

Statement by
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The Legal Counsel
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International Humanitarian Law

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Professor Meron,
Mr. Buff,
Dean Revesz,
Ladies and Gentlemen,

(Introduction)

1. It is with distinct pleasure that I continue the long tradition of the Legal Counsels that preceded me and address, for the first time, this seminar on the issues of international humanitarian law currently before the United Nations and the Office of Legal Affairs. At the outset, allow me to commend the organizers of this annual seminar - the International Committee for the Red Cross and New York University School of Law – for their unwavering commitment to disseminate knowledge and facilitate the exchange of views on a panoply of IHL issues among scholars, diplomats, practitioners, and international civil servants.

2. As I walk you through some of the challenges we face, I would like to underscore the latest developments in the six international or “internationalized” criminal jurisdictions which my Office services, or with which it closely cooperates; the ever-growing recourse to commissions of inquiry of both fact-finding and investigative nature; the “peace and justice” dilemma we face in almost every post-conflict situation and its possible resolution, and our shared efforts to operationalize the new concept of “Responsibility to protect”, the so-called R2P.

3. Let me then turn first to recent developments in the field of international criminal justice.

(International Criminal Court)

4. The establishment of the International Criminal Court crowns the efforts of the international community to enforce the applicability of international humanitarian law, advance the cause of justice and the rule of law on a universal scale. 108 States are now Parties to the Statute, and 139 are signatories.

5. Last year, the Office of the Prosecutor opened a formal investigation in the Central African Republic, in particular into allegations of rape and other acts of sexual violence against women. The arrest and surrender to the seat of the Court of Jean-Pierre Bemba Gombo by Belgian law enforcement authorities on 3 July 2008 has been a major success of the Court.

6. In the Democratic Republic of the Congo, where the Court relies heavily on cooperation from the United Nations, former Ituri warlords Germain Katanga and Mathieu Chui have been surrendered to the Court and the arrest warrant against Bosco has been unsealed. The charges against Katanga and Chui have now been confirmed, and the case is being prepared for trial. On 26 January 2009, the Prosecutor's case against Thomas Lubanga Dyilo entered the trial phase. The Lubanga trial, the first in the short history of the ICC, has been widely hailed as a historic event, which probably would not have been possible without the steadfast and unwavering support of the United Nations, and I should with humility and pride add, of the Office of Legal Affairs.

7. With regard to the situation in Darfur referred to the ICC by the Security Council, an arrest warrant has today been issued against President Al-Bashir of Sudan – the third individual against whom an arrest warrant has been issued in the case of Darfur. As you will understand, I do not wish to comment any further on this sensitive matter.

8. There have been important developments also with regard to the situation in Northern Uganda - a case of self-referral to the ICC. Within the framework of the so-called “Juba Peace Process”, the Lord’s Resistance Army (LRA) and the Government of Uganda have concluded a series of agreements with a view to ending a two-decade conflict that has devastated the northern part of Uganda and affected its neighbouring countries. But while the framework “Final Peace Agreement” has not yet been signed by the LRA leader Joseph Kony, the Juba process has not failed. Following the military campaign mounted by the armed forces of Uganda, the DRC and Southern Sudan, the Juba process has taken centre stage again. Beyond the fate of the surviving LRA leaders and their surrender or otherwise to the ICC, the question facing Uganda is ultimately how to reconcile sustainable peace and its people’s desire for justice.

9. A few years only into its existence, the International Criminal Court has emerged as the centrepiece of our international system of criminal justice. As it advances in its judicial mission, the United Nations will accompany and support it in every respect.

(ICTY / ICTR)

10. The International Criminal Tribunals for the former Yugoslavia and for Rwanda, the first UN-based tribunals and the precursor to the ICC, were established by the Security Council under Chapter VII resolutions in 1993 and 1994, respectively. More than a decade later, both are now working towards their completion strategies.

11. In its resolution 1503(2003) of 28 August 2003, the Security Council called on the ICTY and the ICTR to complete all trials by the end of 2008 and all appeals by the end of 2010. Since then, however, it has become increasingly clear that while working at full capacity, the Tribunals will not be able to meet the completion dates. The volume and complexity of the cases is such that on current predictions, they would continue into 2011. In contemplating their “completion strategy”, therefore, it is now time to consider the establishment of a Residual mechanism to carry on essential functions beyond the life-span of the Tribunals. To that end, my Office is working closely with the Security Council’s Informal Working Group on Tribunals to determine which “residual functions” should continue beyond completion, and what form and structure they should have. Of the many difficult issues now facing us, the question of the “fugitives” tops the list. With the fast-approaching deadlines, it has now become urgent for the States concerned to ensure the arrest and transfer to the Tribunals of the fugitives, including Mladic and Kabuga to the ICTY and ICTR, respectively. If, however, they remain at large at completion, there will be a need to ensure accountability in the form, perhaps, of an international mechanism with a trial capacity based on a roster of available judges.

12. I should recall in this connection that on 26 February 2009, an ICTY Trial Chamber rendered its Judgment in the Milutinović case, the first Judgment handed down for crimes committed during the 1999 conflict in Kosovo. Five former high-ranking Yugoslav and Serbian political, military and police officials were convicted for crimes against humanity; the former Serbian President, Milan Milutinović, however, was acquitted on all charges.

(Special Court for Sierra Leone)

13. As for the Special Court for Sierra Leone, the first “mixed” or “hybrid” tribunal established by Agreement between the United Nations and the Government of Sierra Leone, two major developments are noteworthy. Last week, the Special Court delivered its judgment in the so-called “RUF case” against three members of the Revolutionary United Front rebel group. The judgment is a significant contribution to international humanitarian law, in that among other things, it is the first to convict individuals of forced marriage as a separate crime against humanity, and for attacks against peacekeepers – their killing and abduction in different parts of Sierra Leone during May of 2000 - as a specific war crime. The trial of the former Liberian President Charles Taylor in The Hague is now the only remaining case on the docket of the Special Court for Sierra Leone.

14. Like the ICTY and ICTR, the Special Court for Sierra Leone faces the challenge of planning for a mechanism to carry out the residual functions of the Court, after its completion. These functions include the preservation and management of the Court’s archives, witness protection, supervision of prison

sentences, pardons, commutations and early release, review of convictions and acquittals, and provision of assistance to national authorities.

15. As the Special Court is scheduled to complete all judicial activities by the end of 2010, it is facing, once again, a serious financial challenge. Based entirely on voluntary contributions, the current funding of the Special Court will last for a few months only. I need not over-emphasize the importance of ensuring the availability of funds for the Special Court at this critical juncture of its judicial activities.

(Extraordinary Chambers in the Courts of Cambodia - ECCC)

16. Unlike the Special Court for Sierra Leone, the “Extraordinary Chambers in the Courts of Cambodia” are part of the national judicial system of Cambodia, and as such, they work within, and as part of, Cambodia’s national legal system. At the same time, however, the Extraordinary Chambers are required under the Agreement between the United Nations and the Cambodian Government 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, but the internal rules and procedures of the Extra-ordinary Chambers have been successfully adopted. There are now five accused in custody, and the judges of the Extraordinary Chambers, who comprise both international and Cambodian judges, began the public proceedings in the first case on 17 February 2009. This was a decisive step toward ending impunity for the horrific crimes committed during the Khmer Rouge regime, and one that was

well received not only by the people of Cambodia, but the international community as a whole.

(Special Tribunal for Lebanon)

17. Like the Special Court for Sierra Leone and the Extraordinary Chambers for Cambodia, the Special Tribunal for Lebanon was established by Agreement between the United Nations and the Government concerned. Unlike the former, however, the provisions of the Agreement entered into force by Chapter VII resolution 1757(2007). The Lebanon Tribunal was established to try all those who are alleged responsible for the attack of 14 February 2005 in Beirut that killed the former Lebanese Prime Minister Rafiq Hariri and 22 others. By resolution 1757 (2007) also, the Security Council mandated the Secretary-General, in coordination with the Government of Lebanon, to undertake the steps and measures necessary to establish such a tribunal.

18. Over the last year judges have been selected, the Prosecutor and the Registrar appointed, the Management Committee established and adequate funds for the establishment and the first year of operation of the Tribunal have been received by donor States and the Government of Lebanon.

19. Based on the progress made and following consultation with the Prime Minister of Lebanon, the Secretary-General decided on 17 December 2008 that the Tribunal will commence functioning on 1 March 2009. In accordance with resolution 1757 (2007), a two-month transition period from 1 January to 28 February 2009 ensured a smooth transition from the activities of the International

Independent Investigation Commission in Beirut to the Office of the Prosecutor of the Special Tribunal.

20. Last Sunday, on 1 March 2009, I had the pleasure to represent the Secretary-General at the launch of the Tribunal in The Hague, where it has its seat. As stated by the Secretary-General, “the commencement of the Tribunal’s work marks a decisive milestone in the tireless efforts by all the Lebanese and the international community to uncover the truth” and to bring those responsible for the assassination of Prime Minister Hariri and related crimes to justice.

(Commissions of Inquiry)

21. Alongside the UN-based judicial accountability mechanisms, commissions of inquiry were developed in the practice of the United Nations since the early 1990s as a fact-finding mechanism mandated to investigate serious violations of human rights and international humanitarian law, establish the facts, qualify the crimes, determine responsibilities and make recommendations with a view to bringing those responsible to account.

22. With the winding down of the IIC and its transformation into the Prosecutor’s Office in the Special Tribunal for Lebanon, two other UN established commissions of inquiry are now operating, or about to begin their operations: the commission to investigate organized and transnational crimes in Guatemala, known by its Spanish acronym “CICIG”, and the commission of inquiry to investigate the facts and circumstances of the assassination of the former Prime Minister of Pakistan Benazir Bhutto. While CICIG conducts a criminal

investigation in accordance with the Guatemalan law, the Bhutto commission is a fact-finding commission with no investigative mandate. I should finally note that a UN internal Board of Inquiry has recently been established to assess the damages caused to UN premises and installations in the recent conflict in Gaza.

(Peace and Justice)

23. At the heart of many of these judicial and non-judicial accountability mechanisms lies the dilemma of peace and justice. With the growing involvement of the United Nations in post-conflict societies – both in facilitating the negotiations of peace agreements and in establishing judicial and non-judicial accountability mechanisms – the Organization has frequently been called upon to express its position on the relationship between peace and justice, on the validity and lawful contours of amnesty, on the relationship between the ICC and other judicial accountability mechanisms, notably national, and on the interaction between UN representatives and persons indicted by international and UN-based tribunals who continue to hold positions of authority in their respective countries.

24. In his speech before the Security Council on 22 June 2006, the then Legal Counsel said:

“Justice and peace must be regarded as complimentary requirements. There can be no lasting peace without justice. The problem is not one of choosing between peace and justice, but of the best way to interlink one with the other, in the light of specific circumstances, without ever sacrificing the duty of justice”.

25. In the last decade, post-conflict societies emerging from years of internal conflicts and large scale violations of international humanitarian law were caught in the dilemma between peace and justice. Faced with the choice of granting sweeping amnesties to combatants as a condition for laying down their arms, peacemakers have opted for large-scale amnesties, for the urgent need for peace has overridden, for a while at least, the need for justice.

26. In paving the way for holding to account those responsible for genocide, crimes against humanity and war crimes, the United Nations has redefined the lawful contours of amnesty. In Sierra Leone, Cambodia, Angola, Burundi, and Sudan, amnesty for genocide, crimes against humanity and war crimes has been rejected, invalidated or otherwise declared not to constitute a bar to prosecution. Justice has thus become a component of peace, although in the sequence of events it has sometimes ranked second in time.

27. After a decade-long debate over how to reconcile peace and justice, and whether to pursue them simultaneously or sequentially, the debate, it now seems, is no longer simply between ‘peace and justice’ but between ‘peace and what kind of justice’.

(R2P)

28. Before closing, let me turn to the Secretariat’s efforts to elaborate and operationalize the concept of “responsibility to protect”.

29. On 12 January 2009, the Secretary-General submitted his report on "Implementing the responsibility to protect". The Report was prepared in response to the 2005 World Summit Outcome at which the Heads of State and Government unanimously affirmed that "each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity".

30. The Report underscores the need to develop a UN strategy, standards, processes, tools and practices to implement the responsibility to protect. This represents the UN vision of how it can best encourage States to live up to their duty to protect their populations, and discourage States or groups of States from mis-using the "responsibility to protect" for inappropriate purposes. The report emphasizes, for example, that the responsibility to protect does not provide any additional basis for the use of force under international law. Rather, it reinforces the prohibition of the use of force and the limited exceptions to that prohibition under the UN Charter, namely, self-defence and Security Council authorization.

31. The Report outlines **three pillars** for advancing the World Summit's agenda: Pillar One on the responsibility of States to protect their own population; Pillar Two on "International assistance and capacity-building" to assist States to protect their population; and Pillar Three on a "Timely and decisive response" where States are not able or willing to protect their population. The strategy set out in the Report stresses the value of **prevention** and, when it fails, of early and flexible response tailored to the specific circumstances of each case. Paragraph 47 of the report provides in that respect that: "[t]he rule of law is fundamental to preventing the perpetration of crimes relating to the responsibility to protect. The United Nations system, including through the engagement of donor countries,

should increase the rule of law assistance it offers to Member States”. Indeed, the presence in any society of a strong culture of rule of law is a guarantee for preventing, or minimizing the risk of that society’s deterioration into an “R2P” situation.

32. The Secretariat looks forward to the Member States’ views in response to the Secretary-General’s January Report. As the United Nations moves forward with the implementation of the responsibility to protect, the Office of Legal Affairs will ensure that the rule of law is at the heart of the considerations.

(IHL proposal in the Security Council on 29 January 2009)

33. And finally, let me say a few words on my statement of 29 January in the framework of a private meeting of the Security Council on the subject of “Maintenance of International Peace and Security: respect for international humanitarian law.”

34. In my speech, I proposed for the consideration of member States the idea of establishing a “protected status” to UN premises under international humanitarian law. I explained that while personnel and premises of UN peacekeeping operations, UN signs, uniforms and emblems are protected under IHL, UN premises as such, while protected as a civilian object, do not, as yet, enjoy a “protected status” under international humanitarian law. I proposed that the Security Council give thought to including in the items for further consideration the idea of granting UN sites a “protected status” – alongside the well-established protected sites: archaeological, historic, artistic, and religious sites, and within the

same parameters. Recognizing a “protected status” to UN premises would enhance the UN's character as an international, neutral, objective, and humanitarian organization, and indirectly, but equally importantly, protect the civilian population at risk seeking refuge in UN premises.

35. This idea has simply been suggested for further consideration and yet to garner the support of States and, in the process, to be carefully elaborated and circumscribed to define the premises subject to special protection, and the circumstances and conditions for special protection. The Office of Legal Affairs welcomes an open and frank exchange of views with States and other interested actors, notably the ICRC, and stands ready to make its own contribution to the implementation of this important idea.

(Conclusion)

36. These, Ladies and Gentlemen, were some of my reflections on the challenges of international humanitarian law facing the United Nations, and the Office of Legal Affairs more particularly. In advancing the legal thinking on these and many other issues, you will be discussing in the course of this two-day seminar, I wish you every success.

Thank you.