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Statement

by

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Arthur T. Vanderbilt Hall
40 Washington Square South

President Meron,
Mr. Füllemann,
Dean Morrison,
Ladies and Gentlemen,

I would first like to say that I am very pleased to participate in this seminar on international humanitarian law for the first time.

In this connection, I would especially like to thank Mr. Füllemann for inviting me to this seminar. I also wish to thank President Meron, the ICRC and the NYU Law School for organizing this important seminar.

It is a great privilege for me to continue this tradition.

Looking back at the past year, we still witness a number of armed conflicts affecting many parts of the world. What immediately come to

my mind are situations in the Central African Republic, the Democratic Republic of the Congo, Mali and Syria.

In all these cases, international humanitarian law – or IHL, as it is commonly called – has constantly been at the centre of discussion.

In this short address, I wish to mention a few words about the recent developments at the United Nations where IHL has played a significant role. In doing so, I would like to divide my remarks into two parts:

- 1) The first part will deal with United Nations' efforts to ensure compliance with IHL by others; and
- 2) in the second part, I will deal with the compliance with IHL by the United Nations.

At the end, I will briefly touch upon the legal protection of United Nations personnel in an increasingly hostile environment.

Ensuring compliance with IHL by non-UN actors

When talking about the United Nations' role in ensuring compliance with IHL by non-UN actors, I wish to first recall that one of the Purposes of the United Nations is to “achieve international cooperation in solving international problems of a humanitarian character...and in promoting and encouraging respect for human rights and for fundamental freedoms for all”.

In this general framework, the United Nations has long been involved in encouraging respect for IHL. I am not able to give you a comprehensive history and overview, but I wish to note some recent examples where the Secretariat has played an important role.

Syria

The first example I wish to refer to is the situation in Syria. We all know that the situation in Syria has caused much suffering to those caught up in the conflict.

Much still remains to be done, including finding a lasting political solution to the conflict.

However, we should also look at what has been done up to now, particularly in relation to compliance with IHL by the parties to the conflict.

Syria: Chemical weapons investigations

The investigations into alleged use of chemical weapons initiated by the Secretary-General are a good example.

The General Assembly and the Security Council, in 1987 and 1988 respectively, have provided a general authorization to the Secretary-General to carry out investigations into allegations concerning the use of chemical weapons. The investigations may be carried out if they are brought to his attention by a Member State and if they may constitute a violation of the 1925 Geneva Protocol or other relevant rules of customary international law.

In the course of 2013, the Secretary-General received a number of allegations concerning the use of chemical weapons in Syria from several Member States. He therefore decided to establish a United Nations mission based on the authority given to him by the General Assembly and the Security Council.

You may recall that this United Nations Mission issued two reports in September and December 2013. The findings of the Mission were unequivocal. The Mission concluded that chemical weapons had been used in the ongoing conflict between the parties in Syria. The Mission did not touch upon the legality of the use of chemical weapons, as it was not part of its mandate to do so. But it is clear that any use of such weapons is a violation of IHL. The United Nations Mission was instrumental in drawing attention of the international community to these serious violations of humanitarian law committed in Syria.

However, the findings of the Mission had a broader impact. Shortly after the first report of the Mission was issued, on 27 September 2013, the Executive Council of the Organization for the Prohibition of Chemical Weapons – or OPCW – took a decision setting out a roadmap for the destruction of chemical weapons material and equipment in Syria.

On the same day, the Security Council adopted resolution 2118 endorsing the OPCW decision. Following the adoption of this resolution, the Secretary-General proposed a joint UN-OPCW mission to oversee the destruction of the chemical weapons in Syria, which was approved by the

Security Council. It is also worth noting that, around the same time, Syria acceded to the Chemical Weapons Convention of 1992.

According to the reports of the joint UN-OPCW mission, Syria has provided the required information on chemical weapons in its possession, and has made progress in destroying its capacity to produce chemical weapons. However, it is reported that the removal of chemical weapons material from Syria for destruction outside the country has experienced some delays.

Therefore, while challenges still remain, the United Nations, together with OPCW, has been playing an active role in ensuring compliance by the parties to the conflict with the IHL rule that prohibits the use of chemical weapons.

Syria: Humanitarian assistance

Another difficult issue with respect to the situation in Syria is the provision of humanitarian assistance. The Secretary-General has recently stated at the Second International Humanitarian Pledging Conference on Syria that there are nearly 9.3 million individuals urgently in need of humanitarian aid.

In this regard, it is recalled that IHL requires parties to the conflict to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, provided that it is impartial in character and that there is the consent of the parties.

The United Nations has spoken with one voice in this regard: allow humanitarian relief to reach those who are in need. The Secretary-General, the General Assembly and the Security Council have called upon the parties to abide by this rule of IHL. Most recently, the Security Council, by resolution 2139, demanded that all parties in Syria facilitate the expansion of humanitarian relief operations in accordance with IHL.

In February 2014, approximately 800 people who were trapped in the Old City of Homs were allowed to leave, and the United Nations and the Syrian Arab Red Crescent were allowed to deliver humanitarian assistance into the City after an agreement was reached between parties to the conflict.

While this was a small step forward towards a greater access to humanitarian relief, more needs to be done to ensure that parties to the

conflict in Syria facilitate humanitarian assistance and to protect humanitarian workers.

Human Rights Due Diligence Policy

I would now like to turn to a different aspect of ensuring respect for IHL by non-UN actors.

In recent years, there have been occasions when the Security Council has mandated United Nations operations to support non-UN forces. This has been the case in the DRC, Mali and Somalia. The national armed forces of these States are parties to ongoing armed conflicts with armed groups and are directly engaged in combat operations.

If these national armed forces commit violations of IHL and human rights law, there is a risk that the United Nations is indirectly involved in such violations.

For example, in 2009, there were widespread reports that members of the Congolese armed forces – or FARDC as it is commonly called – were looting, killing and raping members of the local population. MONUC, which was a UN peacekeeping operation established in the DRC in the late 1990s, was mandated by Council resolution 1856 to, among other things, support operations led by the FARDC in order to disarm local and foreign armed groups. This presented a difficult situation for the UN: How can the UN carry out its mandate in the DRC without supporting in any way members of the FARDC who might be committing those violations of IHL or human rights law?

This situation led to a specific policy being devised by the Secretariat, which was to prevent any association by MONUC with such violations. The policy was subsequently endorsed by the Council in resolution 1906. The Security Council called upon MONUC to intercede with the FARDC if elements of a unit receiving MONUC's support were suspected of being involved in the commission of grave violations of IHL, human rights law and refugee law. The Council also decided that, if the situation persisted, MONUC should withdraw support from these units.

This policy was further developed and was adopted as “Human Rights Due Diligence Policy on UN Support to non-UN Security Forces”. This policy now applies across the board where the UN is considering providing most forms of support to non-UN security forces.

The policy essentially consists of three elements:

(1) Where the UN has substantial grounds for believing that non-UN security forces may commit 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 such 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 an end to those violations.

(3) If such violations nevertheless continue, then the UN will be obliged to suspend, or withdraw support, from the forces concerned.

In practice, since the policy was published as a UN document in March 2013, the Security Council has invoked it in its resolutions with respect to UN support to the African Union Mission in Somalia and to the national forces and authorities of Côte d'Ivoire, the DRC, Mali, South Sudan and the Sudan.

The explicit application of the Human Rights Due Diligence Policy demonstrates that the UN is fully committed to ensuring that such UN support is in line with its Purpose, to promote and encourage respect for human rights, IHL and refugee law.

Policy on Human Rights Screening of United Nations Personnel

Recently, the Secretary-General has gone one step further and has adopted a policy to ensure that persons who serve with the United Nations, either as military or civilian personnel, have not committed violations of IHL, as well as criminal acts and violations of human rights law, prior to their service with the UN.

The policy applies both in respect of individuals engaged directly by the UN, as well as personnel nominated, or provided, by Member States, to serve with the UN.

In cases where Member States nominate or provide personnel, they will be asked to screen their personnel and to certify that they have not committed, and are not alleged to have committed, criminal offences, or violations of IHL or human rights law.

In addition, individuals seeking UN employment will be requested to attest that they have not committed, and are not alleged to have committed, criminal offences and/or violations of international human rights or humanitarian law.

This policy is intended to ensure that only individuals with the highest standards of integrity serve with the United Nations. It is also intended to avoid any appearance that the UN condones any such violations. In that respect, the policy will demonstrate the UN's commitment to upholding the principles and purposes of its Charter, in particular those related to respect for human rights.

Compliance with IHL by the United Nations

I would now like to move on to the second part of my address and say a few words about compliance with IHL by the United Nations itself.

In the early years of the United Nations and until the 1990s, the United Nations did not have to be concerned with compliance with IHL by the United Nations itself. UN peacekeeping operations were most often deployed to serve as a buffer between the conflicting parties, rather than to directly engage in military operations.

The exception might have been the peacekeeping operation which was deployed to the Congo in the 1960s. The experience of this UN operation provides us, in many respects, an idea of how the United Nations should comply with IHL.

The UN operation in the Congo was authorized by the Security Council to use force to prevent the occurrence of civil war in the Congo, including the halting of all military operations. Therefore, direct engagement in combat operations was envisaged and ONUC indeed did so. A legal opinion of the Office of Legal Affairs dating back to 1962, which is published in the *United Nations Juridical Yearbook*, already indicated that the provisions of common Article 3 of the Geneva Conventions were applicable to the UN operation in the Congo.

More than 50 years on, the Security Council has taken a bolder step with respect to the Congo. The Council, in March 2013, authorized MONUSCO – the United Nations mission in the DRC – to carry out

targeted offensive operations to “prevent the expansion of all armed groups, neutralize these groups, and to disarm them” through a newly created military unit within MONUSCO called the “Intervention Brigade”. There was no doubt that MONUSCO was now authorized to directly engage in military operations against armed groups.

In practice, between August and November last year, MONUSCO, alongside the Congolese armed forces, engaged in heavy combat with an armed group – “M23” – by employing artillery, mortars, ground troops and attack helicopters. Eventually, M23 announced the end of its rebellion in early November. MONUSCO has now turned its attention to other armed groups in the eastern DRC.

What is the legal framework that governs such military operations by a peacekeeping operation? The first point of reference is the Secretary-General’s Bulletin on the Observance by UN Forces of IHL issued in 1999. This internal regulation of the United Nations sets out the fundamental principles and rules of IHL that must be observed when the UN forces themselves are involved in an armed conflict.

Status-of-forces agreements with the host State also set out the general obligation of peacekeeping operations to respect the principles and spirit of IHL.

Where these instruments do not provide sufficient guidance, we will look to customary rules of IHL and international human rights law to fill the gap.

In the specific case of MONUSCO, resolution 2098 has also required that targeted offensive operations must be carried out in strict compliance with IHL. In this respect, my Office has been regularly asked to provide legal advice with a view to ensuring that MONUSCO complies with IHL during its operations.

One of the immediate concerns has been to minimize casualties to civilians and damage to civilian objects which may be caused by MONUSCO operations. IHL provides a number of rules in this regard. The core rules are:

- to distinguish between, on the one hand,
 - civilians and civilian objects, and on the other hand,
 - persons taking a direct part in hostilities and military objectives;

- to attack only persons engaged in hostilities and military objectives;
- to use weapons and methods of attack that are capable of respecting the distinction I have just mentioned;
- to carry out an attack that would not cause excessive civilian casualties and damage in relation to the military advantage anticipated; and
- to take precautionary measures to ensure that these rules are respected, both at the planning phase and during military operations.

The application of these rules may be challenging, particularly in a context where fighters may blend in amongst the civilian population and where members of armed groups are accompanied by their family members. Therefore, my Office has provided practical guidance to MONUSCO on how to apply these rules in practice.

Another immediate concern has been a situation where MONUSCO captures members of armed groups. The Secretary-General's Bulletin which I referred to earlier provides minimum rules on humane treatment of captured persons. However, it does not provide detailed guidance.

In the case of MONUSCO, the mandate to neutralize armed groups would include the capturing of members of armed groups. As far as possible, these persons will be encouraged to disarm, be demobilized, reintegrate into the normal life, or repatriated to their home country, or handed over to the DRC authorities for appropriate action.

However, there may be cases where none of these options is possible. In such a situation, releasing those persons who pose an imperative threat to civilians, to MONUSCO or to the DRC authorities would be inconsistent with the mandate to neutralize armed groups.

Realizing that there is a high probability for MONUSCO to have to hold on to at least some captured persons, my Office, in consultation with relevant experts, has prepared a set of standing operating procedures that would ensure the handling of captured persons in accordance with IHL and human rights law.

Security of UN personnel

I would now like to come to the final part of my address, and mention a few words about the legal protection of United Nations personnel.

The mandate to carry out targeted offensive operations given to MONUSCO may be an exception, but it is also the case that many other recent peacekeeping operations have been provided with more robust mandates than their predecessors.

For example, the United Nations mission in Mali, or MINUSMA, established in April 2013, is authorized to use all necessary means to deter threats and take active steps to prevent the return of armed elements to key population centres. In addition, MONUSCO, MINUSMA and many other peacekeeping operations are mandated to protect civilians by all necessary means.

Such mandates necessarily bring peacekeeping forces in proximity to civilians. At the same time, these peacekeeping forces may be engaged in hostilities with armed groups to carry out their robust mandates. In such cases, attacks against peacekeeping forces could potentially have an impact on the civilians whom those forces are meant to protect. These are difficult operational questions that accompany the mandate to protect civilians and population centres.

The increasing trend of attacks against peacekeeping forces has also prompted States to put in place more effective legal protection for UN personnel. As a result, States adopted the Convention on the Safety of United Nations and Associated Personnel in 1994, and its Optional Protocol in 2005.

The Convention, among other things, requires States parties to criminalize and take measures to prosecute attacks against personnel and objects of peacekeeping operations, as well as personnel and objects associated with such operations. In recognition of the UN's need to deploy other types of field operations than peacekeeping missions, the Optional Protocol extended the scope of protection to include UN operations delivering humanitarian, political or development assistance.

The Convention and the Optional Protocol currently have 91 and 28 States parties respectively. While the number of States parties has grown over the years, the Convention and the Optional Protocol require wider

acceptance, and I encourage those States that have not already done so, to become parties.

Where host States are not parties to the Convention, recent status-of-forces agreements require those States to apply the provisions of the Convention. It is encouraging to see this trend to extend the application of the Convention to States that are not yet parties to it. However, difficult questions may arise as to whether a peacekeeping force continues to benefit from the protection under the Convention when it is engaged in an armed conflict against an armed group.

In this short address, I have tried to highlight some of the issues related to IHL that have come to the attention of my Office in the past year. As I have mentioned in the earlier part of my address, the UN plays an important role in promoting and ensuring respect for IHL. I hope that the role of the UN in this area will continue to develop further in the future.

I also hope that this address has provided you with a basis for further discussion at the sessions to be held today and tomorrow. I wish you all a very fruitful and successful seminar.

Thank you.