

**Statement by
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**Arthur T. Vanderbilt Hall
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Mr. Fülleman
Professor Meron
Ladies and Gentlemen

It is a sincere pleasure to be here today to speak with you on international humanitarian law issues at the United Nations. This morning I will give you some insight into current IHL issues at the UN, not only in terms of the UN's broader role of preventing violations of IHL, in promoting the application of IHL, and of ensuring accountability when violations occur, but also in connection with the UN as an actor on the international stage, which seeks to comply with the principles and rules of international law.

First, however, I would like to congratulate both NYU and the ICRC for putting together what looks like an excellent programme, with its focus on "contemporary challenges in IHL and humanitarian operations, including the medical mission". I would like to take this opportunity to pay particular tribute to President Meron for his important contribution to the work of the ICTY, I am sorry not to be able to join you tomorrow for his session on the transfer of custody of prisoners of war. This session will undoubtedly raise issues of specific relevance to the Copenhagen process on the treatment of detainees. It is also likely to address the UN's own internal guidelines concerning the detention and transfer of persons to local authorities in peacekeeping operations.

Before I turn to specific issues, I'd like to say a word about the ICRC and our relationship with ICRC. We in the UN Secretariat hold the ICRC in very high regard. Their mission is a noble one and they at the frontline of conflicts in providing humanitarian assistance. While we are two very different kinds of organizations, our purposes are closely aligned, and we work together in complementary ways. In recent times we have had the pleasure of working closely with the ICRC. For example, Robert Young has

represented the ICRC on a number of briefs here at UNHQ. I would highlight the extension of the mandate of the Special Representative of the Secretary-General on Children and Armed Conflict to include the protection of schools and hospitals, as well as IHL issues in peacekeeping operations more generally.

Born out of the devastation caused by World War II - in which millions perished, the United Nations was created, in the words of the preamble to the Charter, "to save succeeding generations from the scourge of war." This underscores that the central mission of the United Nations is intimately linked to the core purposes of IHL – to prevent unnecessary human suffering caused by war. Against this background, it is useful to reflect on the purposes of the United Nations, which include first and foremost, "to maintain international peace and security", "to take collective measures to prevent and remove threats to the peace", to bring about the peaceful resolution of disputes "in conformity with principles of justice and international law", and to promote and encourage respect for human rights.

These purposes are as relevant today as they were when they were drafted in 1945, and they go to the heart of the UN's work to prevent armed conflict, and to create conditions conducive to peace and respect for human rights. We are all too familiar with current crisis situations around the world, such as in Syria, Afghanistan, the DRC and Sudan. In many of these places and situations, the targeting of civilians, sexual violence, forced displacement and denial of humanitarian access are acts which, more often than not, are carried out deliberately, and with total impunity. The contemporary challenges of protecting civilians, and of ensuring respect for IHL, are thus as acute as ever.

Over the years, the Organization has been developing a range of innovative mechanisms to meet these challenges. The main political organs of the UN are seized more than ever with issues of IHL, and are well placed

to lead international efforts to prevent violations, to promote legal standards and to seek accountability.

The Security Council is engaged in numerous ways in promoting the norms and application of IHL. It established the international tribunals for the Former Yugoslavia and Rwanda which have developed ground-breaking jurisprudence concerning violations of IHL, and which have made important strides in eroding impunity for international crimes. The Council has also taken a number of other measures, including imposing sanctions; tasking peacekeeping operations to work with Governments to promote the rule of law as well as to protect civilians under imminent threat of violence. The Council has issued specific demands to individual States and armed groups to cease all forms of violence and human rights abuses against civilian populations. Over the last 12 months, the Council has been especially concerned with respect to situations in the Kivus and Eastern Province of the DRC, in the Abyei Area of Sudan, in South Sudan, in Libya, in Darfur, in Cote d'Ivoire, and in Afghanistan. The Security Council has paid particular attention to sexual and gender-based violence, and has underscored that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide. In this context, the Council has made clear that sexual violence crimes must be excluded from amnesty provisions in the context of peace agreements. Last year, in the context of the crisis in Libya, the Security Council affirmed Libya's "Responsibility to Protect", and imposed a number of measures, as well as authorized the use of 'all necessary means' in efforts to protect civilians.

This leads me to the General Assembly. In 2005, the General Assembly embraced the doctrine of the "Responsibility to Protect" (R2P), which underscores that States have a responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and that the international community has a concomitant role to

help States meet these obligations and to take timely and decisive action where they fail to protect their populations.

Another recent trend is the creation of specific mandate holders, such as the Special Representative of the SG on Children and Armed Conflict, and the Special Representative of the SG on Sexual Violence in Armed Conflict, who report to the Council, and whose work has led to close engagement with States and armed groups to ensure protection for those most vulnerable in times of armed conflict.

The grave situation in Syria is at the top of the international agenda. Indeed, the Secretary-General has stated that "*There is no more urgent task before the international community than to end the killing, immediately*". Thousands of people have been killed over the past year and many more have been injured. As far back as July last year, the Advisers of the Secretary-General on the Prevention of Genocide and on the Responsibility to Protect warned that "the widespread and systematic attacks by Syrian security forces and associated militias on civilians could constitute crimes against humanity". In this connection, a question that seems often to be in peoples' minds is whether R2P has "failed in Syria". The failure by the Security Council to take action last month was met with deep regret by the Secretary-General, and with great disappointment within the wider international community.

At the heart of R2P is the recognition that state sovereignty – the cornerstone of international relations – entails responsibility. States have a responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. And building upon this responsibility is the positive obligation which is placed upon the international community to assist States to meet their responsibilities.

Recent developments in relation to Syria have demonstrated that a "one size fits all" approach to R2P will not work. As you know, the concept of R2P, as defined by the Heads of State and Government at the 2005 World Summit, included a declaration that States were prepared to take collective action "in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII". Thus, the concept is necessarily limited by the legal framework provided under the Charter, in which decisions of the Council on all non-procedural matters require the concurring votes of each permanent member. This underscores that R2P does not create any additional exceptions to the prohibition on the use of force under the Charter, - the exceptions being acts in self defence, and acts authorized by the Security Council.

The "added-value" so to speak of R2P, is that it encapsulates the moral and legal position of the international community in relation to the four "R2P international crimes and violations", and is a vehicle for an important political process, where political pressure, as well as tangible technical and material assistance, may be brought to assist States to exercise their responsibilities. These range from Pillar I long-term prevention measures within and by the State to build the rule of law and respect for human rights; to Pillar II the role of the international community in assisting national authorities exercise their responsibility; to the Pillar III taking of collective action under the Charter when national authorities are manifestly failing to protect their populations.

In this light, the concept is very much at the forefront of efforts by the international community to address the current tragedy in Syria. States have both sought to provide assistance and have imposed economic sanctions. The Secretary-General has repeatedly called upon the Syrian authorities to stop the violence, and reminded Syria of its responsibilities under international human rights law. The League of Arab States has adopted a Plan of Action and is highly engaged with regional actors to

promote a "Syrian led political transition to a democratic, pluralistic political system". The General Assembly has strongly condemned what it has referred to as "widespread and systematic violations of human rights and fundamental freedoms", and has called upon the Government to immediately halt the violence. The UN Human Rights Council has established an independent commission of inquiry to conduct an investigation into violations of human rights law since March 2011. The Security Council has condemned the violations against civilians, called for an end to the violence, and for accountability. And more recently, a Joint Special Envoy of the UN and the League of Arab States has been appointed to focus international pressure to stop the violence, and to facilitate humanitarian access. These are all important efforts to persuade and assist the Syrian authorities to assume their responsibilities.

When R2P was debated in the General Assembly, most States held that the UN's role should focus, at the outset, on prevention. The challenge for giving true practical meaning to the concept is thus to work out how the UN can best assist States to protect their populations before mass crisis situations occur, particularly as there will be situations in which the Security Council will not authorize enforcement action under Chapter VII. This challenge has yet to be met, and of course differs with each unique situation. With regard to the ongoing tragedy in Syria, the challenge for the international community is to explore options under Pillars II and III more broadly, and perhaps more creatively, and to find ways of ensuring that the Security Council will take action before the crisis escalates further.

[International Criminal Tribunals]

Turning now to the broader long-term challenges of prevention, one of the UN's most significant achievements since its establishment is its development and promotion of legal norms concerning international crimes,

which have contributed to what the Secretary-General has hailed as an "age of accountability".

The UN's work to promote the application of international humanitarian law and to punish those who violated it was given concrete expression with the establishment in the early to mid 1990s of the International Criminal Tribunals for the former Yugoslavia and for Rwanda. These were followed by the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia. For almost two decades, the ad hoc international and mixed criminal tribunals have contributed to the gradual erosion of impunity with their prosecution of political and military leaders responsible for the commission of serious, large-scale violations of IHL.

It is now the International Criminal Court that lies at the heart of our system of international criminal justice. Despite the understandable challenges which the ICC is facing, I firmly believe that this permanent court 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. Here I also wish to emphasise the role of States. It is 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 of complementarity and its counterpart, the primary role of national jurisdictions, are the bedrock of the modern international criminal justice system.

I will now give you a brief update on the status and work of the ICC and the other international, or internationally supported tribunals.

[ICC]

Turning to the ratification status, and work of the ICC, the number of States that are Parties to the Rome Statute has continued to grow. 120 States have now ratified or acceded to it, the most recent being the Republic of Vanuatu. There are currently seven situations before the Court: The Democratic Republic of Congo; the Central African Republic; Uganda; Darfur, Sudan; Kenya; Libya; and Cote d'Ivoire.

The first case in the most recently opened situation, in Cote d'Ivoire, is scheduled to start in June with the confirmation-of-charges hearing in the case against former President Gbagbo. The Prosecutor has indicated that, before the end of the year, he may seek a second arrest warrant in respect of war crimes and crimes against humanity allegedly committed in Côte d'Ivoire following the presidential election of 28 November 2010.

The Court issued its first judgment today, on 14 March 2012 - a significant milestone. The Court convicted Lubanga of the war crimes of conscripting children under the age of 15 years into armed groups, enlisting children into armed groups, and using children to participate actively in an armed conflict that took place in the Ituri region of the Eastern region of the DRC. His sentencing hearing is scheduled for the coming months. The Katanga and Chui case, which also relates to the situation in the DRC is expected to end soon, with the closing arguments being heard in May and the judgment is expected before the end of the year.

The trial of Bemba, the former Prime Minister of the DRC, has been ongoing since November 2010, and the presentation of the Prosecution's case continues. Mr. Bemba faces charges of crimes against humanity and war crimes, in respect of his alleged role as President and Commander-in-chief of the Movement for the Liberation of Congo in the Central African Republic in 2002-2003.

Regarding the situation in Darfur, Sudan, charges were confirmed against Abdallah Nourain and Saleh Jamus back in March 2011. The date for the opening of their trial is yet to be set. On 1 March 2012, Pre-Trial Chamber I issued a public warrant for the arrest of Minister of National Defence of Sudan, Muhammad Hussein. There are also three outstanding arrest warrants in respect of the situation in Darfur, relating to Ahmad Harun, Ali Rahman, and President Al-Bashir. There are also outstanding warrants of arrest that have been issued against three top members of the Lord Resistance Army in respect of the situation in northern Uganda.

The charges against four of the six suspects in the situation in Kenya were confirmed on 23 January 2012; and the trials of Ruto, Arap Sang, Muthaura and Kenyatta are expected to start towards the end of 2012 or in early 2013.

In relation to the situation in Libya, the notion of "positive complementarity" has come into play as the Libyan National Transitional Council has informed the Pre-Trial Chamber that it intends to prosecute Saif Al-Islam, whose warrant of arrest, together with that of Al-Senussi, remains outstanding. The decision falls to the Pre-Trial Chamber as to whether the principle of complementarity applies, notably, whether Libya is genuinely willing and able to prosecute Saif Al-Islam for the same crimes he is charged with by the Prosecutor. It is indispensable that this discussion takes place before the Chambers of the ICC, and that it takes place not in the language of diplomacy, but in the language of law.

[ICTY and ICTR]

Turning now to the ICTY and ICTR, almost 20 years after their establishment we are entering an era where the completion of their mandates is expected and a "Residual Mechanism" will continue the jurisdiction and essential "residual" functions of both 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 Arusha branch of the International Residual Mechanism for Criminal Tribunals established by Security Council resolution 1966 (2010) is set to commence operations on 1 July this year. The branch in The Hague will start functioning on 1 July 2013. 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. The arrest of Ratko Mladic and Goran Hadzic last year means that there are no more ICTY fugitives. All the 161 persons indicted by the ICTY have been or will be tried by the Tribunal.

The ICTR has nine fugitives. Three of them, who are considered to be senior level, will be tried by the Mechanism. The cases of the other six may be referred to competent national jurisdiction for trial. In this regard, the ICTR Appeals Chamber’s decision to refer a case to Rwanda opens the possibility that Rwanda could try all the lower level fugitives. Thus the national and international jurisdictions will complement each other to ensure that the fugitives do not enjoy impunity.

[SCSL]

Regarding the Special Court for Sierra Leone, in December last year, the Government of Sierra Leone ratified its agreement with the United Nations establishing a “Residual Special Court for Sierra Leone”. The Residual Special Court will start operating immediately upon the closure of the Special Court, possibly towards the end of this year. The Trial Chamber will deliver its long-awaited judgment in the case of Mr. Charles Taylor, the

former President of Liberia on 26 April. An appeal, if any, could last roughly six months. Funding has been a perennial problem for the Special Court, however, the General Assembly has fortunately now approved an additional financial subvention to allow the Special Court to complete the trial.

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.

[ECCC]

Regarding the Extraordinary Chambers in the Courts of Cambodia, on 3 February 2012, the Supreme Court Chamber confirmed the conviction of KAI NG Guek Eav, alias Duch, for crimes against humanity and grave breaches of the 1949 Geneva Conventions. The Supreme Court Chamber extended his sentence from 35 years to life imprisonment. This is an historic moment for the ECCC and international criminal justice in general. It is the first ever Supreme Court Chamber judgment, and it marks the completion of the ECCC's first case.

The ECCC has also started its second case, against the four most senior surviving members of the Khmer Rouge. In view of the advanced age of the accused persons, the Trial Chamber has adopted an innovative approach of dividing the trial into mini-trials which will be heard consecutively. Interest in the trials among the Cambodian public and media remain 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.

Peacekeeping

I will now turn to peacekeeping. Peacekeeping is a major area of our work in which IHL issues arise. This is largely due to developments in the nature of peacekeeping. Today UN operations are increasingly given much more complex mandates than in the traditional style of peacekeeping, and are frequently authorized under Chapter VII of the Charter to use "all necessary means" in order to accomplish them.

The UN's operation in the DRC, known as "MONUSCO", is a prime example of a current peacekeeping operation with a complex and multidimensional mandate. MONUSCO has sizeable civilian and military components, and its mandate, which is expressed to be under Chapter VII of the Charter, includes a significant number of tasks to promote IHL and to protect civilians from violations of IHL. Like the UN's operations in Liberia, Côte d'Ivoire and Darfur, MONUSCO has a mandate to "protect civilians under imminent threat of violence". Often these "protection of civilians" mandates are restricted in scope in that they are subject to the availability of resources and geographically limited to areas where peacekeepers are deployed, however, MONUSCO is explicitly mandated to "give priority" to the protection of civilians in decisions about the use of available capacity and resources.

MONUSCO's mandate in this regard is very broad as it also includes supporting efforts by the Government "to ensure the protection of civilians from violations of international humanitarian law and human rights abuses, including all forms of sexual and gender-based violence, to promote and protect human rights and to fight impunity". MONUSCO is further requested to collect information and identify potential threats against the civilian population, to bring violations of IHL and HR law to the attention of the relevant authorities; to support national and international efforts to bring perpetrators to justice; to work closely with the Government to strengthen

and reform security and rule of law institutions, including the judicial system, military justice institutions and prisons; to work closely with the Government to prevent violations against children, and to prevent the recruitment of children as child soldiers. As such, there is enormous scope for MONUSCO to engage with the Government in promoting respect for IHL.

Another aspect of MONUSCO's mandate which I'd like to speak to is its mandate to support government forces against armed groups, and to bring such ongoing military operations to a completion. This brings me to an important policy development at the UN concerning the conduct of operations when they are mandated to provide support to non UN security forces, - which has become known as the "human rights due diligence policy". This policy is intended to reinforce cooperation between the UN and Member States towards the goals of consolidating peace, strengthening the rule of law and improving respect for IHL, human rights and refugee law.

By way of background, MONUC, as it was then known, was mandated by Security Council resolution 1856 (2008) to support operations led by the Armed Forces of the Democratic Republic of the Congo (FARDC) in order to disarm local and foreign armed groups, who presented a serious risk to the safety of the civilian population, and to ensure their participation in the disarmament, demobilization, repatriation, resettlement and reintegration process.

In 2009 there were reports by NGOs and the media that members of the FARDC, who were provided with logistical supplies by the UN, were looting, killing and raping the very population that they were supposed to be protecting. This presented a difficult situation for the UN – how to carry out its mandate in the DRC without supporting in any way Congolese soldiers who might abuse human rights.

This situation led to a specific policy being devised by the Secretariat, which was to prevent any perception of association by MONUC with such violations. The policy specified that MONUC would not participate in, or support operations with FARDC units if there were substantial grounds to believe that there was a real risk that such units would violate international humanitarian, human rights or refugee law in the course of the operation. The policy was subsequently endorsed by the Security Council, which in resolution 1906 (2009), called upon MONUC 'to intercede with the FARDC command if elements of a FARDC unit receiving MONUC's support are suspected of having committed grave violations of such laws, and "if the situation persists... to withdraw support from these FARDC units". The policy now applies across the board where the UN is considering providing some form of support to non-UN security forces, and essentially consists of three elements:

- (1) Where the UN has substantial grounds for believing there is a real risk of the non-UN security forces concerned committing grave violations of IHL, human rights law or refugee law, then the UN is obliged to refrain from supporting them.
- (2) If the UN goes ahead and provides support to non-UN security forces and then receives information that gives it reasonable grounds to suspect that those forces are committing grave violations of IHL, human rights law or refugee law, the UN must immediately intercede with the command elements of those forces with a view to putting a stop to those violations.
- (3) If such violations nevertheless continue, then the UN will be obliged to suspend or withdraw support from the forces concerned.

This brings me to the final part of my presentation. As an actor in potential conflict zones, the UN is interested to ensure that military personnel serving in its operations observe IHL when they are engaged as combatants

in situations of armed conflict, and that they too are held accountable when violations occur. In 1999 (the 50th Anniversary of the 1949 Geneva Conventions), the Secretary-General 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, for the most part, 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 this connection, the rules of engagement issued in respect 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.

In this connection, a question that arises is when does a situation in which peacekeepers are involved, through carrying out tasks under their mandates, become one of armed conflict so as to trigger the application of IHL? This threshold question is one of the thorny issues that also applies across a number of mandates within the Secretariat, particularly in the context of situations of non-international armed conflict. For example, the SG's Special Advisers on Children and Armed Conflict and on Sexual

Violence in Armed Conflict must make a judgment call based on legal criteria as to what constitutes a situation of armed conflict in order to carry out their mandates to report on situations within States, and to engage with those States under the terms of their mandates. This is a particularly sensitive issue for States in the context of non-international armed conflicts.

Ladies and Gentlemen, to conclude, the UN is highly engaged on a number of fronts to respect and ensure respect for IHL. The Security Council is increasingly focused on the need to protect civilians in conflict situations, and to take long-term measures to prevent violations of IHL and human rights law. A major achievement of the last 20 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. The laws are in place. The challenge now, both for the UN and its Member States, is to ensure their effective implementation.

Thank you.