



**UNITED NATIONS
OFFICE OF LEGAL AFFAIRS**

**40th Annual Seminar for Diplomats on
International Humanitarian Law
jointly organized by the International Committee of the Red Cross and
New York University School of Law**

Statement

by

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Under-Secretary-General for Legal Affairs and
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**Arthur T. Vanderbilt Hall
40 Washington Square South**

Professor Meron,

Ms. Courtois,

Ladies and Gentlemen,

I would like to thank the NYU Law School and the ICRC for again inviting the Office of Legal Affairs to this event which marks the 40th anniversary of these important seminars. As illustrated in the video that we have just watched, Theodore Meron's unwavering resolution and relentless activities over the years to promote and ensure the implementation of international humanitarian law (including his participation in each of the previous 39 NYU/ICRC seminars),



combined with the expertise of the ICRC and NYU have made this annual seminar a key event for diplomats and practitioners.

We highly value this annual opportunity, as it gives us the chance to bring to your attention some of the recent developments in the United Nations in the field of international humanitarian law, and also to exchange views with Member States.

Nevertheless, before turning to international humanitarian law, I would like to say a few words about a recent success of multilateralism and diplomacy with regards to international law, namely the agreement reached on Saturday 4 March on an historic legally binding international instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. This ambitious project, which had been under discussions for 20 years, constitutes a definite demonstration of the ability of members states, practitioners, and civil society to come together to tackle the most critical issues we all collectively face nowadays. It should also be seen as a sign of hope for the development of other branches of international law.

Turning specifically to IHL now, recent developments within the Organization do not necessarily, as you can imagine, relate to the overall topic chosen by the organizers for this year's seminar ("War in Cities including the Conduct of Hostilities") but I believe they shall nevertheless prove interesting for both academics, professionals and diplomats gathered here today.





I would therefore like to discuss in today's address the IHL framework governing detention and United Nations peacekeeping operations.

In doing so, I would like to focus on situations where a peacekeeping mission might capture persons in the course of an armed conflict, and discuss how IHL and human rights standards apply.

Before discussing the various IHL aspects of detention and peacekeeping, I would like to briefly touch upon certain terms that are used in this context, particularly the terms "peace operations" and "multinational operations".

These terms have sometimes been used broadly to include both military operations authorized by the Security Council and carried out by Member States, as well as United Nations peacekeeping operations. However, from a legal point of view, these two types of operations are very different in nature.

On the one hand, the Security Council has authorized Member States under Chapter VII of the United Nations Charter to carry out operations, which may include the use of force. Such operations have been carried out by a coalition of States or by a single State. The coalition forces in the Gulf War in 1991 are an example that is often cited. But there are instances in which a single Member State





undertakes such operations, such as the French forces in Mali that were supporting until recently the United Nations peacekeeping operation in Mali.

In these instances, Member States individually take part in those operations rather than as a single collective entity. Therefore, if and when Member States are drawn into an armed conflict in the course of such operations, Member States are bound by their respective IHL obligations, which may differ from one State to another. The extent of the obligations would differ depending on the IHL treaties which each State has ratified.

On the other hand, United Nations peacekeeping operations are different in nature. UN peacekeeping operations are established by the Security Council as subsidiary organs of the Council and, as such, are formally part of the United Nations.

These peacekeeping operations fall under Article 29 of the UN Charter, which provides that “[t]he Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.”

While a peacekeeping operation is made up of troops contributed by Member States, nevertheless, from a legal point of view, it is not a collection of individual Member States, but is a single entity. As peacekeeping operations are formally part of the United Nations, they are bound by international obligations that are incumbent upon the United Nations. In addition to this, military contingents that





make up a peacekeeping mission continue to be bound by IHL obligations of the respective Member States to which they belong.

In the light of this, we consider it important to be precise on the type of operation that is being referred to when the term “peace operations” or “multinational operations” is used, as this would determine the way in which IHL applies and the scope of IHL rules that are applicable to the operation.

As far as UN peacekeeping operations are concerned, the question whether IHL applies to peacekeeping operations was debated for many years. There was, after all, no provision in IHL instruments that specifically regulated the conduct of UN peacekeeping operations.

However, this question may now be considered as settled. In 1999, the Secretary-General issued a bulletin on the observance by United Nations forces of international humanitarian law, which contains most of the existing customary rules of IHL. This is a clear indication that the United Nations has recognized that UN peacekeeping operations must be conducted in a manner consistent with IHL.

The fact that IHL is applicable to UN peacekeeping operations does not mean that all those peacekeeping operations are bound by IHL as soon as they are deployed and for the entire duration of their mission.





As IHL applies when an armed conflict exists, IHL becomes relevant at all to UN peacekeeping operations only to the extent that an armed conflict exists in the territory to which they are deployed and only to the extent that they become involved in it.

So, in the case of many peacekeeping missions, whether they are bound by IHL has had little or no practical relevance, as no active hostilities are taking place in the countries to which they are deployed. UNFICYP in Cyprus is an example, at least for nearly all of its life. The UN Emergency Forces that were deployed in the Middle East in the 1950s and the 1970s would be other examples.

Even in instances where peacekeeping operations were deployed to places where armed conflicts were already taking place, those missions were not bound by IHL as they did not engage in an armed conflict, such as the United Nations Mission in South Sudan. On the contrary, members of those missions were protected by IHL.

However, as UN peacekeeping operations become deployed more and more to hostile environments, and become involved in hostilities with various armed groups, the question of whether UN peacekeeping operations are bound by IHL, and, if so, how IHL applies to them in practice has become a real issue.

These issues have surfaced, or resurfaced, in recent years following the establishment of peacekeeping operations with robust mandates, such as MINUSMA in Mali, or where an existing operation has had its mandate





deliberately made robust, such as MONUC and subsequently MONUSCO in the Democratic Republic of the Congo.

In the context of the Democratic Republic of the Congo, the Security Council, in March 2013, authorized MONUSCO 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”. If there had ever been any doubt about it before, there was no doubt now that MONUSCO was authorized to directly engage in military operations against armed groups.

In practice, between August and November 2013, MONUSCO, alongside the Congolese armed forces, engaged in heavy combat with an armed group – the “M23” – by employing artillery, mortars, ground troops and attack helicopters. While the M23 eventually announced the end of its rebellion in early November 2013, they now appear to have resumed their violent attacks in the eastern DRC and MONUSCO is now engaged again with the Congolese armed forces pursuant to its mandate.

In the specific case of MONUSCO, the relevant Security Council resolutions have required that targeted offensive operations must be carried out in strict compliance with IHL. In this respect, our 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 that we had was a situation in which MONUSCO captures members of an armed group. The Secretary-General's Bulletin of 1999 and the Interim Standard Operating Procedures on Detention by United Nations peacekeeping operations were providing at that time the minimum rules on the humane treatment of captured persons and the conditions of any facility in which captured persons are to be held. However, the Bulletin merely lays down some basic principles.

Moreover, the Interim SOP on Detention was not crafted with a situation in mind in which a United Nations peacekeeping operation captures persons in the course of an armed conflict.

In the case of MONUSCO, the mandate to neutralize armed groups could include capturing members of those groups in the course of military operations against them.

As far as possible, members of armed groups who have been captured will be encouraged to disarm, be demobilized, reintegrate into normal life, or will be 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 was a high probability for MONUSCO to have to hold on to at least some captured persons, our Office assisted the Department of Peacekeeping Operations in preparing a set of standing operating procedures that would ensure the handling of captured persons in accordance with IHL and human rights law. Furthermore, drawing from the implementation of the Interim SOP, as well as from the experience of MONUSCO and of the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), a new Standard Operating Procedure on the Handling of Detention in United Nations Peacekeeping Operations and Special Political Missions was prepared, adopted and entered into force on the 1st of January 2021, replacing the Interim SOP.

In preparing the standing operating procedures, one of the issues which we had to deal with was how to ensure that members of armed groups were not held arbitrarily and for an extended period of time, in the event that MONUSCO had to hold on to them.

The Secretary-General's Bulletin does not specifically address this question and only provides that persons captured should be "treated in accordance with the relevant provisions of the Third Geneva Convention of 1949, as may be applicable to them *mutatis mutandis*".





It is recalled that the Third Geneva Convention applies to international armed conflicts and permits the detention of members of the armed forces and other associated persons potentially until the end of active hostilities without any periodic review of whether they should be released or continue to be detained.

However, this did not appear to be a suitable legal framework in the particular case of the DRC, as MONUSCO was dealing with a situation where it might have to capture and to hold on to members of non-State armed groups, and not members of a State's armed forces.

The Fourth Geneva Convention takes a different approach in the context of civilians. For instance, Article 42 of the Fourth Convention provides that “[t]he internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.”

Article 43 then sets out a number of procedural safeguards so that a person who has been interned is not held indefinitely. First, persons who have been interned are “entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.”

The same article then provides that the court or the administrative board “shall periodically, and at least twice yearly, give consideration to his or her case with a





view to the favorable amendment of the initial decision [to place a person under internment], if circumstances permit.”

Similar provisions can be found in Article 78 of the Fourth Geneva Convention.

While the Fourth Geneva Convention applies to international armed conflict and so is not applicable to the present DRC context, the approach taken by this Convention seemed to be more suitable in the event that MONUSCO captures members of armed groups. This approach provides safeguards to ensure that persons are promptly released as soon as they cease to pose an imperative threat to the security of United Nations personnel, civilians or the DRC national authorities.

Compared to international armed conflicts, there are only a few IHL rules concerning captured persons that apply in non-international armed conflicts. For this reason, we understand that there were extensive discussions on how to strengthen IHL rules concerning captured persons in non-international armed conflicts during past ICRC’s consultations with States on that matter. We are aware that, during these consultations, a number of States considered that the approach taken in the Fourth Geneva Convention was generally relevant in non-international armed conflict too.

These were some of the considerations that we took into account when preparing the standing operating procedures for MONUSCO and the new SOP on the





handling of detention. As a result, the procedures currently in force contain detailed safeguards to ensure that, if and when members of armed groups are captured, they would not be held arbitrarily and for an extended period of time.

The procedures, therefore, require that captured persons be informed of the basis upon which they were held.

The procedures also require prompt and regular reviews of the decisions to hold members of armed groups. The initial review is required within three days from the time of arrival at the initial holding facility.

If they are transferred to another facility to hold them for a longer term, another review must be conducted within seven days from the time of arrival at that facility. Thereafter, a review must be conducted no less than every three months.

At the time of reviewing the decisions, there are a number of options to remove captured persons from MONUSCO custody, including:

- the release of captured persons if they no longer pose an imperative security threat;
- handover to the DRC authorities;
- enrolment in a disarmament, demobilization and reintegration programme managed by the DRC authorities; or





- in the case of persons that are not DRC nationals, enrolment in a disarmament, demobilization, repatriation, reintegration, and resettlement programme, or DDRRR [di-di-triple-ar] programme, which is managed by MONUSCO.

As far as MONUSCO is concerned, the preferred approach is to, as far as possible, make use of one of these options to remove captured persons from MONUSCO custody.

A captured person is also entitled to initiate the review process with a view to having the decision to hold on to him or her reconsidered and being released.

The standing operating procedures entrust an independent and impartial body within MONUSCO to carry out the reviews. The body is to be composed of three members who are not within the chain of command of the Force Commander and who have expertise in international law, experience in the military, or experience in dealing with persons captured in the course of an armed conflict.

In the course of its review process, this body is required to provide opportunities to the captured persons to effectively participate in the proceedings, and to allow them to have representatives to act on their behalf.

The standing operating procedures also provide detailed safeguards in the event that MONUSCO decides to handover the captured persons to the DRC authorities.





This is particularly important in the MONUSCO context, since, if and when members of armed groups are captured, the preferred approach would be to handover them to the DRC authorities.

However, if captured persons are to be handed over to the DRC authorities, there are a number of requirements under international law that must be fulfilled before such handover can take place.

The standing operations procedures prohibit the handover of captured persons if they would be subjected to life-threatening risks, such as torture and enforced disappearance. The standing operations procedures also contain detailed rules which provide opportunities to captured persons to express their fear of facing such risks if handed over, and require the mission to conduct the risk assessment in a rigorous manner, with appropriate participation of the captured persons throughout the process.

The standing operating procedures also set out measures that can be taken well before members of armed groups are actually captured. For instance, the handover of captured persons could be delayed simply because the mission requires additional time to identify an appropriate DRC facility to which the captured persons could be physically transferred, or because the mission requires additional time to obtain information that confirms that there is a legal basis in the DRC's national law for the DRC authorities to continue detaining him or her.





In order to prevent such delays, the procedures include rules that require the mission to identify in advance DRC facilities that meet the requirements of international law, and to obtain information concerning national laws that provide a legal basis for depriving a person of their liberty and the procedural safeguards that apply during detention.

The procedures also contain detailed rules to ensure the rigorous monitoring of the treatment of captured persons after they have been handed over, including visits and follow-up measures in instances where a person who has been handed over is not treated in accordance with the applicable international obligations of the DRC.

The standing operating procedures also require the mission to obtain a written statement from the national authorities that specifies their obligations after the captured persons are handed over to them. This includes a detailed procedure in case the national authorities intend to transfer captured persons to another country.

These safeguards have also been applied by missions other than MONUSCO. In 2013, the Organization concluded with the Government of Mali a supplemental arrangement to the status-of-forces agreement for MINUSMA concerning the treatment of persons that MINUSMA might hand over to the Government of Mali. In 2014, a similar supplemental arrangement was concluded with the Central African Republic in respect of persons handed over by MINUSCA.





Our experience in preparing the standing operating procedures for MONUSCO was useful in drafting these agreements, which apply both to persons detained outside a situation of armed conflict and persons captured in the course of combat.

In closing, I would like to note that detention by UN peacekeeping operations involves a number of complex legal and operational issues. While the possibility of UN peacekeeping operations detaining persons in an armed conflict situation might have been remote in the past, this has become more and more real in recent years with the establishment of several robust peacekeeping operations.

Due to their complexity, many of these issues may require further reflection in the light of evolving State practice.

I hope that this address has provided some food for thought on these complex issues, and I wish all participants a fruitful discussion over the next two days.

Thank you.

I thank you for your attention.

