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OFFICE OF LEGAL AFFAIRS**

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and**

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Statement

by

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Arthur T. Vanderbilt Hall
40 Washington Square South

President Meron,
Mr. Spoerri,
Ms. Durham,
Ladies and Gentlemen,

[Opening Remarks]

I am very grateful to the NYU Law School and the ICRC for giving me this opportunity to share my thoughts at this important seminar on international humanitarian law.

This is my second time to participate, and I am glad to see that you have been continuing to organize this seminar. This seminar provides a unique opportunity for me, as United Nations Legal Counsel, to engage with diplomats accredited to the United Nations on important issues concerning IHL.

Unfortunately, I was not able to attend last year's seminar but, I am glad that I was able to make it this year. I am looking forward to exchanging thoughts with you today.

[Pause]



As I'm sure that you all know, the United Nations celebrated its 70th anniversary last year, and I have participated and will be participating in a number of events to celebrate this occasion. It has been an excellent opportunity for me to reflect on the achievements of the United Nations in many different areas over the past 70 years, which are truly impressive. In the field of IHL, the United Nations has, for example, contributed to the codification of IHL and has established international and hybrid criminal courts to try war crimes and other serious international crimes.

However, when I turn my attention to the current situation around the world, the reality is harsh. There is an unacceptable gap between what the law prescribes, and the practical reality. Thousands of civilians continue to be affected by armed conflicts, and have been forced to leave their homes, sometimes taking extremely dangerous routes to seek refuge in safer countries. Parties to the conflict have often resorted to the recruitment of children and sexual violence as a method of warfare. In these armed conflicts, ensuring respect for IHL has been extremely challenging, and there is clearly a serious compliance deficit.

The theme of this year's seminar, "Means and methods to secure better compliance with IHL", is very timely in the light of this increasing disregard for IHL. I would therefore like to seize this opportunity to share some thoughts about the United Nations' contribution to the efforts to improve compliance with IHL, and also highlight what the United Nations and Member States could do to achieve that goal. In doing so, I would like to focus on compliance with IHL in ongoing conflicts. We should think seriously about how the United Nations could halt and prevent violations of IHL in ongoing military operations, and not wait until the conflicts are over.

In the latter part of this address, I will be briefly discussing the issues concerning protection of civilians and humanitarian access in times of armed conflict, the two areas where I believe there are serious problems with compliance.

[Compliance with IHL]

Turning first to the issue of compliance with IHL, I wish to note that this is high on the agenda of the Secretary-General. In a joint press encounter with the President of the ICRC, Mr. Peter Maurer, on 31 October last year, the Secretary-General expressed his "grave concern over the brazen and brutal erosion of respect for international humanitarian law" and called for enhanced compliance with IHL.



This has been followed by a recent report by the Secretary-General for the World Humanitarian Summit to be held in May this year, which calls for improved compliance with IHL. I invite all of you to read this report which was issued as a General Assembly document under the symbol A/70/709.

On the issue of strengthening compliance with IHL, I am aware that Switzerland and the ICRC undertook broad and in-depth consultations with States in recent years to discuss possible ways to strengthen compliance with IHL. I am also aware that regular meetings of States on IHL emerged as a possible new mechanism for enhancing compliance.

While I understand that the International Conference of the Red Cross and Red Crescent did not take a decision on this proposal, I wish to note that the Secretary-General has expressed his support for such regular meetings of States. I hope that this proposal would move forward in the near future.

Pending the outcome of the proposal for a new mechanism to ensure compliance, we should make the best use of the existing mechanisms for compliance. The United Nations continues to play an important role in this regard.

Among other bodies, the Security Council, the General Assembly and the Human Rights Council in particular play a key role in monitoring and advocating for compliance with IHL in ongoing conflicts.

As far as the Security Council is concerned, it clearly reaffirmed its role in ensuring respect for IHL. So, in its resolution 1502 adopted in 2003, the Security Council reiterated “its primary responsibility for the maintenance of international peace and security and, in this context, the need to promote and ensure respect for the principles and rules of international humanitarian law.”

A very well known example of the Council’s contribution to better compliance with IHL is the establishment of and support to international and hybrid criminal tribunals – a topic on which I have spoken extensively in this and other fora in the past. Therefore, for the purpose of this speech, I would like to focus on the Council’s contribution besides its achievements in the area of international criminal justice.



For example, the Security Council has mandated the Secretary-General, his special representatives and envoys, peacekeeping missions and special political missions to monitor potential violations of IHL in ongoing conflicts. These mandates now cover a number of conflict situations around the world, ranging from high-profile conflicts such as Syria to other protracted conflicts such as the Democratic Republic of the Congo and Afghanistan.

These mandates also cover thematic areas such as protection of civilians in armed conflict, children in armed conflict and conflict-related sexual violence. In particular, the Secretary-General is specifically mandated to indicate those parties which have recruited children, committed violence against children, attacked schools and hospitals, as well as parties which may have committed sexual violence in times of armed conflict.

The General Assembly has also taken a number of measures to monitor compliance with IHL in various contexts.

For example, it requested the Secretary-General to report on progress made in strengthening the coordination of emergency humanitarian assistance, which normally includes his assessment on the respect for IHL rules concerning humanitarian assistance during armed conflict. In this regard, reference is made, for example, to General Assembly resolution 70/106 of 10 December 2015 entitled “Strengthening of the coordination of emergency humanitarian assistance of the United Nations”.

The General Assembly has also regularly requested the Secretary-General to report to the General Assembly on measures taken to strengthen the existing body of IHL, based on information received from Member States. I invite you look at the latest resolution on this topic contained in resolution 69/120 of 10 December 2014 entitled “Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts”.

The General Assembly has also occasionally recommended the Government of Switzerland, as the depositary of the Fourth Geneva Convention, to convene a Conference of High Contracting Parties to ensure compliance with the Fourth Geneva Convention in the Occupied Palestinian Territory. The General Assembly made such recommendation at the emergency special session held in 1999 and at the sixty-fourth session held in 2009 and 2010.



For its part, the Human Rights Council, which is a subsidiary organ of the General Assembly specialized in human rights issues, has also mandated a number of fact-finding missions, commissions of inquiry, special rapporteurs and independent experts to report violations of international human rights law. Their reports have, in practice, also included accounts of possible violations of IHL. Currently, these mandates cover such situations of great concern such as in Syria, the Central African Republic, Mali, Somalia, the Sudan, the Occupied Palestinian Territory and Libya.

While, in some cases, it may be difficult to assess the impact of these United Nations' actions, one good example is the Secretary-General's reports on the humanitarian situation in Syria. The Secretary-General reported that humanitarian assistance through many border crossings at the Syrian border was not allowed, contrary to IHL.

To address these obstacles, the Secretary-General proposed a UN mechanism that would monitor humanitarian assistance passing through the border crossings, so that civilians in need received assistance, and so that the Syrian Government was assured of the humanitarian character of the assistance delivered to areas which it did not control. Shortly after the issuance of these reports, the Security Council adopted this proposal in July 2014 in its resolution 2165. I will discuss this example more later.

[Protection of civilians]

I would now like to briefly discuss an issue that is at the heart of the debate on compliance with IHL. This is the issue of the protection of civilians in times of armed conflict.

In his latest report to the Security Council on the protection of civilians in armed conflict, the Secretary-General has indicated that civilians affected by armed conflict or complex emergencies account for about 80 per cent of those requiring an international humanitarian response.

The Secretary-General has also, in his statement on 31 October 2015 with the President of the ICRC, called on those with influence to pressure all parties to the conflict to treat civilians with humanity. The protection of civilians in times of armed conflict is an issue which is high on the agenda of the Secretary-General.

When you are in the United Nations, you will hear the concept of "protection of civilians" very often. I would like to take this opportunity to take a step back and first look at how IHL addresses protection of



civilians in times of armed conflict.

IHL consists of a number of rules that are aimed at protecting civilians in times of armed conflict. They include rules that concern the protection of civilians in the midst of military operations.

So, for example,

- IHL requires the parties to distinguish between civilians and combatants;
- IHL requires the parties not to direct attacks against civilians;
- IHL requires the parties to attack only military objectives;
- IHL requires the parties not to carry out indiscriminate attacks; and
- IHL requires the parties to take precautions before and during an attack to minimize civilian casualties.

IHL also envisages the establishment of zones under special protection, such as neutralized zones and demilitarized zones, in order to provide protection for the wounded, sick and civilians from the effects of hostilities.

So, the protection of civilians in the context of IHL is based on a number of detailed rules of IHL. These rules comprehensively deal with the protection of civilians in times of armed conflict.

However, “protection of civilians” is also a notion that has increasingly been used in the context of United Nations peacekeeping activities, and not strictly within the context of IHL and ongoing hostilities.

By way of short background, in 1999, the Security Council for the first time tasked a peacekeeping operation with protecting civilians under imminent threat of physical violence. This was in the context of the conflict in Sierra Leone, and the United Nations Mission in Sierra Leone was tasked with that mandate.

Since then, the Security Council has regularly mandated peacekeeping operations to protect civilians under imminent threat. Today, United Nations operations in Abyei, the Central African Republic, Côte d’Ivoire, Darfur, the DRC, Lebanon, Liberia, Mali, and South Sudan are all mandated to protect civilians, and in most cases, to “take all necessary measures” to carry out this mandate.



In practice, the mandate to protect civilians under imminent threat has been implemented in various ways, such as by monitoring compliance with international human rights law and IHL, engaging with Government authorities and community groups, conducting patrols, setting up safe areas, and, in exceptional cases, by offensive operations against armed groups.

Recently, in South Sudan, the United Nations Mission in the Republic of South Sudan, or “UNMISS”, has been facing immense challenges in dealing with civilians who were displaced by the conflict and sought refuge in UNMISS premises. According to the latest report of the Secretary-General, there were nearly 180,000 people who were residing in six UNMISS sites for the protection of civilians. Most recently, in February 2016, there was large scale violence inside the Malakal protection site, where more than 47,000 people are housed, which resulted in many deaths and injuries. This gives an idea of how difficult it is to implement the protection-of-civilians mandate.

In this connection, I wish to note that the notion of “protection of civilians” in the context of peacekeeping is not based on IHL, but is a mandate that is given by the Security Council pursuant to the Charter of the United Nations.

While the notion of “protection of civilians” is separate and distinct in the context of IHL and peacekeeping, the actions taken by peacekeeping operations to protect civilians could be complementary to the actions taken by the conflicting parties to protect civilians pursuant to their obligations under IHL.

Protection of civilians by peacekeeping operations must be seen as a proactive way to avoid, prevent or minimize risks of physical harm to civilians affected by conflicts. In this sense, the notion of “protection of civilians” as used in the context of United Nations peacekeeping serves the same purpose as IHL.

However, while recognizing this complementarity, I should also emphasize that the measures under IHL to protect civilians, and those measures authorized by the Security Council should, at times, be very clearly distinguished.

First, the fact that a peacekeeping operation was mandated to protect civilians does not, in any way, mean that the parties to a conflict no



longer need to abide by its obligations under IHL to protect civilians. The parties are first and foremost responsible for complying with IHL, and ensuring that civilians are not harmed by hostilities. Thus, the parties to the conflict should always bear in mind that they remain fully responsible for any actions or omissions that result in harm to civilians.

Secondly, the United Nations should also be mindful as to whether its measures to protect civilians may have a negative impact on measures taken under IHL to protect civilians. For example, during the conflict in Bosnia and Herzegovina in the early 1990s, the Security Council, under Chapter VII of the Charter, designated certain towns as “safe areas”, including Srebrenica, and mandated a peacekeeping operation to protect them, including by the use of force. At the same time, based on IHL provisions, the parties to the conflict voluntarily concluded an agreement which required them to withdraw their forces from Srebrenica, and ensure the security of Srebrenica, not by a peacekeeping force, but by removing hostile elements from the town.

In his report on the “Fall of Srebrenica”, the Secretary-General highlighted the risk of conflating these two measures, and suggested that the confusion between the two may have contributed to the tragic events in Srebrenica.

The Secretary-General stated that “protected zones and safe areas can have a role in protecting civilians in armed conflict, but it is clear that either they must be demilitarized and established by the agreement of the belligerents, as in the case of the ‘protected zones’ and ‘safe havens’ recognized by international humanitarian law, or they must be truly safe areas, fully defended by a credible military deterrent. The two concepts are absolutely distinct and must not be confused.”

The report also states that “in failing to provide a credible military deterrent, the safe area policy would be gravely damaging to the Council’s reputation and, indeed, to the United Nations as a whole.”

I believe that we have a lot to learn from the past experience, and that the caution of the previous Secretary-General is still valid today in the context of protection of civilians by peacekeeping operations in ongoing armed conflicts.

[Humanitarian access]



Another area where compliance with IHL has particularly been challenging is humanitarian access during armed conflict. In recent years, we have witnessed a surge in the number of persons who were displaced by armed conflict. At the same time, we have also witnessed increasing difficulties in providing humanitarian assistance to civilians affected by armed conflicts, such as in Syria, Yemen and Ukraine.

IHL clearly provides for the obligation of the parties to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction. However, in order for the United Nations to deliver humanitarian assistance in a country, the consent of the host country is required.

However, the host country's discretion to grant consent to the delivery of humanitarian assistance is not unlimited. In particular, where civilians are suffering or dying due to lack of supplies essential to their survival, and where the government is unable or unwilling to provide the necessary supplies, it would be inconsistent with IHL if the government did not grant its consent to the delivery of humanitarian assistance.

Depending on the circumstance, the refusal to give consent could be considered as a use of starvation of the civilian population as a method of warfare, which could constitute a war crime in non-international armed conflict. Therefore, in specific circumstances, the host country has little discretion as to whether or not to grant consent to humanitarian assistance.

Despite these rules of IHL, United Nations humanitarian agencies and other humanitarian organizations have faced challenges in crossing the border and delivering humanitarian assistance to civilians in need. The obstacles to humanitarian access in Syria have presented the gravest concerns in this regard.

This has prompted the Security Council to take steps to facilitate the delivery of humanitarian assistance by the United Nations humanitarian agencies across the border of Syria. Resolution 2165 adopted in 2014, which is binding, authorized United Nations humanitarian agencies and their partners to use specific border crossings of Syria, in order to ensure that humanitarian assistance reaches people in need throughout Syria through the most direct routes. This authorization has most recently been extended to 10 January 2017.



Pursuant to this authorization, a number of humanitarian convoys have used the border crossings to delivery aid to Syria. According to the latest report of the Secretary-General, during the month of January 2016, 256 shipments were sent through cross-border deliveries.

Resolution 2165, however, still required the United Nations to notify the Syrian authorities of the uses of the border crossings by the United Nations humanitarian agencies and their partners.

Moreover, the resolution established a United Nations Monitoring Mechanism to monitor the loading and any subsequent inspection of UN humanitarian consignments passing through several specific border crossings, in order to confirm and ensure that the consignments are humanitarian in nature. The Monitoring Mechanism is also required to notify the Syrian authorities that the consignments were humanitarian in nature.

According to the latest report of the Secretary-General, 17 UN humanitarian shipments consisting of 540 trucks passing through the designated border crossings were monitored by the UN Monitoring Mechanism.

I believe that the Security Council took an important step to improve the humanitarian situation in Syria and to complement the obligations already provided for in IHL. However, it goes without saying that more needs to be done to put an end to the seemingly endless suffering in Syria.

[Closing remarks]

In closing, I wish to say a few words. Through this presentation, I tried to highlight the efforts of the United Nations to ensure compliance with IHL. I have also highlighted some examples where the United Nations has taken measures that were complementary to IHL. I believe that the United Nations can do a lot in these areas, and I believe that Member States can contribute a lot too.

I hope that, during this seminar, you will also reflect upon what more Member States can do, through the United Nations, to ensure compliance with IHL, and what you as diplomats could do during your assignment in New York.

I wish you all a fruitful seminar.



Thank you.