

Transcript of the JILIR Conference: UN at 60 Closing Session

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Stephen Toope:

We are going to start by asking the panel what they think we can learn from the various processes that led up to the recent UN Summit and its Outcome Document. Just to remind you, we have already discussed some of the processes today, including the International Commission on Intervention and State Sovereignty (ICISS), a government sponsored but independent commission. We also discussed internal UN reform discussions, the High Level Panel Report, the Secretary General's response and subsequent negotiations. The questions underlying this are: Why did some ideas succeed and many others fail, and what can we learn from this? What processes need to be engaged now so that we can move forward with some hope of success?

Diego García-Sayán:

One possible answer is that it is very difficult to change and to strengthen a multilateral organization like the UN in a context of broad global disequilibrium because there is a tendency for distrust to prevail between the parties. For instance, the proposal made by the International Commission regarding the responsibility to protect made the very important point that the veto would not be always exercised in a context in which there is a clear majority intention to intervene to protect, in the context of genocide or gross human rights violations. That proposal was maybe unrealistic within this context of distrust between the parties; it would not succeed and did not succeed. At the same time this question also has to do with the use of force. How will force be used in difficult contexts where, as we have heard in the last panel, it is very difficult to answer the question of whether the decision to intervene in the context of genocide or gross human rights violation should be taken, be implemented? With what equipment? With what logistical and economic resources? How will it work in a context in which countries are very reluctant to send troops; in a context in which it is not only a question of peace enforcement but also peace building, which involves the military, the police and civilians? In the specific political context of this global disequilibrium, this is a question that still remains to be discussed.

Kenneth Abbott:

There are three characteristics of the processes leading up to the Summit that are unusual and may have contributed to its outcome. I don't think we understand any of these features all that well at the moment. First, this was a very extensive normative process. The documents leading up to the Summit are full of the reiteration of norms, changes of norms, calls for the development of new norms, the adoption of norms that have been generated in other places, and so on. And yet, this was almost entirely a non-state process. The High Level Panel was created by the

Secretary General and made up of private experts. The Secretary General himself is a non-state actor of a different sort. The Millennium Project, which produced suggestions for norms on development, was chaired by an academic. So this was completely different from treaty making, completely different from customary international law-making through state practice, completely different from G8 decisions, completely different from all the legal positivist methods of rule-making. Query: what is going to be the effect of this process? I don't think we understand it. It could have long-term effects in terms of reconceptualizing interests and identities. In the short-term it could lead states to push back, regardless of the content.

The second characteristic of this process is that it looks like what I would call a constitutional convention, in the sense that at one moment they took on the full range of issues and norms, the full range of UN programs, all the principal organs, and many other institutions. That's not an easy thing to do within a country, as Machiavelli famously told us, and neither is it an easy thing to do in an international organization. I can think of two methods that would make it work; I'm not sure that either was applicable here. One would be to create a sort of package deal, in which you include something for everybody and are able to get consensus on the constitution as a result. The other, which we understand much less well, would be to go through the process at what is sometimes called a 'constitutional moment'. The millennium may have been a constitutional moment, but it's not clear that this was a constitutional moment. We do not understand clearly when such moments come around, or whether you can 'create' them.

The third characteristic is that this whole process, and even the Summit Outcome Document, did something that other UN summits have also done, most famously at the 1992 Earth Summit with the creation of the concept of 'sustainable development'. That is, they took concepts that were previously thought of as belonging to separate fields and brought them together as one integrated concept. 'Human security' does the same thing. And the Summit was the apotheosis of this approach—it took all of these issues and said they are really all part of 'collective security'. Issues that different organizations work on, different national ministries, different epistemic communities, different academic disciplines, were all lumped together in the new understanding of security. It makes it quite hard to deal with the result.

I'm not sure what the lessons are, but I think these are all characteristics of the Summit process that influenced the outcome, and may have continuing influence.

Martha Finnemore:

One of the notable things about our conversation today, and about these processes we have been discussing, is how detached they are from domestic politics. Actors pushing these agendas understand themselves to be international or transnational, and function at that level. Connections down into the domestic politics, particularly of powerful member state countries, are difficult for the UN. This is clear from conversations about the UN in US domestic politics. Neither the institutional mechanisms, nor, I would argue, the mindset, exist in the UN to build those roots into domestic politics and national publics. If you want to have meaningful UN

reform that will have broad-based support in countries that have been active and engaged—or countries that one wants to be active and engaged—in the UN, you need to build a constituency for this.

There are some mechanisms to do this. There has been an interesting initiative to connect parliamentarians to UN operations. Ann Florini at the Brookings Institution has been involved in this. There have been other initiatives as well. Building these kinds of connections between the UN and publics in member states would have a couple of effects. First, it would build support for international-level governance within national-level governing bodies. This is obviously useful because, ultimately, the resources and the mandate at the international level have to have some roots at the national level. So international governance needs national support, but the process flows both ways. You also want to spread some of these international norms and educate these domestic actors about what is in it for them. How would you reshape a national interest? Well one way to do that, if you were the UN, is to become engaged with, and converse with national-level political actors of consequence.

Paul Heinbecker:

I have a different take on some of this altogether. First of all, why did some ideas pass and some fail? Some were better than others. For one thing, they were timelier. I think it is fair to say that the two things that people point to as having been successes, the responsibility to protect and the Peace Building Commission ‘flew in’ under the fratricidal warfare that was going on with respect to all of the other issues, and came out the other end more or less untouched. The state at the beginning of the responsibility to protect was the government of Canada; it created the ICISS. That government just didn’t put that report out on the table; it maintained an interest in it; it set up an office to promote it. I went to the UN, and I promoted it for four years. My successor, Allan Rock, came and promoted it, and when the crunch time came in the negotiations, the Canadian Prime Minister phoned other leaders and persuaded them that they should endorse this idea. So there was a very strong role being played there by the government of Canada and virtually none of the other issues had that kind of support. I think that that is another reason why it passed.

I guess that the second point is that Bolton, in his 750 amendments, caused a lot of fratricidal effects. Things that the US wanted they didn’t get because they made it pretty clear to everybody else that the things *they* wanted the US was not going to agree to. So, that kind of fratricidal warfare probably played into our hands a little bit. The last thing I’ll say is for those who are seeing the glass 5 per cent full and 95 per cent empty—that is basically how I see it—remember the Brahimi Report experience. For those who followed it, it was a report on how to make peacekeeping work. And in fact, in the first go-round we didn’t get very far on it. There was all kind of opposition. But, about two years later, when we looked back and did the tally, we had managed to pass just about all of it. So maybe there is a lesson there also for this issue, although the agenda here was larger.

Kenneth Abbott:

I think we should also talk about another broad issue: what do we do now? It's not clear that we have talked about that very much. I think we need a diagnosis of what happened on the way in, and of what were the dominant characteristics of the process—whether it was last-minute bargaining or the nature of the norms—before we can decide how to go forward. We certainly haven't gotten consensus on what that diagnosis should be.

A couple of points I would like to make in terms of how we move forward. First, the preparatory documents for the Summit—if you read all of them and listened to all of the discussion today—they are all about the UN. They were supposed to be about the UN—that was their mandate. But if you read other documents on UN reform that have been issued in the US—for example, there was the Congressionally mandated Gingrich-Mitchell commission on UN reform, and Representative Hyde has a bill on UN reform—you see that these people, who are influential opinion leaders and legislators, see the UN as one forum, one organization, through which the US can work in order to achieve its national interests and promote its values. There might also be other organizations that aren't part of the UN system, there may be bilateral means of pursuing these interests, there are the infamous 'coalitions of the willing', there has been discussion of creating a group of 20, and so on.

My impression from these documents is that the High Level Panel and others working on the Summit didn't give adequate attention to the other institutions that are out there. Partly to deal with the very different US perspective on this, and partly because it's a good idea, we need to think of global governance as more than just the UN. One way forward would be to approach the whole problem as what I would call an exercise in 'networked governance'. By and large, coming out of the Summit, the UN organs don't have a strong mandate to do very much in a centralized, organized way. But there is plenty of room in those documents for liaising with other organizations, with state representatives and legislators, with people from specialized ministries within states and the specialized agencies they deal with, to figure out how to move these norms forward.

Second, this is especially true because of the way these norms were formulated, by lumping disparate issue-areas together. The High Level Panel did quite a good job of rationalizing that formulation, but we don't fully understand all of these normative interconnections. In the short term, I would like to see institutionalized some processes of learning and dialogue through which we can begin to investigate what it means to bring all these issues together and treat them all as security issues. This dialogue should involve non-state actors on a broad scale. It should include civil society and it should involve the academic community. If we think the High Level Panel and its formulation of norms were good things, then we ought to have more conferences like this, and we ought to institutionalize other ways to figure out what this all means and how we can pursue it.

Jutta Brunnée:

Do any of the other panellists want to pick up on this before we move forward?

Diego Garcia-Sayán:

The resolution adopted in September says that countries are prepared to take collective action in a timely and decisive manner. That raises two levels of questions. First, will the issue be taken up by the Security Council at all, in a context in which there is great reluctance by its members to act in that sort of situation because this may lead to the involvement of the country that takes part in the decision? Second, the crucial question is, if we are reading closely the wording ‘in a timely and decisive manner’, this means that the UN is prepared, or should be prepared, to intervene in that way, which requires more than has been done in successful operations. I took part in the operation in El Salvador in the 1990s, and it succeeded mainly because of the will of the El Salvadorians, the guerrillas and the government, to achieve peace. Of course, the UN was crucial in that process, but without such a decision from the Salvadorians, the success of more than 2,000 people in a mission combining the military, civilians and police in such a small country would not have occurred. In a context in which there is genocide, gross human rights violations, in which there is evidently a lack of political will to achieve a peaceful agreement, much more is needed from the UN, including very well trained and equipped military personnel, police and civilians to implement tribunals, guaranteed public security and so on. My main concern here is *how* the decision is made, and whether there is a veto or not. Maybe one way to follow up on what has just been said, would be to promote and sponsor a strong coalition between certain countries and non-state actors to create some sort of political pressure so that the appropriate decision is made. Maybe that’s the way to follow up this specific case that we are discussing.

Jutta Brunnée:

Paul, did you want to offer a guess about how we get the glass from 5 per cent full to a little bit fuller, to pick up on your earlier point?

Paul Heinbecker:

One of the lessons that I draw from this experience is that we can’t seem to make these major transformations absent extraordinary motivation, such as having suffered 60 or 70 million people killed beforehand in war. In other words, short of war, the system is just not going to respond because there is just no consensus that things need to be changed in such a dramatic way. I think the lesson I’ve drawn from this is that we should be disaggregating what needs to be done. We should be focusing on a few things, and we should be trying to get some change on those things that are manageable. I think those are the lessons I draw from the success with R2P and the Peace Building Commission. Admittedly they are both timely ideas, and the lesson is that these specific innovations can be accomplished if you put the resources to it, if the intellectual underpinning is reasonably good, and if you are persistent. Change across the board, though, is just too difficult.

Jutta Brunnée:

How do we bring non-state actors into the system ‘in all their complexity’, as Philip Alston put it yesterday? He placed great emphasis on accountability issues, and when he talked about disaggregating non-state actors he seemed to suggest that different solutions, different strategies, may be needed depending on the actor we

are dealing with, be they non-governmental organizations, transnational corporations, private armies or terrorists. At the other end of the spectrum, he said less about the benefits of law that might accrue to non-state actors. As a human rights lawyer, I assume he took these for granted, but it may be worth talking a bit about what opportunities there are for giving greater standing to non-state actors.

Martha Finnemore:

Let me make two quick points. One is that I think you would get fundamental political and academic disagreement about whether global governance of this kind is desirable. So, before we start doing all this, let's think about why we are doing it. It is not clear to me that having an international legal system that is going to deal directly with all non-state actors in all their many forms is a good thing. Listening to Philip Alston yesterday, I suspect that international lawyers and international relations people would ask this question in a different way and with different goals. The difference might be one of intellectual stance, but I think that it probably has normative implications. Alston, as I understood his remarks, was interested in the legal status of these things, and in the legal treatment of them. International relations scholars would probably ask much more basic questions like: Who are these actors? How many of them are there? What are they doing? What kind of capacities do they have? For example, with private security companies, the answer is 'we don't know'. The US government does not know how many there are. Certainly in that arena there would be huge disagreement about whether you would want to develop international law and apply it to deal with those actors.

Diego Garcia-Sayán:

One question is whether there is some possibility that the UN might play a central role in the international arena. I am not too optimistic about that possibility, but I am sure that the UN could be more relevant than it is right now. If there is a strategy of inclusiveness with the main non-state actors it is very difficult to find homogenous and unique criteria. Maybe one of the many criteria that we can use is to focus on the difference between those non-state actors that are linked to work under a legal framework and operate openly (for example, NGOs, transnational corporations, et cetera), and those non-state actors that act against the legal system, like terrorist groups. Of course there may be some groups and organizations that live in a sort of grey zone. For example, some guerrilla movements in some countries after some years become the government; maybe they were illegal, but they were never terrorists, they were just technically on the 'wrong' side at that moment. In the international system we have had, and continue to have, some areas in which non-state actors play a decisive role, for instance, the ILO, where entrepreneurs, patrons and trade unions play essential roles in the decision-making process.

Yesterday, Philip Alston mentioned the norms adopted by the sub-commission several years ago to regulate business and corporations. Maybe we can adopt two levels of analysis. First, what should be the role of some of these 'legal' non-state actors in the reform of the UN system? For instance, what should be the role of corporations and trade unions in redesigning the organization and objectives of the economic and social council (ECOSOC)? The decision that George Soros may be making today about any matter is much more important than all the decisions

made in a year by ECOSOC. Be sure of that. So the question of to what extent should we begin to involve these actors, opens a lot of further questions.

Second, specifically in the area of human rights, of course, it is a key matter to discuss whether oppositional armed groups or terrorist groups may be held accountable in regional or UN human rights monitoring bodies. I think this is very difficult, not only legally, but even as a practical matter. How can they be sent a letter, a fax or an email? Where they are located? How are they to be held legally responsible as official actors? But of course, in areas such as the responsibility of corporations regarding human rights, there have been already some very important steps taken that can be followed up, and, if the norms exist, where the world community through the UN expects some clear accountability from these kinds of corporations.

Kenneth Abbott:

I think you are right that Professor Alston was mainly talking about the status of non-state actors. I understood him to be talking much of the time about non-state actors as targets, as it were, as actors whose behaviour one wants to influence with mechanisms of global governance and international law. I know less about the international legal status of multinational corporations, but as many of you know there are some fascinating exercises in global governance aimed specifically at bringing international standards to bear on multinational corporations or other non-state actors. Professor Alston mentioned some of those. The UN Global Compact is a very prominent initiative of the Secretary General. The OECD has its Guidelines for Multinational Enterprises. The ILO also has guidelines for multinational enterprises. There are even guidelines for the human rights practices of private security companies. Most of these standards have been formulated in multi-stakeholder processes, in which various non-state actors, often including the business groups themselves, have input into the formulation of the norms and the administration of the system. I think this is going to form a much larger part of the global governance universe.

In terms of the participation of non-state actors, rather than non-state actors as targets, we have traditionally talked about this in terms of consultative status with ECOSOC or other kinds of formal participation. But there are also a number of remarkable public/private partnerships, some of which are formal organizations, but many of which are informal collaborative bodies, doing incredible work. In international health, for example, partnerships work on everything from polio eradication to the development of vaccines. And there are similar initiatives on the environment and development. In a world where norms are being clumped together and we have to think about the interactions among the disparate fields, this type of model is a natural part of the networking approach I discussed before.

One last point on accountability. It's been clear all day that if you want to guarantee a laugh in this crowd, all you have to say is 'John Bolton'. I have no more positive feelings about Bolton than those of you who have been laughing at the name. However, one should not underestimate Bolton intellectually. He has written some penetrating articles in which he raises serious questions about the validity of global governance. This might be diametrically opposed to what I just suggested,

but I would single out one point from the many he has made. That is that much of global governance is an elite process. You look at the High Level Panel, and you see an awful lot of norms formulated by what is sometimes called an alliance between experts and true-believers. The average person is not consulted.

Apart from the accountability of any individual non-governmental organization, I think we need to worry about the democratic legitimacy of the whole process and figure out responses to this question, instead of just trying to brush somebody like Bolton aside. What does civil society represent, who does it represent, is it taking a 'second bite of the apple' internationally, having lost the fight to influence governments through domestic democratic processes, as Bolton alleges? Bolton says that allowing NGO's to participate at the international level actually undercuts democratic governance in states, because it gives some actors a second bite at the apple. I don't know the answer to all these questions, but I think we have to confront them and not simply dismiss the messenger.

Jutta Brunnée:

Paul, you spoke earlier about disaggregating the issues to focus on something that is doable. Do you see anything in the non-state actor context that you would consider particularly important and doable?

Paul Heinbecker:

I have one very narrow comment to make on non-state actors and that is to be careful what you wish for. I've seen the National Rifle Association be very effective in New York at the UN; I've seen far right religious groups that have disproportionate influences at processes in the UN. I think the idea that somehow it's necessarily a good thing to have non-state actors involved, and that you can count on them to be constructive, is probably incorrect. At the same time, I do recognize that as Lloyd Axworthy has said, he didn't feel any particular public pressure to reform the UN, and if we were not feeling that very much in Canada, then you can imagine what it must have felt like in Uganda. The point is that no one really managed to mobilize international public opinion on behalf of UN reform. It was basically left up to the states, and they did what they do best, which is disagree with each other. I would say one thing about the L-20: If we had created the L-20 in time I have no doubt that we would have been much farther down the road on UN reform and we would have gotten much more out of it. There is no institution that is above the UN, or the IMF or the WB, that has a bird's eye view on how well things are working, and the L-20 could have given the world that. And the L-20 we are talking about is one where you have China, India, Brazil, South Africa, Nigeria, as well as G8 and other countries. If you can get a consensus in that group, or if you can get close to a consensus in that group, you are much further ahead than trying to introduce it to the 191 members of the General Assembly and trying to get consensus there. So I think it was an opportunity missed. It was a good idea and it remains a good idea. We will see whether there is any appetite for it in the coming months.

Stephen Toope:

While we're disaggregating things, I wonder whether we should do a better job of disaggregating the UN. We've had hints of that in the discussion already. Simon

Chesterman talked about the differences between governance and management aspects of the UN, and we can also go right back to the first panel this morning where we had discussions that were in many ways implicitly revolving around some of the subsidiary organs or specialized agencies of the UN, like the UNDP. We’ve also had discussions of post-conflict peace building. One of the issues that seemed to emerge right from the beginning of the discussion was the extent to which we really should see the UN as a coordinating body and what the challenges of that conception are. Ngaire Woods indicated that there were real risks in policy coordination. But to what extent should the UN be seen primarily as a coordinating body and to what extent is it actually a program delivery mechanism? Do we have to look at it in very different ways depending on which of those aspects we may be focusing upon?

Martha Finnemore:

The political scientist in me says this is an empirical question. We academics should go study it. The UN should ask it and they should go study it. Then, the UN has to decide how to deploy its resources. There are track records in these areas and the UN often knows quite a bit about these track records. The IMF and the Bank—they know what they do well and what they do badly because they study it. There is a lot to be said for decentralization, but whether the UN should coordinate or whether decentralizing international action is a good thing are empirical questions. Good management always involves knowing when to lead and when to stand back and get out of the way.

Paul Heinbecker:

One of the things that has been running through the discussion that I think illustrates the difference among views, is what the UN is about and what the UN Security Council is about. And I think it is pretty clear that if you examine the approaches taken by the US government to this reform process, the issue is the extent to which the UN can be made an instrument of US foreign policy, the extent to which it serves the purposes of US foreign policy. But some other governments really do see it as a forum; a place where you can come in and sort things out. It is not an instrument you can use, so much as a place where you come and try to resolve problems. And I don’t think I heard those two functions in the way you were describing coordination and program delivery. I have no doubt whatsoever that the UN is good at some program delivery in some very difficult spots. Jim Dobbins has done a review of successful peacebuilding cases and he has found the UN actually to be quite successful. I mean, it’s the old Churchill comment: the UN is the worst organization we have, save for all the others. And I think that there is something to be said for that.

The UN is a multifaceted thing; it has a lot of sides to it and it does a lot of things that you wouldn’t want it to stop doing, though you might want it to do them better. But I don’t think you can categorize it very readily into that kind of organization. I think it has all of that, and what I fear, as one hears more and more the discussion of decentralization, is that we’ll spin off UNESCO, we’ll spin off the WHO, and so on. What you lose is more than the sum of the parts, and I’m not sure that the heart of international law can be preserved in that circumstance. And I

think that one should be very careful in that we are in an innovative mode and some feel we can now create a new kind, several kinds of institutions; something that is made for the twenty-first century. We could have coalitions of the willing on the avian flu and coalitions of the willing on something else and it would all be disaggregated with Washington always the hub. I think that at the end of the day if we do that, we will have lost the capability to consult, and to some extent conform and to cooperate.

Kenneth Abbott:

I just want to put out one idea. There is this concept of subsidiarity, which has come up a couple of times. There is another very interesting literature — the 'global public goods' literature—which meshes very nicely with the idea of subsidiarity. The notion here is that we should first try to determine whether particular issues can be dealt with by individual state action. Even many global public goods can be created through a summation process: if each state does its part, you don't need international action to produce the global public good; it will be supplied by the sum of the individual actions of states. If states are doing this adequately, or if the major states are making a large enough contribution on their own, you may not need any international action at all.

With issues like avian flu, you might expect that each country would respond out of self-preservation. However, there is often a problem with this approach when certain countries are unable to do their part. In those cases, where there is a weak-link problem, other states may need to provide technical assistance, financial assistance, or other types of intervention to strengthen the weak links for the benefit of all.

Then there might be issues where all that is needed is to provide an international forum where countries can come and work out solutions to a problem. And finally, there may be some issues to which you need a centralized international solution, or even a coercive international solution, as under Chapter VII. Coordination is relevant to this, because coordination amounts moving an issue up to a higher plane, taking action on a higher plane.

Diego García-Sayán:

Following up on that approach, maybe one of the criteria is to answer the question of what has worked and what hasn't worked in past years. For instance, it is obvious that the UN has been crucial in certain areas like attention to refugees and refugee protection as a whole. It's difficult to imagine such areas without the UN. In other areas, it may be more important to promote coordination, for instance, with regional organizations and, of course, increasing positive coordination that exists. For instance, at the inter-American level, cooperation between the WHO and the Pan-American Health Organization is very important because it facilitates fundraising for the Pan-American Health Organization, and as everybody knows, they are supplementing the work of the WHO. So right now, the Pan-American Health Organization's budget is as big as the OAS as a whole, which gives you an idea of the success story of coordination in the health area.

I think there should be more debate about how coordination with, for example, ECOSOC, may play a role in economic and social areas with all the relevant actors. What does this mean exactly, when we are thinking about corporations, about trade unions, and NGOs, in a context in which international finance organizations are the ones that have the lead in these areas of economic and social matters? And to what extent can ECOSOC be rebuilt, in the sense that coordination with all relevant actors, including multilateral financial institutions, will open the possibility, for instance, for dialogue and for communication with trade unions or corporations that doesn't always exist in bilateral communication between multilateral financial institutions and governments. Maybe there is room for the UN and ECOSOC to play a more substantial role than the ones that they play now in that very crucial area.

QUESTIONS FROM THE FLOOR

Question 1 (Ellen Hey):

A lot of this conference has been about the position of the United States at this time. I also suggest that we must ask ourselves why the United States is in this position. Europe is terribly divided. I think the vote in France and the Netherlands over the constitution has probably made it even more inward looking. Yesterday they were discussing the possibility of European and Latin American countries cooperating more closely. And when I hear the discussion, one of the things I took from the current discussion is that there should be room for dialogue for creating pressure, and I think it's fair to say that there is a responsibility for other countries. Europe is part of the problem here. Maybe also Latin America. There are responsibilities to be taken and this is a theme that needs to be explored more in this context. It is fine to bash the hegemon, but that doesn't get us much further because the US is in that position and is going to be in that position for a while.

Question 2 (Mary Ellen O'Connell):

When you look at world politics, it isn't just a world of states with international institutions. There is a world of what we might call global civil society. Many of the failings that have happened in terms of failed states and such don't happen just because of failed political structures and authority and leadership but also because of opportunistic private actors. So, if you accept that there are private and public sources of injustice, oppression and so on, and the UN is concerned basically about a global order that is responsive to the concerns of common humanity, then it has to be able to fight oppression from both of these sources. In that sense, what I argue in terms of global governance is not that these private actors have to now become accountable according to the same standards. The idea is that none can be granted agency without some form of accountability, at least in terms of claims of common humanity. The reason why I think the UN needs a policy about this in terms of the standing and agency and accountability of non-state actors is, if you look at any context, like humanitarian intervention, the UN faces various types of problems of powerful states trying to control civil society actors. For example, in the US-led intervention in Iraq, they have tried to control humanitarian aid agencies by saying: you must display our flag or you must spend funding in a certain way. What is the

UN's stance on this? Is it acceptable for a state to do that when it's involved in a humanitarian intervention or peace building? So, the UN has to have some normative account of the relationship between public and private actors. I argue it should adopt a liberal cosmopolitan conception where it should try to enable a relatively free and independent global civil society and also help it maintain its independence in the face of powerful controlling state actors but at the same time it has to be able to discipline some of the powerful global civil society actors, such as pharmaceutical companies, in the name of state interest in, for example, providing basic access to essential medicines. My basic point is that there need to be principles that ought to guide the relationship between the state and non-state actors, and the UN ultimately has a role to play in that.

Responses from Panel:

Diego García-Sayán:

Maybe the issue of strengthening multilateralism in the reform of the UN should be a matter for strategic cooperation between Canada, Europe and Latin America. Theoretically, it's not the best base in which we can find coincidences between Europe, Latin American and Canada. Nevertheless this has not happened, maybe because of a lack of leadership in that process. Maybe another answer could be that there is a generalized pessimism about the fact that something good can be done in a context of global big and obvious disequilibrium and that it is preferable to wait for another, better moment without confronting any specific country. So maybe this can be seen as an explanation and at the same time as a possibility of an absolutely crucial area where there could be more cooperation and more communication. It may be that in the case of Latin America, if an open dialogue between Europe, Canada and Latin America is put in force to discuss this matter, I am sure that that would create better conditions so that inside Latin America some more awareness would be created to deal substantially more with the issue of UN reform.

Martha Finnemore:

I have just two quick responses. First, to Ellen Hey, I think you put your finger on something crucial here. You mentioned a general lack of willingness to step up and do some of this UN reform, that Europe is inward looking, and that it wasn't clear that the Latin Americans were going to do this (the Americans we've already talked about). To me, this lack of connection—this lack of widespread public demand—is going to limit how much reform you are going to get. Reform will continue to be an elitist process. The elites can all go to lunch on what was done in September. We will all have meetings and conferences and we'll hobnob amongst ourselves, but to get robust solutions you have to motivate people inside countries. Europe has to be less inward-looking and start putting these kinds of issues on the agenda. Certainly, the Americans have to sort out what kind of international position they are going to take, and become more constructive players in this. Motivating civil society in the elite transnational sense isn't the key to reform; motivating domestic societies, though, would have important consequences and is essential for anything like sweeping or lasting reform.

Second, as to the claim that the UN is concerned to establish global order and fight injustice—global order is exactly what the fight is about, and not everybody would say that it is the UN’s job to establish order. There is an actual political fight about that, so what you say is not uncontroversial. That was my only point. The reason a lot of reform gets stymied is precisely because the normative position I see you putting forward is not ‘mom and apple pie’. There are people who would disagree.

Paul Heinbecker:

I have three concluding comments. One is that it is a little surprising in a room full of lawyers talking about the UN and the Security Council that we didn’t actually get into the role of the Security Council as legislator. Increasingly, the Security Council is acting under Chapter VII of the Charter and is making decisions which are supposed to be the law of the land of all of those 191 countries who signed up to the Charter. There is some very far reaching stuff there. Some of it has to do with terrorism. But, there is potentially more there than that. A corollary is that a lot of the reason that things happen in the Security Council is that, contrary to the public image, it is the organ of the UN that works the best. It really is much more capable than others, and every time I hear pleas for reform of the ECOSOC, I am reminded of the time I accompanied our then Finance Minister and now Prime Minister to a meeting of ECOSOC. The Ambassador of Cameroon gave a press conference with our Finance Minister and decided that he should speak for 25 of the 30 minutes. So the possibility of persuading our Finance Minister that there might be something useful in ECOSOC was gone forever. And he is in a no less powerful position today. So if I could start the slate clean, I would just throw ECOSOC out. I would just plain write it out of the Charter. I would get rid of it before I would try to reform it.

Second, on support for the UN and the idea of generating that support, it is an interesting thing, but there is probably more public support in the US for the UN than there is in most countries. It may be a mile wide and an inch deep but it’s nonetheless there. The polling that has been done about attitudes about the UN in the Muslim countries in particular shows way lower numbers. The UN is almost held in the same regard as the US itself is, and probably for the same reason.

The last thing is the oil-for-food program has not come up so far, the importance of reforming UN management hasn’t been a subject for discussion, which perhaps is normal given who we are, but I would just add that I think the oil-for-food scandal has been a) greatly exaggerated b) enormously dangerous and c) perhaps the worst case of a double standard that’s been perpetrated on the UN in a long time. I look forward to the day when Mr. Bremmer explains what happened to the \$9 billion that was given to him by the UN oil-for-food program when the Coalition Provisional Authority took over. The CPA cannot account for what it did with the money.

Kenneth Abbott:

I would say three things. One, we didn't talk today about UN management reform. Two, we also didn't talk at all about financing the system. If you read, especially, the High Level Panel Report, it's full of phrases like: 'this program needs to be fully resourced'. Peace building and peacekeeping, health and development, they all need to be fully resourced, but there is virtually no discussion in there about where these resources are supposed to come from. There are a lot of innovative ideas out there, most of them aimed at funding for development rather than funding for the whole system. That's a subject for another day but it's a very important one.

Three, on how to proceed from here, I would at this point suggest that the constitutional convention approach has basically been a failure. If I were at the UN, what I would do now is to pick out the specific issues that have the greatest momentum, in the public eye and among the member states that have the strongest mandate, and drive on those issues so that we at least get something accomplished. Some issues that might be considered for this are, obviously, creating and strengthening the Human Rights Council and the peace-building organizations. Then I would suggest working on some health issues and some aspects of development, both of which still seem to me to have quite a bit of momentum and public support behind them.

In conclusion, just because the 'constitutional convention' hasn't really succeeded doesn't mean that the normative process is over. I would return to the notion that all of us can participate in trying to move this process forward, on a more incremental basis, trying to achieve some of the goals set out in these reports. Even though it may still be a somewhat elite process, it doesn't have to be an inter-state process, or a process driven by UN officials.

Jutta Brunnée:

We would like to thank all of you. Stephen and I had discussed earlier how best to close the session. What we thought we would do is pull out some themes that struck us as resonating through the discussions yesterday and today, focusing on themes that relate to thinking about how to move forward. These themes are not necessarily in order of priority, although I will say that the first one does take a priority position in that it is a theme that came up throughout our discussions: legitimacy. Legitimacy was highlighted by virtually all speakers as central to the reform enterprise, both in terms of the continued process that we are embarking on and in terms of the outcomes of that process. In the discussion of legitimacy issues, accountability and transparency came up frequently. Ellen Hey mentioned these aspects with respect to international organizations and, in particular, the Security Council. We also heard that preventing state failure implicates the legitimacy of the entire society of states, which in turn relates to the questions regarding the role of the use of force in this context. We heard from Colonel Horn, I think very persuasively, that these questions involve two significant challenges, one concerning the ability to mobilize combat power, the other the ability to make very complex and often times very quick assessments on how best to use it. Paul Heinbecker just mentioned that we never got to talking about the Security Council in that context. In light of this comment, let me add a related, overarching theme that emerged from

our discussions. Something that several of our panelists mentioned was that the Security Council may find itself in an increasingly difficult situation if more and more issues are “uploaded” to it as “security” issues. I think the point that Paul Heinbecker just made about a “legislative” role of the Council puts these difficulties in the spotlight as well. More generally speaking, the more we make issues matters of security and high politics, there is a very real possibility that the existing legitimacy challenge for the Security Council will actually be exacerbated, and that the distance between its formal power to bind and its actual ability to influence may grow. In short, this is an issue cluster that also needs to remain on the table.

A second theme, and one that we’ve had a good discussion on, is the challenge of the diversity of actors, including the questions of what that diversity means for various processes, and for international law in terms of entitlements, rights, standing, or accountability. In the latter context, I think it is important that it is not necessarily the case that non-state actors need to have full legal status; one could think about different ways to bring them into the legal arena, through both soft law and hard law methods. I would also add to that it may be a matter of thinking, in the context of hard law, how one best conceptualizes non-state actor issues. Take the example of terrorists and the debate on whether we should be thinking about them as individual criminal actors or whether we should be incorporating them into an interstate war model.

Stephen Toope:

We also thought that the theme of spelling out challenges honestly, that Liz Dowds emphasized, is important. The idea that there is no iconic status here for the UN or any other organization is really important to pursue. I think this goes to the finance and management questions, which have to be explicitly on the table. We think that the High-level Panel did a pretty good job at that but subsequently the discussion has been lost and we think it really does have to be recaptured. Bertie Ramcharan phrased the same point somewhat differently by asking: what can the UN actually deliver? So that strategic question always has to be at the forefront.

The fourth theme which has come forward powerfully on this panel is: how do you engage publics? How do you try to help domestic populations understand the role of the UN and help them to care? That goes to a whole set of questions that John Bolton has raised, as Ken Abbott pointed out. These include the commitment to popular sovereignty, and whether or not international institutions can in fact engage at the level of popular sovereignty; and whether it’s possible to have accountability, questioning whether international institutions may not have to be entirely elite driven. This is a fundamental set of questions for any reform process going forward.

Jutta Brunnée:

Issue five is related to standards. What came out of Philip Alston’s remarks yesterday and also some of the discussions today was the idea that international standards need to be applied equally to all actors. For example, in the human rights context, it shouldn’t always be certain countries, mainly developing countries, that are being scrutinized. While Philip Alston thus stressed the need for consistent

application of standards, he also noted the need to contextualize standards so that developed countries would not necessarily be held to the same standards as developing countries. However, in today's discussion on the use of force it was Mary-Ellen O'Connell's observation that it was important that we have fixed standards that are indeed applied equally to all. It seems that the problem of standards relates to the issue of due diligence also. For example, as much as we want to make non-state actors more accountable, it does seem that it remains equally important to hold states to their due diligence obligations. Here I would just point to some of the comments made by Bertie Ramcharan, who noted that in preventing state failure it is crucially important to focus on state level action, albeit against the backdrop of basic principles of international solidarity and cooperation.

Stephen Toope:

Sixth, a lot of people talked about whether some of what we saw in the reform process is going to be this year's crop of ideas, which may have replaced other good ideas that were last year's crop of ideas. A question that we would close with, and it has particular relevance within Canada, is the question how central the responsibility to protect concept is. We actually saw versions of the concept being invoked in terms of public health, in terms of the national protections systems of human rights and in environmental protection. But of course, in the Outcome document, the right-to-protect concept is actually quite constrained and limited in its meaning. It is focused on extreme human rights situations. How useful is right-to-protect as a framing concept? Is it a fundamental challenge to the notion of sovereignty that is now going to get picked up and used and applied in varied ways in different contexts? We think that it is a concept that is going to be very interesting to track over the next while. And with that, I will say thank you for wonderful contributions by all the participants.