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International Humanitarian Law**

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**Statement by Ms. Patricia O'Brien
Under-Secretary-General for Legal Affairs
The Legal Counsel**

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**Arthur T. Vanderbilt Hall
40 Washington Square South**

President Maurer,
President Meron,
Mr. Fülleemann,
Dean Revesz,
Ladies and Gentlemen,

Opening Remarks

It is my great pleasure to attend this annual Seminar again this year - my last as Legal Counsel of the United Nations - to speak about humanitarian law issues at the United Nations.

Before I start, however, I would like to congratulate President Meron, the ICRC, and the NYU Law School on the 30th anniversary of this Annual Seminar.

And I wish to take this opportunity to congratulate President Meron on his interview on BBC's "Hard Talk" last week. He articulated brilliantly what all of us would like to say about the importance, the achievements and the positive prospects for international criminal justice. I support and endorse everything that he said in this interview.

I would also like to congratulate Mr. Peter Maurer on his appointment as President of the ICRC last July. I understand that this year is a particularly important year for the ICRC as it is celebrating its 150th anniversary. And in this regard, I'd like to pay special tribute to the ICRC and its staff for their tireless work in promoting IHL, and in providing such important services to countless people affected by conflict around the world.

Looking at its achievements over the last 150 years, the ICRC has much to be proud of.

Armed conflicts continue to plague our world and devastate the lives of hundreds of thousands of people. While some are new, others have been continuing for many years. Over the last year, we've witnessed the emergence of new armed conflicts in the Central African Republic and Mali, as well as a dramatic increase in the intensity of violence in Syria. In the case of the protracted armed conflicts in the Democratic Republic of the Congo (DRC), Afghanistan, Iraq and Somalia, the prospect of peace is still highly uncertain. As a world without conflict seems elusive, the need to promote respect for IHL, its application and enforcement, remains extremely urgent. In this regard, the UN and the ICRC play complementary roles.

While the UN has an important role in facilitating solutions to end conflicts, it also has what I consider to be an under-appreciated role: that of developing and promoting international norms and standards in respect of conduct during conflicts. You might think that this is a fairly recent development, but in fact, it began early on.

IHL in the context of the UN Charter

As you know, the United Nations was established in the aftermath of World War II, which saw violations of IHL on a massive scale. It is against this backdrop that its core purposes overlap with those of IHL.

The UN Charter, in the preamble, contains a solemn declaration of a determination “to save succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights, in the dignity and worth of the human person”. And the “purposes and principles” of the United Nations, include, as set forth in the first article of the Charter, “to achieve international cooperation in solving international problems of a humanitarian character and in promoting and encouraging respect for human rights”.

In this sense, the creation of the United Nations was by no means unconnected to humanitarian issues that arise during armed conflict. The atrocities that took place during World War II were undoubtedly at the forefront in the minds of those drafting the Charter.

For their part, IHL instruments have also recognized the role of the United Nations in situations of serious violations of IHL. Indeed, Article 89 of the first Protocol Additional to the Geneva Conventions requires that High Contracting parties act, jointly or individually, in cooperation with the United Nations in situations of serious violations of the Geneva Conventions and of the Protocol.

Today, human rights law is usually considered as separate from international humanitarian law, although the two are closely related and indeed overlap. However, in the context of the UN, early practice shows that the General Assembly interpreted “human rights” as encompassing IHL. Of course, both bodies of law serve essentially the same purpose, i.e. the protection of, and respect for, the dignity and worth of the human person. However, IHL plays a special role, and concerns those core protections that remain applicable in times of war, when certain recognized human rights might be liable to suspension or curtailment.

The UN's role in promoting respect for IHL dates back to the 1960s when both the General Assembly and the Security Council adopted resolutions relating to IHL. For example, in 1968, the General Assembly adopted resolution 2444 entitled "Respect for human rights in armed conflicts". In this resolution, the Assembly recognized the necessity of applying basic humanitarian principles in all armed conflicts. It also invited the Secretary-General, together with the ICRC, to study steps that could be taken to secure the better application of existing IHL in armed conflicts, as well as the need for additional legal instruments for better protection of civilians, prisoners and combatants, and the prohibition and limitation of the use of certain methods and means of warfare. It adopted a similar resolution every year until 1977, when the two Protocols Additional to the Geneva Conventions of 1949 were adopted.

The Security Council has also played an important role in promoting respect for IHL. Since 1967 when it first invoked IHL treaties in the context of the conflict in the Middle East, its role has increased exponentially. Interestingly, 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*".

I'd now like to outline some of the Council's major actions in this field. I will then give you an overview of some of the current IHL issues that we are dealing with in our Office.

The UN as an actor implementing and enforcing IHL

International criminal justice

Perhaps the most visible and concrete examples of the Council's role in promoting and ensuring respect for IHL are its actions in the area of international criminal justice. As you are aware, the Council established the International Criminal Tribunals for the former Yugoslavia and Rwanda, by means of resolutions adopted under Chapter VII, in 1993 and 1994 respectively.

Since their establishment, the ICTY has prosecuted over 160 persons, and the ICTR over 90 persons, for crimes falling within their respective jurisdictions, which include the crime of genocide, crimes against humanity and war crimes committed during the armed conflicts in the former Yugoslavia and Rwanda. The tribunals have made the protections in the Geneva Conventions more effective and real. Further, their rich jurisprudence has resulted in a wider dissemination, appreciation and understanding of IHL. For instance, in the Tadić case, the ICTY clarified the legal criteria for distinguishing between international and non-international armed conflict, and determined that both forms of conflict may take place alongside each other. The tribunal also clarified that international and internal armed conflict can exist concurrently not only where another State intervenes in an existing internal armed conflict, but also where some of the non-State armed groups in the internal armed conflict act on behalf of a State.

The ICTY and ICTR are now in the process of completing their work. In order to streamline the completion phase, in December 2010, the Council established the “International Residual Mechanism for Criminal Tribunals”, which will carry out the essential residual functions of the two tribunals when they close. The Residual Mechanism has the power to try the ICTR’s three senior-level fugitives, and this shows the international community’s resolve not to tolerate impunity for grave breaches of the Geneva Conventions, violations of the laws or customs of war, and other serious international crimes.

The two ad hoc international tribunals laid the foundation for further UN engagement in other temporary courts established to address serious violations of IHL, namely the Extraordinary Chambers in the Courts of Cambodia in 2001, and the Special Court for Sierra Leone in 2002. The Extraordinary Chambers were established as a national court under Cambodian law, but have operated with United Nations assistance. For its part, the Special Court for Sierra Leone was established pursuant to an agreement between the Secretary-General and the President of Sierra Leone.

Both courts have jurisdiction over war crimes and crimes against humanity and, in addition, the Cambodian Court has jurisdiction over genocide. The Special Court was the first to prosecute the crimes of enlistment, recruitment and use of child soldiers, attacks on peacekeepers, - and forced marriage as a "crime against humanity".

Importantly, the ad hoc tribunals also paved the way for the creation of the International Criminal Court in 2002. The Court is not a UN body, as it was established under the Rome Statute of the International Criminal Court, a treaty. However, the UN served as an important forum for generating the dialogue among its Member States which subsequently led to the negotiations on the ICC Statute. With jurisdiction over genocide, crimes against humanity, and war crimes committed in both international and non-international armed conflicts, the ICC represents a truly remarkable achievement of the international community in terms of promoting respect for IHL, and in symbolizing an end to impunity.

A lot is expected of the ICC. Hopes are expressed, each time that atrocities are committed, that the ICC will be able to "fill the gap" when national legal systems stand by, unable or unwilling to act. Sometimes, it has been able to, as in the cases of Libya and Mali. In others, though, it too stands by, helpless to act. And failure weakens faith in the system of international criminal justice, or breeds the cynicism that says that international criminal justice is selective and partial – that it brings only the friendless and the powerless to justice and that those who are, or who have, powerful masters continue to enjoy the impunity they always have. But this ignores the wider picture: the principle of complementarity.

The ICC is unique in that it places the primary responsibility to prevent and prosecute atrocities on States. The Court was established as a court of last resort. As enshrined in Article 1 of the ICC Statute, the Court is "complementary to national criminal jurisdictions." Moreover, a case will be inadmissible where it is being, or has been, investigated or prosecuted by a State with jurisdiction over it. In such circumstances, the ICC may only exercise its jurisdiction if the State is unwilling or unable genuinely to carry out the investigation or prosecution, or if a decision not to prosecute results from the unwillingness or inability of the State genuinely to prosecute.

States therefore have the principal role in the prosecution of such cases, and it is imperative that they live up to their obligations in this regard. ICC States Parties in particular have a primary duty to investigate and prosecute Rome Statute crimes that are committed in their territory or by their nationals.

The notion of “positive complementarity” refers more specifically to the actions taken in order to strengthen national investigations and prosecutions of the crimes stipulated in the Rome Statute. Although the ICC is not involved in the capacity building, it has cooperated with national prosecutions, notably in France and Germany of persons accused of having participated in atrocities committed in the DRC. The States Parties underlined such cooperation with the national authorities at the latest Assembly of the States Parties held in November last year.

If complementarity is judged to be successful, we will witness a system where national and international courts work interdependently in order to punish serious crimes of international concern.

Thematic areas - Protection of civilians

Aside from leading international efforts to enhance the enforcement of IHL through the establishment of the ICTY and ICTR, the Security Council has turned its attention to the prevention of IHL violations. In this regard, it has focused on particular thematic areas, such as “children in armed conflict”, and more generally, the “protection of civilians in armed conflict”. I will speak a little about the latter.

The Council first took up the agenda item of protection of civilians in armed conflict in 1999. This was against the background of the tragic events in Rwanda and the former Yugoslavia in the early 1990s. As you know, massive atrocities were committed against civilians in these conflicts, which are now well-documented in cases prosecuted before the ICTY and ICTR.

Since then, the Council has discussed the issue annually, and has adopted a resolution or presidential statement almost each year. These resolutions and presidential statements have gradually clarified the role of the UN in protecting civilians in armed conflict, and have assisted the Council in formulating actions for specific situations.

For example, in resolution 1296 adopted in 2000, the Council declared that deliberate targeting of civilians and widespread violations of IHL may constitute a threat to international peace and security, and thus trigger the application of measures under Chapter VII.

This brings me to the role of UN peacekeeping operations in protecting civilians. In 1999, by its resolution 1270, in the context of the war in Sierra Leone, the Council for the first time tasked a UN operation with protecting civilians under imminent threat of physical violence. Since then, the Council has regularly included such protection responsibilities in resolutions establishing peacekeeping operations. Today, UN operations in Abyei, Côte d'Ivoire, Darfur, the DRC, Lebanon, Liberia and South Sudan are all mandated to protect civilians and in some cases, to "take all necessary measures" to carry out this mandate, implying the use of armed force when warranted.

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, in the case of the DRC, MONUSCO, the UN's peacekeeping operation there, is explicitly mandated to "give priority" to the protection of civilians in decisions about the use of available capacity and resources.

Of course, when UN peacekeeping operations resort to force to protect civilians in an armed conflict situation, they are bound by the relevant rules of IHL. The UN's obligation to observe IHL was clarified in the Secretary-General's Bulletin on the Observance by United Nations forces of International Humanitarian Law, as promulgated in 1999.

In addition to operations under UN command and control, the Security Council has also authorized Member States, including via regional organizations, to “take all necessary measures” to protect civilians, including through the use of force. Examples include the recent (and somewhat controversial) case of Libya, as well as prior to that, Chad and the Central African Republic, the DRC and Côte d’Ivoire.

Human Rights Due Diligence Policy

However, the UN is not only concerned to ensure that its own personnel observe IHL, but also that others to whom it may provide support comply with international human rights and humanitarian law.

There have been occasions when the Council has mandated UN operations to support non-UN forces. This has been the case in the DRC and Somalia, and is a current possibility with respect to Mali. In order to ensure that UN forces do not provide support to forces which violate international human rights and humanitarian law, the Secretary-General has issued a policy concerning the conduct of operations when they are mandated to provide support to non-UN security forces.

By way of background, 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, protect civilians under imminent threat of physical violence, and support operations led by the FARDC, the Congo’s armed forces, in order to disarm local and foreign armed groups.

In 2009, there were widespread reports that members of the FARDC, who were provided with logistic support by the UN, were looting, killing and raping members of the local population. This presented a difficult situation for the UN – how to carry out its mandate in the DRC without supporting in any way members of the FARDC who might have committed 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 perception of association by MONUC with such violations. The policy specified that MONUC would not participate in, or support, the operations of the FARDC 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 Council in resolution 1906, which called upon MONUC to intercede with the FARDC if elements of their unit receiving MONUC's support were suspected of having committed grave violations of IHL, human rights law and refugee law, and if the situation persisted, to 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 some form 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.

This policy is to ensure that support by UN entities is consistent with the purposes and principles of the UN as stipulated in the Charter, particularly with the purpose to promote and encourage respect for human rights, including IHL and international refugee law.

Just last week, the policy has been made available to the public as a UN document A/67/775-S/2013/110. With the publication of the policy, it is expected that UN organs will systematically apply the policy in cases where the UN is authorized to provide support to non-UN forces.

In fact, shortly after it was issued as a UN document, the Security Council invoked the policy in resolution 2093. The UN has been providing logistical support package to the African Union Mission in Somalia since 2011, and the explicit application of the Human Rights Due Diligence Policy demonstrates that the UN is 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.

Situations in Mali and the DRC

I'd now like to move on and give you an overview of some current IHL issues in connection with the UN's role in Mali and the DRC.

With respect to the situation in Mali, two different ways of UN involvement are currently proposed. One is the logistic support by the UN to the African-led International Support Mission in Mali, "AFISMA", and the other is to establish a UN peacekeeping operation for Mali.

In December 2012, the Security Council requested the Secretary-General to develop and refine options for a UN logistic support package to AFISMA. As you may know, AFISMA is authorized to use force to support the Malian authorities in recovering areas in northern Mali under the control of armed groups.

In replying to the Council, the Secretary-General has emphasized that any support by the Organization to AFISMA would be provided subject to, and consistently with, the Human Rights Due Diligence Policy.

In its subsequent resolution, the Council endorsed the Secretary-General's position, and emphasized that UN support to AFISMA must be consistent with IHL, human rights law and refugee law.

In recent days, some States have suggested the establishment of a UN peacekeeping operation in Mali. As part of that proposal, AFISMA troops would be "re-hatted" as members of a UN operation.

In the event of such re-hatting, such troops would, quite naturally, be required to be trained in, and to respect IHL, human rights and refugee law as applicable to UN forces.

That having been said, the policy would still remain very much applicable to any support that the UN operation might provide to the Malian security forces, or to any other forces operating in Mali at the Government's request.

Further, if the proposed UN peacekeeping operation in Mali were authorized to use force, it would very likely be involved in active combat with the armed groups in Mali. In such cases, the UN operation would be required to comply with the applicable rules of IHL, particularly those set forth in the Secretary-General's Bulletin on the Observance by UN forces of IHL. In practice, the peacekeeping force may face various practical challenges in complying with some of the obligations under those rules of IHL, including in ensuring that it has adequate facilities and satisfactory procedures in cases of detention of persons during military operations.

In the case of the DRC, as mentioned earlier, the UN peacekeeping force in the country, MONUSCO, has already been providing various forms of support to the FARDC.

However, with the emergence of an armed group called "M23" in the eastern DRC in April 2012, last year the International Conference on the Great Lakes Region proposed a "neutral international force" to eradicate them. Recent developments suggest that this "neutral international force" would be part of MONUSCO.

While MONUSCO has already been authorized to use force under Chapter VII, this has mainly been to support the military operations of the FARDC instead of MONUSCO launching its own military operations.

In this sense, if a military unit intended for offensive military operations against armed groups is incorporated in MONUSCO, it would be one of a few cases where a UN peacekeeping operation is clearly tasked with an offensive combat role.

In any event, if such a military unit is established in MONUSCO, it would be expected to comply with the applicable rules of IHL during its military operations against the armed groups, just as any other military personnel of MONUSCO would be bound.

And allow me a final comment on the DRC. You will have seen that Bosco Ntaganda surrendered himself to the US Embassy in Kigali. The United States have already expressed their intention to transfer Bosco to the seat of the ICC in The Hague. It is my hope that all authorities involved agree on and cooperate in this transfer, so that he can answer to the serious charges that have been brought against him.

Policy on Human Rights Screening of United Nations Personnel

The Secretary-General has also recently 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 international human rights or humanitarian 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 Organization. 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.

UN as an entity protected by IHL

So far I have discussed the role of the UN in implementing and enforcing IHL. However, it is also worth highlighting that UN personnel and property are entitled to protection under IHL in armed conflict situations.

Such protection is crucial in an era where UN personnel, including personnel providing humanitarian assistance, are increasingly targeted in situations of armed conflict even when they play no part in hostilities. The attack against the UN office in Baghdad in 2003 will remain in our minds for a long time, but more recently, similar attacks have taken place in Algeria in 2007 and Nigeria in 2011.

As long as a UN force is not engaged in an armed conflict, all its personnel are entitled to the same legal protection under IHL as civilians. Therefore, parties to an armed conflict have the obligation to distinguish between UN personnel and, for example, members of the armed forces of the host State, and attacks must not be directed against UN personnel.

Similarly, UN property, whether it be premises, vehicles, equipment or other assets, enjoy protection as civilian objects. This applies for as long as such objects are not used directly for UN combat activities. Therefore, the parties to the conflict are under the obligation to distinguish between, for example, UN vehicles and the military vehicles of the host State's armed forces, and attacks must not be directed against UN vehicles.

In order to enhance the protection of UN personnel, States adopted the Convention on the Safety of United Nations and Associated Personnel in 1994, and its Optional Protocol in 2005. The Convention and the Optional Protocol entered into force in 1999 and 2010, and have 90 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 by depositing the relevant instrument with the Secretary-General of the United Nations.

The Convention applies to a wide range of persons serving in, or working in co-operation with, UN peacekeeping operations. It covers persons serving in UN peacekeeping operations and other UN staff present in the area of UN operations. The Convention also covers other persons carrying out activities related to the mandate of UN peacekeeping operation, whether from governments, international organizations or humanitarian NGOs.

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. Thus, UN personnel who are part of special political missions, or humanitarian assistance missions, as well as members of humanitarian NGOs working in cooperation with such missions would be covered.

Under the Convention, States parties not only have the obligation to criminalize attacks and other serious offences committed against them, but also to prosecute or extradite, in case offenders are present in the States parties' territories.

States parties are required to criminalize, amongst others:

- Murder, kidnapping and attacks against UN and associated personnel;
- Attacks against the official premises, private accommodations, or means of transportation endangering UN and associated personnel; and
- Threats to commit these types of attacks.

I would like to highlight that the Rome Statute expressly criminalizes intentional attacks against UN personnel and objects in times of both international and non-international armed conflict, as long as such UN personnel are entitled to the protection given to civilians or civilian objects under IHL. This is consistent with the provisions of the Convention on the Safety of UN and Associated Personnel. In practice, the ICC has charged two key members of armed groups in Darfur with leading attacks against peacekeepers who were serving in the African Union Mission in Sudan, the predecessor of the current African Union/UN Hybrid Operation in Darfur.

I was also pleased to read in the ICRC study on customary IHL, that attacks against peacekeepers are also considered prohibited in customary international law. This demonstrates that attacks against UN personnel are not only a crime under the ICC Statute, but prohibited more broadly in times of armed conflict.

I am aware that the ICRC has recently launched a campaign entitled "Health Care in Danger" in order to address issues affecting the delivery of health care, medical facilities and vehicles, and health-care workers and patients in armed conflicts.

We share the ICRC's concerns and hope that IHL and the Safety Convention and its Optional Protocol would be fully applied so that all humanitarian personnel and related objects would be protected, whether or not they are in the context of UN operations.

Concluding remarks

To conclude, I have tried to give you an overview of IHL issues at the UN. As reflected in the UN Charter and the first Additional Protocol to the Geneva Conventions, which I mentioned at the beginning of this 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.

In this regard, I am encouraged that the ICRC and the Government of Switzerland launched an initiative in 2012 which aims at facilitating discussions on enhancing the effectiveness of compliance with IHL in situations where armed conflicts are ongoing. I hope that this initiative will also provide an opportunity to discuss the UN's role in enhancing compliance with IHL.

Thank you.