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OFFICE OF LEGAL AFFAIRS**

American Bar Association "ABA Day at the UN"

Statement

By

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The United Nations Legal Counsel

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Distinguished colleagues,
Ladies and Gentlemen,

[Opening Remarks]

It is an honour for me to address you tonight, for the first time as United Nations Legal Counsel. I am delighted to continue this excellent tradition of hosting the American Bar Association at the United Nations. Each year, our partnership goes from strength to strength.

I would like to thank James Silkenat and the ABA's International Law Section for your continued and valued partnership with the United Nations. The American Bar Association's goal of promoting the Rule of Law is entirely aligned with the United Nations objectives. Almost seventy years ago, the drafters of the UN Charter recognised the vital role which the rule of law must play in bringing about lasting peace and security. Article 1 of the Charter expressly provides that one of the purposes of the United Nations is to "bring about by peaceful means, and in conformity with the principles of justice and international law [the] settlement of international disputes or situations which might lead to a breach of the peace".

It is a tragic fact that in situations of armed conflict, victims are often those who are most vulnerable, and this is perhaps never truer than with regard to crimes of sexual violence. Holding the perpetrators of such crimes accountable is all the more important when the victims are those who are so often denied a voice. For its part, the United Nations has taken progressive steps to ending impunity for sexual violence crimes. These efforts range from the pioneering work of the *ad hoc* tribunals for the former Yugoslavia and Rwanda to the Security Council's numerous resolutions and their influence at both the national and international level.

During the course of my remarks, I will provide you with an overview of the work of the United Nations in relation to accountability for crimes of sexual violence. I will also speak about the jurisprudence of the *ad hoc* tribunals as well as recent developments in the International Criminal Court and their implications for the prosecution of sexual violence crimes.

I also hope to touch upon the role of the Office of Legal Affairs.

[United Nations role in ensuring accountability for sexual violence crimes]

Ending impunity for crimes of sexual violence has been a priority of this Organization since the 1990s. The conflicts in the former Yugoslavia and Rwanda were not only characterized by a brutality that the international community had not witnessed since World War II, but also by the pervasiveness of rape and other sexual violence crimes.

On 18 December 1992, the Security Council declared the "massive, organized and systematic detention and rape of women, in particular Muslim women, in Bosnia and Herzegovina" an international crime that must be addressed. As many as 60,000 women were said to have been raped during the three-year conflict in the former Yugoslavia.

The figures are even more staggering in the case of the Rwanda Genocide, in which between 100,000 and 250,000 women are believed to have been raped, many repeatedly.

Against this background, the United Nations Security Council decided to establish the two international tribunals, both of which have played a fundamental role in ensuring accountability for crimes of sexual violence in conflict.

The Statute of the International Tribunal for the former Yugoslavia provided for the prosecution on charges of crime against humanity of persons responsible for the crimes of rape and torture when committed in armed conflict and directed against any civilian population. One year later, the Statute of the International Criminal Tribunal for Rwanda (ICTR) defined rape as a crime against humanity when "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds".

Building on the work of these *ad hoc* tribunals and in recognition of the disproportionate effects of armed conflict on women, the United Nations Security Council adopted in 2000 its celebrated resolution 1325 calling for increased participation of women in the "prevention and resolution of conflicts" and in the "maintenance and promotion of peace and security".

With the entry-into-force of the Rome Statute in 2002, we witnessed the first international treaty to expressly include various forms of sexual violence crimes as underlying acts of crimes against humanity and war crimes.

Equally significant and ground breaking, after the entry-into-force of the Rome Statute, was the Security Council's adoption in 2008 of its landmark resolution 1820.

This resolution confirmed that sexual violence can amount to a war crime, a crime against humanity or an act of genocide. It also calls for the exclusion of sexual violence crimes from amnesties. In implementation of this resolution, the United Nations was able to ensure that crimes of Sexual Violence in conflict were excluded from the scope of the amnesty in the Nairobi declarations that saw the end of the M23 rebellion in the Democratic Republic of Congo.

In 2009, the Security Council by its resolution 1888 established the Office of the Special Representative on Sexual Violence in Conflict. Resolution 1888 was one in a series of resolutions that recognized the damaging impact that sexual violence in conflict has on communities, and at the same time acknowledged that such crimes undermine efforts at peace and security and rebuilding. Both the creation of the Office of the Special Representative and the series of resolutions from 1820 to 1888, demonstrate the international community's commitment to ensuring that conflict-related sexual violence is dealt with as a crime that is preventable and punishable under international law.

One of the priorities of the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict is to end impunity for sexual violence in conflict by assisting national authorities to strengthen criminal accountability, responsiveness to survivors and judicial capacity.

I think you will agree that these efforts by the international community demonstrate an increasingly focused and operational determination to end impunity for sexual violence crimes. Gone is the vagueness of the post World War era and the treatment of crimes of sexual violence against women as offences against the men to whom these women "belonged". We now have clear definitions of rape and sexual violence crimes and the circumstances under which they occur. And while there are still challenges in ensuring justice for victims of sexual violence crimes, I would be bold enough to state that we are headed in the right direction.

[Security Council resolution 1820]

Ladies and Gentlemen, allow me to take a closer look at the landmark Security Council resolution 1820 which calls for an end to the use of acts of sexual violence against women and girls as a tactic of war and an end to impunity of the perpetrators.

The Council adopted resolution 1820 in 2008 against a background of armed conflicts where sexual violence had become commonplace. Resolution 1820 built upon the foundation of international humanitarian and criminal law by reaffirming the status of sexual violence crimes as war crimes, crimes against humanity and constituent acts of genocide.

In his first report in 2009 on the use of sexual violence in situations of armed conflict to the Security Council, the Secretary-General noted that parties to armed conflict continue to use sexual violence with "efficient brutality". The Secretary-General called for better protection of women and girls and an immediate end to the impunity that perpetrators enjoy. The Special Representative of the Secretary-General for Children and Armed Conflict has brought to light on a number of occasions that the

majority of victims of sexual violence in armed conflicts are in fact girls and boys — under the age of 18.

The message of resolution 1820 is unambiguous; that sexual violence in conflict is a threat to international peace and security and that it merits an appropriate response.

Since the adoption of resolution 1820, the issue of sexual violence in conflict has been included more routinely both in peacekeeping mandates, pre-deployment training and briefings of Force Commanders. As such, the issue has gone beyond the consideration of just gender experts and has engaged the military, the police, peacekeepers and other security stakeholders in what one can argue is a far more meaningful than was previously seen.

An equally, if not more noteworthy, achievement of resolution 1820 is its call on Member States to prosecute persons responsible for acts of sexual violence, and to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice. This critical Security Council resolution also stresses the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth and national reconciliation.

Finally resolution 1820 calls for state specific sanctions against regimes that commit rape and other forms of sexual violence against women and girls in armed conflict. In doing so the resolution takes a much-needed multi-disciplinary approach to tackling sexual violence crimes.

[The contribution of the *ad hoc* tribunals to accountability for sexual violence crimes]

I would like to now go back to the groundbreaking work of the *ad hoc* tribunals –the International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. These criminal tribunals, established by the Security Council pursuant to its Chapter VII powers, were the driving forces behind the development of international jurisprudence prohibiting rape and sexual violence. The case law that emerged from both tribunals laid the foundation for defining both rape and sexual violence within the context of the crimes under the jurisdiction of the tribunals– Genocide, War Crimes and Crimes against Humanity.

A noteworthy achievement of the former Yugoslavia tribunal, the ICTY, is that almost half of those convicted were found guilty of elements of crimes involving sexual violence.

The ICTR’s broad approach to rape and crimes of sexual violence also played a significant role in the way in which international tribunals subsequently dealt with these crimes. Additionally the ICTR demonstrated that various forms of sexual violence can take place during a conflict; the Prosecutor presented evidence of sexual mutilation in the Akayesu case which led to the clause in the Rome Statute “or any other form of sexual violence” which negotiators of the Rome Statute in 1998 felt would guarantee that acts such as forced nudity and sexual mutilation, or any other

similarly degrading acts invented by perpetrators in the future, would be covered by the International Criminal Court.

The UN-assisted Special Court for Sierra Leone built upon the work of the ICTY and ICTR in sexual violence jurisprudence, where the trial chamber in the AFRC case set out the elements for rape as a crime against humanity.

I will now introduce some particular contributions of the *ad hoc* tribunals for the former Yugoslavia and Rwanda as well as the Special Court for Sierra Leone vis-à-vis their prosecution of sexual violence crimes. In so doing, I note that there has been some criticism that these judicial bodies have not adequately addressed the systematic use of sexual violence crimes in the conflicts of the 1990s. My focus today, however, will be on their important contributions to the development of this body of law.

[The International Criminal Tribunal for Rwanda: Rape as Genocide]

As early as September 1998, the International Criminal Tribunal for Rwanda became the first international court to find someone guilty of rape as a crime of genocide. The judgment against Jean-Paul Akayesu, was hugely significant, not only because of its broad definition of rape as a "physical invasion of a sexual nature, committed on a person under circumstances which are coercive", but also because the ICTR recognized that rape could be used as a form of genocide, if committed "with specific intent to destroy, in whole or in part, a particular group, targeted as such. . ."

While the Chamber acknowledged that there was no widely-accepted definition of rape in international law, it decided that rape was a form of aggression, and went on to define it. At the same time, the Chamber recognized that sexual violence, including rape, was not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.

Furthermore, the Chamber ruled that coercive circumstances do not need to be evidenced by the existence of physical force; "threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion."

The ICTR can be considered as the pioneer of sexual violence jurisprudence in international criminal tribunals.

[The International Tribunal for the former Yugoslavia: Rape as torture]

Just two months after the Akayesu judgment, the ICTR's sister tribunal, the ICTY, found four former members of Bosnian armed forces guilty of rape as a form of torture, and as such guilty of both a grave breach of the Geneva Conventions and a violation of the laws and customs of war. When issuing its judgment in Delalic et al. also known as the "Celebici" case, the judges asserted that, "There can be no question that acts of rape may constitute torture under customary international law."

A month later, when convicting Anto Furundzija, a Special Forces commander for rape and torture as war crimes under Common Article 3 of the Geneva Convention, the ICTY decided to expound upon the elements of the crime of rape for itself in an effort to determine whether the act of rape could constitute torture. This was the first case at the Yugoslav tribunal that focused exclusively on charges of sexual violence.

Equally innovative, in 2001, the Trial Chamber convicted Dragoljub Kunarac of torture after finding that the rapes resulted in severe mental and physical pain and suffering for the victims. The victims, Bosnian Muslim girls and women, were detained for prolonged periods in a detention setting and were routinely subjected to rape.

The Kunarac definition set the standard in international law for the crime of rape.

[The Special Court for Sierra Leone: Forced Marriage as a Crime against Humanity]

I would now like to turn to the contribution of the Special Court for Sierra Leone to our ever growing body of international jurisprudence for crimes of sexual violence. The SCSL, a United Nations-assisted tribunal, issued the first ever conviction in the Revolutionary United Front or RUF case for the crime against humanity of sexual slavery and of forced marriage as an inhumane act.

The Sierra Leone conflict was heavily characterized by crimes of sexual violence. Some 60,000 women are believed to have been raped. The Prosecutor of the Special Court charged ten of the thirteen accused with rape as a crime against humanity and as the war crime of outrages upon personal dignity. In view of the widespread practice of abducting young girls and women and treating them as sex slaves while referring to them as “bush wives”, the Prosecutor also charged six accused with forced marriage.

The crime of forced marriage did not exist in the Statute of the Special Court for Sierra Leone. The Prosecutor therefore charged it as a crime against humanity under the rubric of “other inhumane acts”.

By characterizing forced marriage as an inhumane act, the Trial Chamber in the Armed Forces Revolutionary Council or AFRC Judgment recognized the complexity and multi-layered nature of such crimes. However, the majority could not agree on whether the forms of sexual violence witnessed constituted a separate crime or whether already subsumed by sexual slavery as an outrage upon personal dignity. They therefore dismissed the counts as duplicitous. On appeal, the dissenting view was accepted that the conjugal aspects of the conduct established criminal behavior that was independent of sexual slavery, thus justifying the separate crime of “forced marriage”.

Subsequently in the RUF case, another Trial Chamber relied on the AFRC Appeals judgment to uphold forced marriage as a crime under international law separate from sexual slavery. The judges found that the RUF used the term “wife” deliberately and strategically to enslave and psychologically manipulate civilian women and girls.

The contribution of the SCSL to the jurisprudence on sexual violence is noteworthy. The Court's treatment of forced marriage demonstrates the need for flexibility in treating such gendered crimes.

[The International Criminal Court: failure to prosecute sexual violence crimes in the Lubanga case and developments in the Katanga case]

I will now touch briefly upon the role of the International Criminal Court – the centerpiece of our system of international criminal justice — in the treatment of sexual violence crimes.

The first cases before the International Criminal Court related to the Democratic Republic of Congo — a conflict that has witnessed the most widespread crimes of sexual violence. Over 200,000 cases of rape have been recorded in the course of the various conflicts in that country since 1998. The perpetrators of these crimes have been able to continue their lives with absolute impunity. It was therefore encouraging to think that senior perpetrators of crimes of sexual violence would be brought to book.

The Prosecutor originally limited the charges in the first case against Thomas Lubanga to the recruitment, conscription and use of child soldiers, due to the evidence available at the confirmation stage. Once evidence emerged much later as to the sexual violence committed upon the same child soldiers, the Prosecutor chose not to bring additional charges prior to the start of trial. Instead, he proposed that such evidence be assessed as an aggravating factor for the purpose of sentencing. During the trial, when witnesses came to testify in The Hague, they spoke about rape and crimes of sexual violence that they witnessed or to which they were subjected. Although the judges decided that it was too late for this evidence to serve any purpose with regard to the accused's culpability or for sentencing, they did take pains to note in the judgment that it was a failing of the Prosecutor for not charging such crimes from the outset.

By contrast, the Prosecutor did charge Germain Katanga with sexual violence crimes in relation to the attack on Bogoro village in the Eastern DRC. During the confirmation of charges hearing, the Prosecutor introduced evidence of forced marriage as proof that women were subjected to sexual slavery. However, in the final trial verdict, while finding that crimes of sexual slavery and rape were proven to have taken place, the judges said that they were not satisfied that the Prosecutor had proven that Katanga was personally responsible for their commission.

Many viewed this as a devastating blow to the thousands of victims of sexual violence crimes in the Democratic Republic of Congo. However as legal practitioners, we know only too well that the lack of a conviction does not necessarily denote failure. That the Prosecutor charged these crimes and that their occurrence was affirmed by the Trial Chamber is already a step in the right direction. It is worth noting that Bosco Ntaganda, who was part of the same militia as Thomas Lubanga, has been charged with crimes of sexual violence against civilians.

[The International Criminal Court: Reparations for victims of sexual violence crimes]

In August 2012, the ICC issued its first ever decision on the principles and procedures to be applied to reparations. The decision confirmed *inter alia* that a gender approach to reparations would be adopted. It also made reference to the need to adequately compensate the harm caused by sexual and gender-based violence.

The International Criminal Court's recognition of the role of victims in its process and its acknowledgement that there should be some form of compensation for the suffering caused by rape and other crimes of sexual violence is significant.

[Closing remarks]

In this short address, I have tried to tackle the question of accountability for crimes of sexual violence both in terms of the work of the United Nations, its international tribunals and the International Criminal Court.

I hope you that my address has provided you with a glimpse of our efforts to address sexual violence and to end impunity for perpetrators of these egregious acts.

Thank you.