The Honourable Society of the Middle Temple

"Legal Issues Facing the United Nations"

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Lord Justice Burnton,
Master Treasurer,
Distinguished Masters of the Bench,
Distinguished Members of the Honourable Society of the Middle Temple,
Ladies and Gentlemen,

[Introduction]

It is a great pleasure and an honour to address you this evening. I see this not only as a personal compliment but as an indication of your interest in the work of the United Nations and in international law.

Last year, when I was bestowed with the honour of becoming a Bencher of this noble Inn of Court, I was invited to spend some time with you and to speak about issues facing us in the UN, I did not hesitate to accept. The challenge we faced was to find a mutually convenient date. Thank you, Master Treasurer and Lord Justice Burnton, for your patience. With the peripatetic life I lead, I have begun to feel that this beautiful Hall is part of my home.

[Background]

It is just over two years since I joined the UN as Legal Counsel to head the Office of Legal Affairs. I thought I would start by giving you some background to my role: Before I took up the post, my main experience of the organisation was as the Irish Foreign Ministry's legal adviser. In many respects, I was an outsider – from a small but committed member state - looking in on how this vast and complex body worked. Naturally, this only allowed for a fleeting glimpse at most of the issues, or, for a very concentrated focus on an issue of particular national importance. In my role as Legal Adviser of the UN, I now have a clear sense of how centrally international law currently figures among UN priorities.

The Office of Legal Affairs employs about 200 staff on a full-time basis and acts as in-house Counsel to the Secretary-General, to the senior management and to the wider UN system. Much of our work is, understandably, carried out quietly and behind the scenes. We cover a range of issues of international public law which many people would associate with the UN – for example, advice on the law applicable to war, Peacekeeping Operations, Oceans & Seas, international criminal justice, contracts of over $4 billion, procurement matters, Treaty Law, privileges and immunities, international trade law/UNCITRAL and the new system of administration of justice for a staff of more than 60,000.

The Charter of the UN is, of course, the fundamental legal basis and primary law of the UN.

So to the Charter: where the Peoples of the UN expressed their determination "*to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained*". Since 1945, the Organization and its Members have constantly striven to give practical meaning to this resolve and to develop legal bases for peaceful relations between States. My Office plays a central role assisting states in the negotiation of Treaties and international legal texts which have become milestones in the field.

Over the years, the UN has seen periods of great advancement in international law and jurisprudence, just as there have been times when our function as guardian of the global legal architecture has seemed more peripheral. Since joining the Organisation, it has become clear to me that international law - and the role of the UN as its champion - is absolutely central to the work of the UN and to the Secretary-General and his team. The Secretary-General places a particular emphasis on the need to reform the administration of the UN and to manage the resources of the Organization as effectively as possible including minimizing duplication and overlap. We – as lawyers - are at the Secretary-General's table on so many issues at his Policy Committee; Senior Management Group; which I suppose one could liken most closely to a cabinet, and which meets every week; and his Management and Political Advisory meetings, etc.

My meetings with the Secretary-General occur on a frequent basis for one reason or another - often, for instance, on issues of public international law but also for issues relating to the administration and management of the UN. Discussions at all the Secretary-General's meetings, as you might imagine, are lively and sometimes difficult. As chair, the Secretary-General works to ensure that the focus remains firmly on his goals for the Organization.

As Legal Counsel, among my tasks is to support the Secretary-General's commitment to the strengthening of the rule of law, the pursuit of justice and the determination to end impunity for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian and human rights law. So I will focus on this topic which, in one way or another, permeates my activities on a daily basis

My Office plays a key role in promoting the rule of law at the national and international levels. Many people see references to the rule of law as little more than the high-blown rhetoric of international conferences attended by people who do not live in the real world where the rule of law is constantly under threat or indeed, in some cases, is non-existent. Others view the rule of law, while well-intentioned, as falling firmly into the category of abstract conceptual theory.

However, the pursuit of this principle is a recognition that, without it, the lines between justice and tyranny can too easily blur or disappear altogether. We witness the results of its absence on a daily basis in so many countries. Quite frankly, its promotion and protection is a goal which permeates all our work at the Office of Legal Affairs. Establishing respect for the rule of law is fundamental and essential for a number of reasons, including: prevention of conflict; achieving a durable peace in the aftermath of conflict; the effective protection of human rights; and also, of course, sustained economic progress and development.

The principle of the rule of law, embedded in the Charter, encompasses elements relevant to the conduct of state to state relations. In addition to the ICJ, the main UN organs including the General Assembly and the Security Council, all have essential roles in this regard. The principle that everyone is accountable to the law – from the individual to the State itself – is, of course, a fundamental concept which drives much of our work.

[The fight against impunity and the age of accountability]

I have decided to focus on accountability and our ongoing quest to end impunity for genocide, crimes against humanity, war crimes and other violations of international humanitarian and human rights law:-

At the recent Review Conference of the ICC held in Kampala which I attended with the Secretary-General, he recalled that the international community had overwhelmingly embraced "an Age of Accountability". He stressed this again in his annual address to the General Assembly in September. He emphasised in Kampala that impunity for international crimes is no longer an option, as shown by the developments which followed the conflicts in Rwanda, the former Yugoslavia, Sierra Leone, Cambodia and elsewhere. He constantly looks to what more can be done to achieve justice.

International criminal mechanisms have already achieved a great deal. A number of those who, from high positions, planned and directed the most

serious crimes in the conflicts I have just mentioned have been brought to justice or are currently facing trial. Heads of State have **not** been exempted. Before the establishment of these mechanisms, impunity was viewed by some perpetrators of terrible crimes as a very likely outcome. This is no longer the case. At the same time, the international community cannot be complacent. Unfortunately, to date, only a relatively small number of those responsible for genocide, crimes against humanity or war crimes find themselves before a court of law. Their victims have rarely been granted redress for the unimaginable suffering they endured.

The panoply of international and mixed tribunals established by the UN since the mass atrocities in the former Yugoslavia and Rwanda in the early to mid-1990s began with the International Criminal Tribunals for the former Yugoslavia and for Rwanda. These were followed by the Extraordinary Chambers for Cambodia, the Special Court for Sierra Leone and the Special Tribunal for Lebanon. For almost two decades, international criminal tribunals have contributed to the gradual erosion of impunity and the prosecution of those responsible in political and military leadership roles for commission of serious, large-scale crimes. These international judicial mechanisms have been at the heart of the revival and development of international criminal law and jurisprudence.

The ICC is the centrepiece of our system of international criminal justice. If we want to be serious about combating impunity and nurturing and developing a culture of accountability, we must support its work.

Despite the understandable challenges which the ICC is facing in consolidating itself as a vital and indispensable part of the community of international organizations, I firmly believe that where states are unable or unwilling to investigate and prosecute, the ICC is our main hope in the quest to end impunity for international crimes.

This Court provides the opportunity and the vehicle for our generation to significantly advance the cause of justice and, in so doing, to reduce and

prevent unspeakable suffering. If we fail to support the ICC, we fail humanity.

Complementarity

It is clear that the UN has a responsibility to support the ICC and to spearhead the international effort to bring justice for these crimes. And we take that responsibility seriously. However, I take every opportunity to emphasise the role of States. The principle of complementarity is essentially the duty of States first and foremost to prosecute international crimes. Only where national judicial systems are unable or unwilling to investigate or prosecute should international courts be involved. This principle is of crucial importance for the future of international criminal justice and the quest to end impunity for grave violations. This issue of complementarity is at the heart of much of our current work.

We are all aware that international justice mechanisms, whether permanent or ad hoc, are not intended to supplant States where they have organized criminal justice systems which are willing and able to ensure that there is accountability for the crimes concerned.

International mechanisms are not substitutes for national mechanisms.

The premise of the complementarity principle is that national systems are best placed to investigate and prosecute the statutory crimes of the Rome Statute. It is national systems which are closest to the victims and affected communities. The preference for national judicial proceedings is at the heart of the Rome Statute/ICC system.

If we want to remain on the offensive in our quest to end impunity and to ensure the prospects for a genuine "Age of Accountability", we must be truly committed to strengthening national judicial capacities. I believe that the full potential of a proactive approach to complementarity is far from realized. The UN can and will assist States with technical cooperation and rule of law

support. But again it will, first and foremost, be up to States to embrace and implement the principle of complementarity.

In the final analysis, justice is a nation's choice. The fight against impunity cannot be won at the international level alone. It must be fought and won inside States, with the political will of the Governments and in the hearts and minds of the citizens. Supporting the principle of complementarity through fortifying national judicial systems is a priority in our common fight against impunity for the coming years.

National systems must assume a more prominent role in filling the impunity gap that currently exists in dealing with international crimes. .

Tribunals

The building of a culture of accountability is a challenge that the UN and the Secretary-General has vigorously undertaken. As I mentioned, many important trials against perpetrators of international crimes in the former Yugoslavia and in Rwanda have been conducted by the ICTY and the ICTR, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia. Work is ongoing at the Special Tribunal for Lebanon to bring to trial those responsible for the assassination of President Rafiq Hariri.

The Tribunals have taken important steps to develop international criminal law.

The Special Court for Sierra Leone was the first "mixed" or "hybrid" Tribunal established by Agreement between the UN and a State. This Court is now winding down its presence in Sierra Leone. It has handed over its jail to the government which is now using it as a women's prison. The Court handed down its final verdict in Freetown in November last year. The Court's only remaining trial - the case against Liberian former President Charles Taylor - is currently ongoing. So the Court is preparing to close its doors after a successful undertaking (estimated to close June 2013). It will be the first international Tribunal to end its work.

A breakthrough has recently been achieved in the context of the Court of Cambodia (ECCC) with (i) the historic arrest and surrender of five principal Khmer Rouge leaders to the Court; (ii) the successful completion of the first trial; and (iii) the recent indictment of the five leaders. This Court has become a catalyst for strengthening the rule of law in Cambodia. Unlike the other UN-assisted courts, it is not an international tribunal, but a court embedded in the national jurisdiction of Cambodia. It is a national court with participation by international judges, prosecutors and administrators.

The Court has recently successfully completed its first trial. On 26 July 2010, the Court convicted Kaing Guek Eav, alias Duch, of crimes against humanity, grave breaches of the Geneva Conventions, and serious offences under Cambodian national law. There has been criticism that the sentence of 35 years was too light. But, this is a topic of its own. It is one which is mirrored in so many national jurisdictions and, in my view, this discussion now in Cambodia is evidence itself of the evolution of the rule of law within the State. Duch was the Secretary of the S21 detention centre in Phnom Penh, where records show that more than 12,000 people were detained and executed, although the actual numbers are believed to have been considerably greater.

One of the really striking successes of the ECCC is the impact it has had on Cambodian society. More than 31,000 Cambodians visited the ECCC to witness the proceedings against Duch, many travelling long distances from the provinces and staying overnight. This number is believed to be higher than for any of the other UN-assisted tribunals. It is a forceful reminder of the importance of pursuing justice in the country where atrocities have taken place wherever possible. Further, there is a strong potential for the transfer of capacity and international standards to the national courts since the ECCC is embedded in Cambodia's national court structure and jurisdiction, with participation by international and Cambodian judges, prosecutors and court administrators. When I visited the ECCC in April this year, and again two weeks ago I was struck by the determination and professionalism of the national judges and officials. Cambodia is serious about the need to ensure that new skills and standards are retained, and that the rule of law in Cambodia is enhanced.

The ECCC is likely to prosecute a relatively limited number of the senior leaders of the former Khmer Rouge regime and those most responsible for the shocking crimes that took place in Cambodia in the 1970s. This Court will also therefore complete its work in the next few years. The Court is not just a mechanism for accountability, bringing justice to the victims of the Khmer Rouge regime. Equally important is the fact that, in a country like Cambodia, it is also a catalyst for its national judicial reform and development, and has become an essential element of building capacity for the establishment of rule of law and good governance.

[Establishment of Residual Mechanisms]

The fact that most of these UN-assisted tribunals are approaching the completion of their work is not the end of the story. The tribunals have a number of essential functions which must continue beyond the lifespan of the tribunals themselves. These include: (i) the trial of any fugitives – it is imperative that fugitives are not allowed to avoid justice by "out-waiting" the tribunals; (ii) the protection of witnesses; (iii) the international monitoring of the enforcement of prison sentences; and (iv) the archives of the tribunals must continue to be properly managed.

The bodies to succeed each of the UN-assisted tribunals have become known as "residual mechanisms". These successor bodies will in fact be courts – naturally smaller and leaner successors to their judicial predecessors. The challenge will be to design these mechanisms so that they are able to carry out the residual functions that I have just listed, including the judicial, prosecutorial and administrative aspects of those functions, with limited staff and resources.

The issues, both legal and administrative, are novel and complex.

In designing, negotiating and establishing these residual mechanisms, the UN Office of Legal Affairs is at the forefront of developing the future architecture of international criminal justice to complement that of the ICC. The Office of Legal Affairs is the lead department in the UN for the tribunals and their successor bodies. It falls to us to ensure that the residual mechanism can

commence functioning at the very moment that the tribunal is terminated, with continuity of jurisdiction and a smooth passing of the residual functions.

Questions abound as to the effect of justice on prevention of atrocities and punishment – R2P

Many of you will be familiar with the extreme violence that has occurred in more recent times in places as diverse as Afghanistan, Darfur, the Democratic Republic of the Congo, Guinea, Kyrgyzstan and Sri Lanka. The topic of ending impunity has thus not gone away and becomes ever more acute. In many of these places and situations, the targeting of civilians, sexual violence, forced displacement and denial of humanitarian access are acts which, more often than not, have been carried out with impunity.

The UN is best placed to lead the international effort to put an end to such violence. But the response to global violence must, of course, be the joint effort of States, non-State entities, international organizations both governmental and non-governmental and civil society at large. The question at the centre of the debate is: how to prevent the violence and to punish those responsible for its consequences. However, in the practice of the international community, including the UN, prevention and punishment – which are of course "two distinct yet connected obligations" have (in the words of the ICJ in the Genocide case) - too often been seen as "punishment as prevention". One of the most effective ways of preventing criminal acts, according to many great legal philosophers and jurists, is to provide penalties and to impose them effectively on persons who committed them. But while punishment as a deterrence or a form of prevention has been a common purpose of all international criminal jurisdictions –one, among many – in reality, punishment alone and the prospect of it seldom prevents. Clearly, prevention requires much more.

I believe the core idea that has inspired the UN action in the field of human rights and humanitarian law is that compliance with relevant rules is a matter of concern to the international community as a whole. Such compliance will prevent these crimes. International law powerfully mirrors this idea, when it

conveys that, while the primary responsibility for complying with international humanitarian and human rights law falls upon the State directly involved, the international community also has a role to play to ensure respect for the law. This is the same conviction that brought the 2005 World Summit to proclaim the concept of the "Responsibility to Protect", which provides that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity" and that "[t]he international community, through the United Nations, also has the responsibility . . . to help to protect populations from" those crimes. The focus is on prevention of these crimes and protection of civilians must be a corollary of protection.

The concept of R2P is a powerful notion that has attracted the attention both of Governments and the international legal community. We have identified three pillars for advancing the World Summit's landmark decision in this area: Pillar One on the responsibility of States to protect their own population; Pillar Two on "International assistance and capacity-building" to assist States to protect their population; and Pillar Three on a "Timely and decisive response" by the international community where States are not able or willing to protect their population.

Interestingly, the notion of an "international rule of law", which —I believe— lies at the heart of the responsibility to protect, may again prove useful in understanding the action needed under these three pillars of R2P.

Under the first pillar, there is a need for States to become parties to relevant international instruments on human rights, IHL and refugee law, and to the ICC Statute; and the core international standards need to be faithfully embodied in national legislation. The presence of a strong culture of rule of law in a society may prevent or minimize the risk of deterioration into an "R2P" situation.

Under the second pillar, there is a need for assistance programmes to build specific capacities within societies that would make them less likely to travel the path to crimes relating to the responsibility to protect.

Under the third pillar, emphasis is needed on all the available tools provided under the Charter, notably in Chapters VI, VII and VIII. This confirms that our goal is not to add a new layer of bureaucracy, or to re-label existing United Nations programmes; it is to incorporate the responsibility to protect as a perspective into ongoing efforts, including those on the promotion of the rule of law. The discussion on a strategy to implement the responsibility to protect is still ongoing, but the concept shows the potential benefits that a unified action in this field may bring to the international community as a whole.

[Targeted Sanctions]

Now I wish to briefly turn to the issue of sanctions which has recently resurfaced after the European General Court rendered its decision in the second round of the so-called "Kadi" jurisprudence on 30 September:

The issue is that of fair and clear procedures for the Security Council sanctions regime. It is an issue which has the potential to cause significant tensions for States in their commitments to the UN and regional organisations to which they belong.

The issue itself is as old as the invention of "smart" or "targeted sanctions".

It exists ever since the Security Council began moving towards imposing targeted sanctions with respect to particular individuals and entities, rather than imposing comprehensive sanctions with respect to governments or trade sectors. This shift has resulted in making sanctions more effective, and focussing the effects where they belong. Such sanctions usually involve the imposition of travel bans, the freezing of assets and arms embargoes.

In light of the increasing number of persons who are subject to such measures in the context of counter-terrorism activities, targeted sanctions raise a number of concerns, in particular as to how human rights and fundamental freedoms of persons who are subject to such sanctions can be respected.

The Secretary-General, pursuant to this mandate, took the initiative to convey his views on this issue to the Members of the Security Council in 2006.

He submitted to the Council that minimum standards, required to ensure fair and clear procedures, would have to include several basic elements, including the right to be informed; the right to be heard; the right to be assisted or represented by counsel; and the right to review by an effective review mechanism.

Security Council resolutions of 2005 and 2006 have improved the notification of listings. A further resolution in 2008 aimed to address the issue of the right to be heard.

In December 2009, the Security Council unanimously adopted Resolution 1904 (2009) in an effort to address the right to an effective review mechanism.

Most notably, the Council decided to establish the "Office of the Ombudsperson" to assist the "1267 Committee" when it considers delisting requests from individuals and entities. For the first time, petitioners seeking their removal from the list can present their case to an independent and impartial Ombudsperson who, after consultations with both relevant states and the petitioner will present his observations to the Committee. In the words of the Council, the creation of this role addresses the "right to review by an independent mechanism."

We will have to see how the first Ombudsperson implements her important mandate and how the interaction between the Ombudsperson and the Committee on the one hand, and between the Ombudsperson and the

petitioners works in practice. Eventually, a lot will also depend on how the Ombudsperson's observations will be taken up and dealt with by the Committee.

The UN Office of Legal Affairs welcomed all of these steps taken towards ensuring fair and clear procedures for placing individuals and entities on Security Council sanctions lists and for removing them. These positive developments are a reflection of a widely shared perception that progress was needed.

Meanwhile, however, these developments have been accompanied by a growing number of court cases around the world, in which listed individuals and entities have challenged their listing. They have argued that their fundamental human rights have been infringed due to the lack of adequate procedures provided by the Security Council sanctions regime. A corresponding national and regional jurisprudence emerges.

In fact, in addition to the Kadi case, several national and regional courts have been seized of cases which concern, *inter alia*, obligations under coercive measures issued by the Security Council under Chapter VII of the Charter and their compatibility with obligations under international law, and, specifically for European States, with obligations arising under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

We are following these cases with great interest and concern. There are more cases currently before the Court of Justice of the European Union and, in particular, before the General Court. The Kadi case is certainly the leading case in many respects and we are all following its progress closely.

[Piracy]

Now – for a wholly different flavour of our work: I will speak briefly about Piracy. For my Office, the piracy dossier is an active and important one. The human cost of piracy off the coast of Somalia is incalculable, with killings and widespread hostage-taking of sailors whose daily jobs are already filled with

risk. The commercial cost is also very high. The problem clearly demonstrates the increasing interdependence of States and people in a globalised world. The number and diversity of States and organisations with a stake in finding a solution provides strong evidence of this, with human welfare, and commercial and security interests under threat.

Piracy has a rather technical definition in the United Nations Convention on the Law of the Sea (UNCLOS). Essentially it includes violence or detention for private ends by the crew of a private ship against another ship. It is not a complex crime. Some refer to it colloquially as "robbery at sea", although, of course it is broader than this, and includes hostage–taking, which has had such a devastating effect on the lives of so many.

As piracy is a crime which, by definition takes place on the high seas, beyond the territorial jurisdiction of any State, UNCLOS and customary international law provide for universal jurisdiction over it. Any State may seize a pirate ship, arrest and detain the perpetrators, and prosecute them. There is no lack of international law for dealing with piracy, but rather a lack of implementation. Over the last few years, however, the international naval presence off the coast of Somalia and the arrangements between some naval States and regional States for transfer and prosecution of suspects, has begun to have an impact. The number of piracy incidents is still high, but the effectiveness of these attacks has been diminishing each year. The efforts of Kenya and the Seychelles in particular to conduct prosecutions is commendable. One of our key efforts must be to try to encourage and assist an increase in the number of such regional States to play an active role.

The measures which the international community put in place to combat the problem have demonstrated the strengths of the legal regime established under UNCLOS, but also the regime's reliance on States with the capacity and political will to fully implement its provisions. A number of entities within the UN and the International Maritime Organization have been engaged in efforts to assist States in addressing the legal issues which emerge from the apprehension, detention and prosecution of suspected pirates.

The Secretary-General has been the driving force behind these UN efforts. On 25 August, he introduced a report to the Security Council in which he identifies seven possible options to further the aim of prosecuting and imprisoning those responsible. The knowledge and experience that the Office of Legal Affairs has developed of international tribunals over the past two decades placed us very well to prepare this report on behalf of the Secretary-General. For the Security Council, I set out the international legal regime and details of the seven options. These include the creation of special domestic chambers in regional States, possibly with participation by international judges and prosecutors; a regional tribunal; or an international tribunal on the lines of the former Yugoslavia and Rwanda tribunals, and corresponding imprisonment arrangements.

The Secretary-General's report was welcomed as an important and timely contribution, and food for thought for the Security Council. It is critical that the international community does not tolerate impunity for crimes of piracy. However, as recognised in the report, piracy is a symptom of the instability that has persisted in Somalia for nearly two decades. Prosecution of those responsible must therefore form part of an integrated international response which aims to help rebuild the rule of law, and economic and social stability on land in Somalia.

[Conclusion]

Ladies and Gentlemen,
Colleagues,

With this I have reached the end of my remarks tonight.

Thank you for listening to this address on a wide range of issues. I'm sure you noted that the issues addressed ranged from a very old problem, piracy, to the responsibility to protect, a concept that was formulated in those terms only in recent years.

This range of issues reflects well the broader practice of the Office of Legal Affairs in New York, which confronts on any given day issues arising in core areas of our practice that date back to the days of the UN Charter and cutting edge issues that may be drawn from the headlines of the day.

I hope that I have succeeded in conveying to you the dynamic quality of the practice of international law at the United Nations, a feature of its practice which is, of course, shared with many other intergovernmental organizations, national government legal adviser's offices, and non-governmental organizations.

It is in light of this dynamic quality that I believe that it is a very good time for a law student to be considering becoming an international lawyer. The challenges that such a career presents and the satisfactions that such a career produces are substantial. I encourage your continued interest in the practice of international law.

I would be grateful for comments and thoughts that you may have at this point. And I will try my best to answer any questions that you may have.

Thank you very much.