in places as diverse as Afghanistan, Darfur, the Democratic Republic of the Congo, Guinea, Kyrgyzstan and Sri Lanka. The challenges of protecting civilians, and of ending impunity, have become acute. In many of these places and situations, the targeting of civilians, sexual violence, forced displacement and the prevention of humanitarian access are acts which, more often than not, have been carried out with total impunity.

The UN is well placed to lead the international effort to put an end to such violence. But the response to global violence must, of course, be the joint effort of States, non-State entities, international organizations, both governmental and non-governmental, and civil society at large. The question at the centre of the debate is: how to prevent the violence and to punish those responsible for its consequences. In the practice of the international community, prevention and punishment, which in the words of the ICJ in the Genocide case, are "two distinct yet connected obligations", have too often been seen as "punishment as prevention", with little, if nothing more. While one of the most effective ways of preventing criminal acts, is considered to be providing penalties and imposing them on those responsible, in reality, punishment alone and the prospect of it, seldom prevents. Clearly, prevention requires much more.

I believe the core idea that has inspired the UN action in the field of human rights and humanitarian law is that compliance with relevant rules is a matter of concern to the international community as a whole. Such compliance will prevent these crimes. International law powerfully mirrors this idea, when it conveys that, while the primary responsibility for complying with international humanitarian and human rights law falls upon the State

directly involved, the international community also has a role to play to ensure respect for the law. This is the same conviction that brought the 2005 World Summit to proclaim the concept of “Responsibility to Protect”, which provides that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity” and that “[t]he international community, through the United Nations, also has the responsibility . . . to help to protect populations from” those crimes. The focus is on protection by prevention.

As you know, back at the time of the 2005 World Summit, more than 150 Heads of State and Government unanimously affirmed the concept of “responsibility to protect” (R2P). As you may recall, there were three main aspects to it. First, they acknowledged that each individual State has the responsibility to protect its populations from genocide, war crimes, and crimes against humanity, as well as ethnic cleansing. Second, that the international community, through the UN, has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means to help States protect their populations from such crimes. And third, that Member States were prepared to take collective action, in a timely and decisive manner, through the Security Council and in accordance with the Charter, when peaceful means were inadequate and national authorities were manifestly failing to protect their populations.

While it is premature to judge the success or otherwise of R2P in the context of Libya, the UN and the Secretary-General have been highly engaged in raising awareness and rallying for action on the responsibility to protect the civilian population. The Secretary-General has been very vocal on the issue –speaking directly with Colonel Gaddafi, engaging diplomatically with States, and encouraging the political organs of the UN to take swift and decisive action. The Security Council has taken a range of enforcement measures under Chapter VII of the Charter of the United Nations: it imposed an arms embargo, targeted financial sanctions and travel bans against

Colonel Gaddafi, his family members and senior regime officials, and referred the situation to the International Criminal Court for investigation and possible prosecution.

The Secretary-General appointed a Special Envoy, Mr. Al-Khatib, who is carrying out significant diplomatic efforts. Further, the Human Rights Council has expelled Libya and requested an international investigation into the crimes committed. The EU and US have imposed sanctions and individual States have ceased diplomatic relations - all in efforts to encourage the regime to cease committing such crimes against its own people. Here the action by the international community has been swift and it has been targeted.

Efforts to operationalize R2P have culminated in the Security Council's recent adoption of the first fully-fledged "R2P resolutions". Resolutions 1970 and 1973 recognize the responsibility of the Libyan authorities to protect the Libyan population (pillar one). It identifies the wide-spread and systematic attacks in Libya as "crimes against humanity", thus framing them within the "R2P crimes".

The lead-up to the resolution saw numerous "diplomatic, humanitarian and other peaceful means" taken by the Secretary-General, States and regional arrangements to protect civilians (pillar two) (e.g. the Security Council imposed targeted financial sanctions and travel bans and referred the situation to the ICC for investigation and possible prosecution, Libya's rights of membership were suspended in the Human Rights Council, the Secretary-General spoke with Colonel Qaddafi and engaged diplomatically with States, sanctions have been imposed by the United States and the European Union, States have severed diplomatic relations with Libya).

Finally, in the words of paragraph 139 of the Outcome Summit resolution, Member States have taken collective action in accordance with

Chapter VII, through the Security Council (pillar three). This Security Council resolution and its authorization “to take all necessary measures ... to protect civilians and civilian areas under threat” is the most explicit and robust application of the R2P doctrine to date. All this raises the question as to how the international community can act more swiftly, and how it can play a stronger preventative role, so that crimes of such a magnitude will not happen.

When we talk about R2P we are talking about a broad range of possible actions by States and by the United Nations, including the possible use of force where necessary. It is important to underline that R2P does not provide a third exception to the Charter prohibition on the threat or use of force against the territorial integrity or political independence of any state – the other two exceptions being acts in self defence, and acts authorized by the Security Council. The Responsibility to Protect does not create any additional exceptions to the prohibition on the use of force. It is clear that collective enforcement action may only be taken with the authorization of the Security Council.

While R2P does not create any new legal basis for the use of force, and is not – as popularly misconstrued - another way of talking about “humanitarian intervention”, it is an important political acknowledgment that sovereignty entails responsibility, and that the international community has a responsibility to act to assist States to protect their populations. When this concept was debated in the General Assembly last July, most States agreed that the UN’s role should focus, at the outset, on prevention. The true challenge for giving practical meaning to the concept is to work out how the UN can best assist States to protect their populations effectively; as of course, one size does not fit all – the situation in Libya is not the same as in Cote d’Ivoire or the Sudan. I will leave you with this thought for a while, and will come back to it at the end of my presentation.

The UN, through its various different organs, plays an important role in promoting and enforcing international humanitarian law. It works towards preventing violations of human rights, protecting civilians during armed conflicts, and holding accountable those responsible for violations. The Security Council has called on parties to respect the Geneva Conventions and IHL, and condemned them when they fail to do so. It regularly establishes peacekeeping operations with mandates that include protecting civilians. It has established tribunals to ensure accountability for violations of international humanitarian law. The International Court of Justice, the General Assembly, and the Human Rights Council, in their respective fields, have also contributed their share to the development, promotion and enforcement of IHL.

The UN undertakes a variety of activities designed to prevent conflict, and by implication, to prevent violations of IHL. These range from projects in the field such as promoting the rule of law, fostering development, institution building, training police and monitoring elections. All these activities have the capacity to contribute, in one way or another, to creating more stable societies, governed by the rule of law, and to preventing the outbreak of conflict. The use of “good offices” in times of crisis can help to bring about a political resolution to a matter before conflict breaks out and, of course, the establishment of judicial and non-judicial accountability mechanisms such as tribunals and commissions of inquiry to pursue responsibility for past atrocities. These mechanisms are a public demonstration that the international community will no longer tolerate impunity, and in this approach can deter future violations of IHL. Individually and collectively, these are all important prevention activities.

At the Review Conference of the ICC held last year in Kampala which I attended with the Secretary-General, he recalled that the international community had overwhelmingly embraced “an Age of Accountability”. He stressed this again in his annual address to the General Assembly in

September. He emphasised in Kampala that impunity for international crimes is no longer an option, as shown by the developments which followed the conflicts in Rwanda, the former Yugoslavia, Sierra Leone, Cambodia and elsewhere.

International criminal mechanisms have already achieved a great deal. A number of those who, from high positions, planned and directed the most serious crimes in the conflicts I have just mentioned have been brought to justice or are currently facing trial. Heads of State have not been exempted. Before the establishment of these mechanisms, impunity was viewed by some perpetrators of terrible crimes as a very likely outcome. This is no longer the case. At the same time, the international community cannot be complacent. The pursuit of justice continues inexorably. The recent arrest of Mladic is, simply put, more evidence that justice no longer takes a back seat and that peace and justice must go hand-in-hand.

The range of international and mixed tribunals established by the UN began with the establishment in the early to mid 1990s with the International Criminal Tribunals for the former Yugoslavia and for Rwanda. These were followed by the Extraordinary Chambers for Cambodia, the Special Court for Sierra Leone and the Special Tribunal for Lebanon. For almost two decades, international criminal tribunals have contributed to the gradual erosion of impunity and the prosecution of those responsible in political and military leadership roles for commission of serious, large-scale crimes.

The Rome Statute system is the centrepiece of our system of international criminal justice, and the International Criminal Court is at its heart. If we want to be serious about combating impunity and nurturing and developing a culture of accountability, we must support its work. Despite the understandable challenges which the ICC is facing in consolidating itself as a vital and indispensable part of the community of international organizations, I firmly believe that the ICC is our main hope in the quest to end impunity

for international crimes. This Court provides the opportunity and the vehicle for our generation to significantly advance the cause of justice and, in so doing, to reduce and prevent unspeakable suffering.

It is clear that the UN has a responsibility to support the ICC and to spearhead the international effort to bring justice for these crimes. And we take that responsibility seriously. However, I take every opportunity to emphasise the role of States. The principle of complementarity is essentially the duty of States first and foremost to prosecute international crimes. Only where national judicial systems are unable or unwilling to investigate or prosecute should international courts be involved. This principle is of crucial importance for the future of international criminal justice and the quest to end impunity for grave violations of international humanitarian law and human rights law. This issue of complementarity is at the heart of much of our current work.

We are all aware that international justice mechanisms, whether permanent or ad hoc, are not intended to supplant States where they have organized criminal justice systems which are willing and able to ensure that there is accountability for the crimes concerned. It is clear that the primary role of national jurisdictions and the principle of complementarity has become the bedrock of international criminal justice. International mechanisms are not substitutes for national mechanisms.

This brings me to some of the international criminal tribunals which have been established by the UN to address genocide, crimes against humanity and war crimes. Twenty years ago, I do not think that many people would have believed it possible that the international community would have established an extensive architecture of international criminal justice, consisting of ad hoc international and hybrid tribunals, and the permanent International Criminal Court. These developments over the last 18 years have not only heralded a new era of accountability for individuals

committing serious violations of international criminal law, but importantly, they have taken place on the basis of mandates supported by the international community acting through the United Nations.

The establishment by the Security Council of the international criminal tribunals for the former Yugoslavia and Rwanda were the first ad hoc steps which showed the way, and led eventually to the negotiation of the Rome Statute establishing the International Criminal Court (ICC). The Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon were each established on the basis of bilateral agreements between the UN and the Governments concerned. All of these developments, and in particular the establishment of the ICC, the only permanent international criminal tribunal, demonstrate a new determination by the international community to address impunity.

Regarding the ICC, today 115 States are Parties to the Statute, the most recent being the Republic of Moldova and Grenada respectively. Three trials are currently underway – the trial of *Jean-Pierre Bemba Gombo*, the former Prime Minister of the DRC, on charges of crimes against humanity and war crimes, in respect of his alleged role as a commander in the Central African Republic in 2002-2003, and the *Lubanga*, and the *Katanga* and *Chui* cases of the DRC. Verdicts are expected in the two trials concerning the DRC during the course of this year. Regarding the Sudan, the Pre-Trial Chamber has confirmed charges of genocide and crimes against humanity against President Al Bashir.

In March 2010, the Pre-Trial Chamber authorized the Prosecutor to initiate investigations into the situation in Kenya in relation to the post-election violence of 2007-2008. In December 2010, the Prosecutor requested the issuance of summonses to appear to six individuals, for their suspected involvement in the commission of crimes against humanity. In

March 2011, the Pre-Trial Chamber decided to issue summonses to appear before the Court against all six individuals.

And as I mentioned earlier, a few months ago, on 26 February, the Security Council referred the situation in Libya since 15 February 2011, to the Prosecutor of the ICC, who has since conducted an investigation into that situation. On 16 May, the Prosecutor filed an application with Pre-Trial Chamber I for the issuance of warrants of arrest against Colonel Muammar Gaddafi, his son Saif Al Islam Gaddafi and the Head of the Intelligence, Abdullah Al Sanousi.

Some 17 or 18 years after the establishment of the ICTY and the ICTR, we are entering an era where the completion of their mandates is expected. The arrest of Mladic on 26 May 2011 – one fugitive less – leaves only one remaining high profile ICTY fugitive - Hadžić. The recent convictions of two Croatian military leaders and the conviction in May of the former Commander of Rwanda's army for his role in the 1994 genocide show that the fight against impunity continues.

On 22 December 2010, acting under Chapter VII of the United Nations Charter, the Security Council adopted resolution 1966 (2010), in which it decided to establish the "International Residual Mechanism for Criminal Tribunals". This Residual Mechanism will continue the jurisdiction and essential "residual" functions of both tribunals, including the trial of fugitives from the tribunals, the ongoing protection of witnesses and the monitoring of the enforcement of prison sentences. The newly established Mechanism has two branches, one for the ICTR in Arusha, Tanzania, to commence functioning on 1 July 2012, and one for the ICTY in The Hague, the Netherlands, to commence functioning 1 July 2013. This is a pivotal moment in the development of the international criminal justice architecture for the future.

Resolution 1966 (2010) requests the ICTY and ICTR to take all possible measures to complete all their remaining work expeditiously, and no later than 14 December 2014. They are to prepare for their closure and to ensure a smooth transition to the Residual Mechanism. If fugitives remain at the time of closure of the Tribunals, the Residual Mechanism has an effective trial function so that they cannot evade justice. This sends a clear signal to the fugitives that they cannot “run down the clock” and outlast the international community’s will to insist on accountability.

Similarly, in anticipation of the completion of the judicial activities of the Special Court for Sierra Leone, the Government of Sierra Leone and the United Nations have concluded an agreement establishing a Residual Special Court for Sierra Leone. Like the Special Court, the jurisdiction of the Residual Special Court is limited to persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. Thus, the Residual Special Court will have the power to prosecute the one fugitive if his case has not been referred to a competent national jurisdiction, and to prosecute any cases resulting from review of the Special Court’s convictions and acquittals.

The Residual Special Court will start operating immediately upon the closure of the Special Court. It is expected that the trial judgment in the only remaining case at the Special Court, the trial of Mr. Charles Taylor, former President of Liberia, would be delivered in the summer of this year. According to the projections, an appeal, if any, would be completed early next year. Towards the end of last year, lack of funding posed a significant threat to the Special Court’s ability to continue conducting the trial. Fortunately, recognizing the important role of the Special Court in this new age of accountability, the United Nations General Assembly approved a financial subvention to enable the Special Court to fulfill its mandate.

Unlike the Special Court for Sierra Leone, and uniquely for a UN-assisted tribunal, the Extraordinary Chambers in the Courts of Cambodia (ECCC) are part of the national judicial system of Cambodia, and accordingly work within, and as part of, Cambodia's national legal system. At the same time, however, the ECCC is required under the Agreement between the United Nations and the Royal Government of Cambodia to function in accordance with international standards of justice, fairness and due process of law. The process of combining Cambodian norms with international standards has been a difficult one. On 26 July 2010, the Trial Chamber of the ECCC, comprised of both international and Cambodian judges, rendered its first verdict in the case against KAING Guek Eav, alias Duch, and found him guilty of crimes against humanity and grave breaches of the Geneva Conventions of 1949. He was sentenced to 35 years of imprisonment. Duch was the first person to stand trial before the ECCC. He was the Chairman of the S-21 Tuol Sleng prison in Phnom Penh, a security centre tasked with interrogating and executing persons perceived as enemies of Democratic Kampuchea.

The conclusion of this first trial was a decisive step towards ending impunity for the horrific crimes committed during the Khmer Rouge regime. It also paved the way for the second case which concerns the four most senior leaders of Democratic Kampuchea who are still living. Interest in the trials among the Cambodian public and media has been huge, which demonstrates the potential for a legacy of enhanced respect for the rule of law in a country that is eager for judicial development.

Recently, there has also been some significant development at the newest United Nations-assisted tribunal, the Special Tribunal for Lebanon. The mandate of the Special Tribunal is to prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Prime Minister Rafiq Hariri and in the death or injury of other persons. On 17 January 2011, the Prosecutor of the Special Tribunal submitted a confidential

indictment to the Pre-Trial Judge for confirmation. The Pre-Trial Judge is now reviewing the indictment to make an assessment of whether the charges are supported by the evidence presented by the Prosecutor.

In the last two decades, as well, commissions of inquiry established by the Secretary-General to investigate serious violations of human rights and international humanitarian law have become the foremost non-judicial accountability mechanism, and a tool – both legal and political – to bring a message of accountability to post-conflict societies. Throughout the years, commissions of inquiry to investigate serious violations of human rights and international humanitarian law were established in the former Yugoslavia, Rwanda, Burundi, Cote d’Ivoire, Darfur, Guinea, Timor-Leste, and in Pakistan the Bhutto Commission, to mention but a few.

Commissions of inquiry were also established to undertake criminal investigations under the national laws of a requesting State - notably the Commission of Inquiry into the assassination of former Prime Minister Hariri in Lebanon, and the Commission to investigate organized transnational crimes in Guatemala (known in its Spanish acronym of “CICIG”). Some of the “traditional” commissions of inquiry have paved the way for the establishment of judicial accountability mechanisms, i.e., the ICTY and ICTR and the ICC following a referral of the Security Council. For the many which have not, their report remained a testimony, the only one perhaps, for the events.

On a related note, the Secretary-General's Panel of Experts on Sri Lanka was established pursuant to a commitment made in a Joint Statement of the Secretary-General and the President of Sri Lanka on 23 May 2009. In that Joint Statement the Secretary-General underlined the importance of an accountability process to address allegations of violations of international humanitarian law and human rights law committed during the last leg of the

military operations between the Government and the Liberation Tigers of Tamil Eelam.

Unlike other commissions of inquiry, the Panel is not an investigative or fact-finding body. Rather it is an advisory body tasked with advising the Secretary-General on the modalities, applicable international standards, and comparative experience with regard to accountability processes in order to address alleged violations of international human rights and humanitarian law committed during the military operations. The report of the Panel has recently been released.

I now want to turn your attention to the application of IHL in UN peacekeeping operations. Peacekeeping is a critical avenue to ensure respect for IHL. Experience has shown that the very presence of peacekeeping troops can be a deterrent to violations of IHL. Even a small operation can make a big difference.

Traditionally the UN was reluctant to allow the use of force in peacekeeping operations. Peacekeepers would undertake specific activities such as monitoring buffer zones and would only use force in self defence. Today the Security Council is increasingly giving peacekeeping operations much more complex, multidimensional mandates, and is authorizing them, under Chapter VII of the Charter, to use force in implementing their mandates. A very important development is that the Security Council is now mandating operations to protect civilians under imminent threat of violence. Currently, peacekeeping operations in the DRC, Liberia, Côte d'Ivoire, and Darfur all have this mandate. Although these mandates are restricted in scope in that they are subject to the availability of resources, and geographically limited to areas where peacekeepers are deployed, they provide a crucial means to prevent violations of IHL against civilian populations.

Currently, there are almost 100,000 troops from 115 States serving in 14 different peacekeeping operations around the world. As an actor in conflict zones, we want to ensure that our troops comply with the rules of IHL when they are engaged as combatants, and to ensure that others respect the same rules *vis-à-vis* our troops. Already in 1999 (the 50<sup>th</sup> Anniversary of the 1949 Geneva Conventions), the Secretary-General recognized this and promulgated a *Bulletin on Observance by United Nations Forces of International Humanitarian Law*. The Bulletin sets out the principles and rules of IHL applicable to UN forces conducting operations under UN command and control. It is designed to apply to UN forces when they are actively engaged as combatants in situations of armed conflict. It applies in both enforcement actions and in peacekeeping operations when force is used in self-defence.

While the Bulletin is a binding legal instrument in the internal law of the Organization, the rules confirmed in the Bulletin are already binding upon members of UN operations under their respective national laws. Overall the Bulletin reflects the undertaking set out in the UN's standard status of forces agreements (SOFAs) entered into with host Governments since 1993. This undertaking provides that (i) the UN shall ensure that its peacekeeping operation shall conduct its operation in the host country with full respect for the principles and rules of IHL; and (ii) that the Government undertakes to treat at all times the military personnel of the peacekeeping operation with full respect for the same principles and rules. In addition, the rules of engagement (ROE) of peacekeeping operations also require that military personnel comply with the law of armed conflict and IHL, and to apply the rules of engagement in accordance with these laws.

To conclude, the UN is highly engaged on many fronts to respect and ensure respect for IHL. The Security Council is increasingly focused on the need to protect civilians in conflict situations. The laws are in place. The challenge remains their effective implementation. A major achievement of

the last 17 years has been the international community's willingness to insist on individual criminal accountability for those committing mass atrocities. While the UN is actively working to promote the rule of law to try to prevent and respond to conflict, primary responsibility lies with States. States have acknowledged their responsibility to protect their populations. The challenge now, both for the UN and its Member States, is to translate those words into actions.

Ladies and Gentlemen, those are some of my thoughts on the role of the UN in implementing international humanitarian law. I hope that in the coming two days we will have an opportunity to explore some of these issues in more depth.

On that note, I look forward to the statements by François Bugnion and Ted Meron.

Thank you very much.