

## DEBATE

### IS THE UNITED NATIONS STILL RELEVANT?

The relevance of the United Nations (UN) to the development of international law and to international security remains vigorously contested. In this inaugural debate, we have invited contributions from two scholars who reflect the division. Professor William Burke-White, of Penn, contends that “[t]he active engagement of the Security Council and a range of other UN organs in the processes of international lawmaking has never been more necessary.” Indeed, Burke-White maintains that “[t]he UN and its organs are more urgently needed today than ever before to facilitate the creation of broad international treaties, to codify and interpret customary rules, or to ‘legislate’ on behalf of the global community.” Professor Abraham Bell, of Bar-Ilan and Fordham, is less sanguine. Bell “argue[s] that the UN makes a net negative contribution to aggregate international welfare in all but the category of facilitating mostly non-controversial treaties.” Further, he suggests “that legal rules and institutions should be judged by the results they produce rather than the aspirations they purport to represent.” On this score, he writes, “it is far from self-evident that the good aspirations produce good results,” and that “only the good results should interest us.” We welcome your thoughts, comments, and reactions to the lively exchange below.

#### OPENING STATEMENT

*The Indispensable United Nations: A Necessary Forum for International Lawmaking in Response to Global Challenges*

William W. Burke-White<sup>†</sup>

In the wake of the failure of the United Nations (UN) Security Council to legitimate or prevent the 2003 war in Iraq, the summer

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2006 impasse over a resolution to the conflict in Lebanon, and the likely September 2006 stalemate with Iran over nuclear development, there are good reasons to be skeptical about the ability of the Security Council and, perhaps, the broader UN to fulfill their mandates to maintain international peace and security. Yet, in the face of new global challenges ranging from environmental degradation to infectious disease, from the proliferation of weapons of mass destruction to the prevention of terrorism, international lawmaking through the UN may be the best and possibly only means to promote international peace and security through the rule of law. The active engagement of the Security Council and a range of other UN organs in the processes of international lawmaking have never been more necessary.

In pursuing their various interests, states may choose from a broad array of means to cooperate. At times, they may choose non-legalized forms of cooperation such as implicit understandings and “handshake” agreements. In other circumstances, they may opt for formal legal arrangements with a single partner, such as a bilateral investment treaty. At still other times, regional treaties such as the North American Free Trade Agreement (NAFTA) or the European Convention on Human Rights may be preferred. The importance of such forms of lawmaking should not be underestimated; there are more than 60,000 bilateral treaties deposited with the UN. Yet, the processes of globalization, the growing dangers posed by transnational threats, and the need for broad global coordination requires legal rules that reach across the globe, beyond any single relationship or region. Despite its faults and limitations, the UN is by far the best-suited institution to lead the global lawmaking that is essential to respond to these new challenges. The UN’s longstanding prominence in the creation and enforcement of international legal rules must continue if the present moment’s challenges are to be met through the law.

While the Security Council’s exercise of its Chapter VII authority is the most likely to make the headlines, international lawmaking through the UN takes a number of forms. The International Law Commission (ILC)—a group of international legal experts tasked with the progressive development of international law—meets annually to develop foundational drafts for future international treaties, such as the Rome Statute of the International Criminal Court, and to explicate rules of customary international law, such as the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, which codifies customary rules of state liability. In addition, the

UN Sixth Committee offers a forum for discussion of international legal issues. The Human Rights Council (HRC) (formerly the Human Rights Commission) provides important jurisprudence in human rights law and monitors state compliance with human rights obligations. The International Court of Justice (ICJ), the chief legal organ of the UN, has a growing caseload of interstate legal disputes and has pushed the development of international law through important precedents interpreting international treaties and identifying rules of customary international law. Perhaps the most important contribution of the UN to international lawmaking, however, is its role in the creation of new international treaties. A wide variety of international treaties—ranging from the 1982 Convention on the High Seas to the 1999 Convention on the Financing of Terrorism—have been negotiated under UN auspices. In fact, since 1945, the UN is the official depository of 517 concluded multilateral treaties.

The UN offers at least four critical benefits to international treaty making. First, and perhaps most important, is the possibility for wide, and sometimes even universal, participation in the creation of the legal rules that regulate international affairs. Every state is represented at the UN and can be included in the processes of international lawmaking. While it is true that bilateral or regional agreements may result in deeper levels of commitment—greater synergies of interests are likely to be found amongst smaller numbers of states—the challenges and dangers the global community faces today demand the near universal participation in legal regimes made most possible through the UN. Whether international law seeks to regulate the Internet, respond to global warming, combat international terrorism, or address pandemic diseases, the exclusion or defection of only a small number of states may well render the broader enterprise of legalization worthless. A handful of serious polluters, a few safe havens for terrorists, or even one epicenter of disease outbreak may well undermine an otherwise global legal regime. The UN, with its broad reach, its all-encompassing membership, and its agenda-setting potential may well be the best (and perhaps the only) hope for developing universal legal regimes that can effectively respond to these new challenges.

Second, international lawmaking through the UN offers a global legitimacy critical to creating effective legal rules. Admittedly, the UN is subject to criticism—some of it justified—and its effectiveness has

been questioned by the current US administration. Yet, for much of the rest of the world, the UN remains the preeminent, if not the only, institution capable of conferring legal legitimacy worldwide. While many states note the lack of representativeness of the Security Council, they nonetheless respect the bargain struck in San Francisco in 1945 and the normative force of an institution designed to “save succeeding generations from the scourge of war.” Whatever form international lawmaking takes—be it a multilateral treaty or the identification of customary rules in a decision by the ICJ—the fact that such rules were created through the UN creates a considerable “compliance pull” for many states to ratify international treaties, accept customary rules and, perhaps, change their behavior.

Third, the UN allows representation of diverse interests and promotes more equitable outcomes. Working through the UN allows poorer or less-developed states (particularly those from the Global South) to be included in the creation of international legal rules. Whereas many states lack the resources to monitor the ad hoc creation of legal rules and many fewer send representatives to every diplomatic conference where such rules may be created, all are represented at the UN. In contrast to regional arrangements or bilateral arrangements, international lawmaking through the UN affords the possibility for preexisting subgroups of states to assert collective interests to counterbalance powerful states. The result may be more equitable legal rules to which there may be more widespread adherence.

A fourth important benefit of international lawmaking through the UN is the considerable reduction in contracting costs—making cooperation easier to achieve and legal rule making more efficient—accompanying the use of a preexisting international institution. The standing organs of the UN provide an already established forum for the negotiation of international treaties, the codification of emerging customary norms, and the explication of rules through judicial decisions. Organizing large conferences of states to conclude a treaty, setting the terms of reference for such a negotiation, or undertaking the background legal work to make a new treaty can be extraordinarily costly and time consuming, often preventing agreements from being reached. Collectively, the institutions of the UN—in which long-term investments have already been made—provide a relatively efficient means of lawmaking and require considerably less incremental expense. For example, the ILC, as part of its normal work, may engage in years of background preparation for a possible new treaty. State delegations in New York may discuss

and deliberate an emerging rule or proposed treaty. The UN Secretariat may coordinate an international treaty conference and the ICJ may interpret the resultant treaty in any subsequent dispute. The enhanced coordination and more cost-effective process that often accompanies international lawmaking through the UN may well result in new international agreements that otherwise would have been prohibitively costly to conclude.

Beyond its critical role in the creation and interpretation of international treaties, the UN Security Council has taken important new steps in response to pressing global threats. Whereas the Security Council has traditionally created international legal obligations under its Chapter VII authority with respect to individual states and in response to a clear threat to international peace and security, the Council has, in recent years, become more willing to recognize threats to international peace and security and to direct its lawmaking authority at the international community at large. For example, in response to systematic human rights abuse—traditionally a matter within the sovereign domain of states and outside the Council's purview—the Council has found a threat to international peace and security, invoked Chapter VII, created binding legal obligations, and even legitimated the use of military force to end such abuses. Likewise, the Council has shown a new willingness to create legal obligations for all states to utilize their domestic systems to respond to pressing international threats. For example, Resolution 1373 requires states to “prevent the commission of terrorist acts” through the domestic criminalization of terrorism financing, freezing of terrorist assets by national authorities, use of domestic courts to bring to justice those involved in terrorist acts, and ratification by domestic authorities of relevant antiterrorism conventions. While some have criticized such “legislation” by the Security Council as *ultra vires*, it offers an important new tool for the creation of universal legal rules and state obligations to respond to the most urgent threats and challenges. The imposition on all states of such specific obligations to take domestic action is likely to be a critical element of the future of international lawmaking. Only the UN Security Council has the legal capacity to do so.

Admittedly, the UN has its fair share of problems. The Security Council is often unable to reach agreement and its permanent membership is no longer representative. The General Assembly is subject to deep divisions and can be overly politicized. Processes of

lawmaking are often slow and cumbersome. While the reforms suggested by the Secretary General's High Level Panel on Threats, Challenges, and Change are promising—as indicated by the new Human Rights Council—their realization and ultimate success are far from assured. Reforms are urgently needed to ensure the long-term viability of the UN. The Security Council must become more representative. Mechanisms to prevent political deadlock in the Council and the General Assembly must be developed. The processes of lawmaking must become more rapid and responsive.

Yet, consider the alternatives to lawmaking through the UN, despite its faults. Informal and nonlegal cooperation will continue to be important but cannot generate formal, binding obligations. Bilateral treaties, while perhaps more effective in regulating matters that only pertain to two states, cannot provide the seamless legal regime needed to address global threats. The use of regional organizations as fora for international lawmaking has its place, but cannot respond to truly global threats and creates the potential for regional fragmentation. The creation of multilateral treaties through ad hoc processes is costly, often exclusionary, and may lack the legitimacy necessary to generate state compliance. The establishment of an alternative global institution of a general nature as a replacement for the UN is politically impossible. Institutions such as the proposed Council of Democracies as an alternative or supplement to the UN may be useful, but in the short to medium term cannot offer many of the key benefits of international lawmaking through the UN.

In the face of avian flu, Al Qaeda, climate change, and the proliferation of nuclear technologies, legitimate and effective global rules of international law are urgently needed to coordinate states' efforts and constrain governmental conduct. The UN continues to offer critical advantages that cannot be easily rivaled in the creation of such rules. The UN and its organs are more urgently needed today than ever before to facilitate the creation of broad international treaties, to codify and interpret customary rules, or to "legislate" on behalf of the global community. Whether the UN's potential to generate effective legal responses to these threats is fully realized, however, will depend on whether the organization itself embraces the reform process and whether states are willing to commit to the global processes of lawmaking so urgently needed.

## REBUTTAL

*The Dispensable United Nations*Abraham Bell<sup>†</sup>

It will perhaps help matters if I state at the outset my points of agreement with William Burke-White. Like Professor Burke-White, I believe that the International Law Commission (ILC) can play a marginally useful role in helping to draft new treaties on many—mostly innocuous—subjects. I also agree with Professor Burke-White that if one only takes into account the marginal cost of the ILC drafting a new treaty and not other costs, the ILC might be the lowest-cost provider of these legal services.

Unfortunately, I believe this exhausts the points of agreement.

In essence, Professor Burke-White proposes four arguments for believing that the UN is an efficient lawmaker, which, for reasons I address below, I do not find convincing. He then makes an even more unpersuasive leap from this claim to the argument that the UN as a whole is an institution that makes a positive contribution to international welfare. Professor Burke-White's argument on this last point comes in two forms. The first, and weaker, of these assertions is that "international peace and security" is promoted in some significant manner "through the rule of law." The second, and more modest—but, I would say, still unconvincing—claim proffered by Professor Burke-White comes in a three-part proposition: (1) there are global public goods; (2) some of these global public goods are in the form of global laws; and (3) the UN is the best available institution to lead the production of these goods. To be fair, I should add that my skepticism about all of Professor Burke-White's claims places me, rather than him, outside the mainstream.

Let me begin at a point of relative agreement with Professor Burke-White. To evaluate the UN's true contributions—or lack thereof—it's best to understand that the UN actually fulfills a number of roles. Its most high-profile role—and the one that generally serves as the primary justification for the UN's continued existence—is its responsibility to "maintain" peace and security. Other prominent

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roles include the UN's alleged contribution to the protection of human rights and its production of information (and disinformation). The smallest of the UN's official roles is its facilitation of various, mostly noncontroversial treaties. There are also a handful of other functions that we can safely ignore for the sake of discussion. A nonofficial and rarely discussed role is the UN's production of patronage jobs and distribution of rents: the UN has a workforce of over 50,000, of which 7500 are employed by the Secretariat alone, and a yearly operation budget of more than \$2.5 billion; it also deploys 67,000 personnel in more than a dozen "peacekeeping" missions, and it disposes of tens of billions of additional dollars through other budgets.

I would argue that the UN makes a net negative contribution to aggregate international welfare in all but the category of facilitating mostly noncontroversial treaties. Additionally, I would argue that the contributions in this last category could be made much more cheaply by an ILC unconnected with the UN and organized along the lines of the American Law Institute.

Let's look at each of these items in turn. The peace and security role of the UN is loudly trumpeted in the UN Charter and informs much of the activity of the Security Council and General Assembly. Yet, with a handful of exceptions, the UN has made little contribution here. Many conflicts have never been addressed by the UN at all. Others have been addressed by dozens of toothless resolutions that have made no dent. In some cases, the UN has exacerbated conflicts by directly encouraging aggression—consider, for example, the Human Rights Commission's (HRC's) repeated resolutions endorsing Palestinian "resistance" by "all means necessary"—or by rewarding aggressors. Even if one ignores the last set of cases, the overall UN contribution here must be viewed as negative, because even doing something ineffective is costly; at the very least, it involves organization costs, and it likely discredits the idea of intervention, raising the costs of other kinds of collective action.

The UN record on human rights is even worse. Professor Burke-White indirectly acknowledges the appalling record of the UN's HRC by endorsing the reform that abolished the Commission and replaced it with a Human Rights Council; disturbingly, Professor Burke-White cites this reform as an accomplishment even though it is already clear that the new Council shares all the pathologies of the old Commission. Like the old Commission, the new HRC is comprised in large part of serial human rights abusers like Saudi Arabia, Cuba, China, and Azerbaijan and has an anti-Israel monomania that has led

the Council to resist all country-specific resolutions except those attacking Israel's human rights record and to hold two special sessions so far—both attacking Israel—even as the Council has said nothing about genocide in Darfur, oppression of women in Saudi Arabia, political repression in Syria, a dystopic police state in North Korea, and open planning for genocide in Iran. Meanwhile, the UN's General Assembly has issued a number of human rights-related resolutions, many of which have grown into treaties, but the outpouring of platitudes has hardly translated into greater global respect for human rights. Indeed, several studies, such as those of Oona Hathaway, suggest that the human rights treaties have actually served as cover for worsening human rights records.

Relatedly, the UN has used its enormous resources to produce reams of information in the form of studies, investigations, etc. In theory, provision of this sort of information by a central authority could be beneficial, as it overcomes a potent free-rider problem. However, the actual information produced is massaged in order to distort decision making and is tailored to produce desired political results. In some cases, the disinformation production is open, as in the UN's only committees and divisions devoted to advancing the claims of a single people or state—the Committee on the Exercise of the Inalienable Rights of the Palestinian People and the Division for Palestinian Rights—and their affiliated NGO Network on the Question of Palestine. These have provided vital information, such as that Zionism collaborated with the Nazis, that Jews encourage anti-Semitism by failing to “contextuali[ze] the memory of the Holocaust” and by subscribing to “genuine Zionism,” and that an integral part of Zionism is the tenet that “[i]f Palestinians cannot be removed by massacres and expulsion, they shall be removed by extermination.” In other contexts, the disinformation is less open, but no less disturbing. For example, UN-appointed investigators have refused to find evidence of weapons programs or genocidal intent for fear of the likely political consequences. And no information at all has been produced about many problems, such as terrorism by certain groups, creating damaging misimpressions about the location and nature of global challenges.

Even the basic lawmaking functions within the UN are not without problems. While I concede some usefulness in having a treaty clearinghouse as well as a small commission that attempts to codify various parts of international law, this seems more the work of a small

academic department than a sprawling worldwide bureaucracy with billion-dollar budgets. In addition, the UN has contributed a share of mischief here, as various quasi-legislative acts of the General Assembly have been presented as customary international law despite the absence of state practice, or, indeed, a compelling rationale.

And thus we come to the true usefulness of the UN: its enormous budget and patronage. As the Oil for Food scandal showed only too well, the UN wields and abuses enormous amounts of money. In addition to feather-nesting, the UN bureaucracy purchases various constituencies that then support the continued work and funding of the UN. Given the various pathologies of public choice, this sort of negative-utility bureaucracy is all too sustainable. However, that does not mean it makes a positive contribution to global welfare.

What then of Professor Burke-White's arguments in favor of the UN? He argues that the UN does a better job of lawmaking than anyone else for four reasons: (1) the possibility for wide, and sometimes even universal, participation in the creation of the legal rules that regulate international affairs; (2) the UN's global "legitimacy" that is critical to creating effective legal rules; (3) the UN's representation of diverse interests and promotion of more equitable outcomes; and (4) the reduction in contracting costs that accompanies the use of the UN as a preexisting international institution.

This last argument is the most easily disposed of. The fact that many of the costs of negotiating a treaty in the UN appear in a different UN budget hardly demonstrates that use of the UN is cost-effective. While it is true that the costs of creating the UN are sunk and should not be counted against the cost of negotiating a treaty within the UN, ongoing operating costs are highly relevant. I suspect that when all relevant costs are taken into account, in most cases, the UN is not the most cost-effective means of negotiating treaties.

The alleged equality of UN representation is even less persuasive. By the nature of international law, treaties bind only willing signatories; thus, it is not clear how or why representation in the UN enhances full representation in treaties. Unrepresented countries would simply not be bound. Moreover, the UN's record demonstrates, if anything, lack of equality. The political blocs in the UN are well-known, as are their prejudices. Finally, it is not clear why equality among regimes of various degrees of repression and freedom is a particularly compelling goal. By a similar token, in a world of telecommunications and cheap travel, it is not clear why the existence of the UN ensures greater treaty participation.

The UN certainly enjoys a good reputation in some circles, although this reputation is quite limited and does not seem to have had very much effect in actually leading to positive results. The reputation of the UN has had obviously limited effect in bringing states to accept and comply with legal rules. And such positive reputation as there is seems in many ways to have been purchased by distributing funds and political favors in a manner that directly undermines the mission of the UN.

Finally, it is difficult to see why one should ignore organizational costs in examining the utility of the UN in undertaking action.

But even if one accepts *arguendo* all of Professor Burke-White's arguments that the UN does a better job of global lawmaking than anyone else, together with the indubitable proposition that there are global challenges for which global solutions would enhance global welfare, this hardly demonstrates that the UN warrants continued support.

Consider the following argument. Earthquakes are terrible natural phenomena that kill many people every year. There is no perfect solution known to humankind that will prevent earthquakes. Proponents of human sacrifice to Mother Gaia hope that the human sacrifices will reduce the number of earthquakes every year. While they acknowledge that human sacrifice is not a perfect way of eliminating earthquakes, everyone knows that there is no competing method anywhere in the world that does a better job of reducing the number of earthquakes. We should therefore increase the number of human sacrifices to Mother Gaia.

I trust that most people will understand just how illogical this argument is. Shockingly, however, this is the logical structure of argument that is regularly invoked in international law and international relations circles in favor of various functions of the UN.

Thus, to take a recent real-world example from the UN, consider Security Council Resolution 1701 of August 11, 2006, intended to resolve conflict between Israel and Hezbollah in south Lebanon primarily by disarming Hezbollah. Yet, since the cease-fire went into effect on August 14, all relevant parties—from the Lebanese government and the UN force (UNIFIL) to Hezbollah itself—have explicitly committed themselves to not disarming Hezbollah.

What then are we to think of the Security Council resolution that seeks to bring about an end to the conflict by means of a disarmament that certainly will not occur? Secretary of State Condoleezza Rice

explained: “I don’t think there is an expectation that this force is going to physically disarm Hezbollah. I think it’s a little bit of a misreading of how you disarm a militia. You have to have a plan, first of all, for the disarmament of a militia, and then the hope is that some people lay down their arms voluntarily . . . .”

Where is the logical connection between the UN resolution laying out the plan and the hope?

Let me state this differently. My most basic premise—which is appallingly controversial for most international law scholars—is that legal rules and institutions should be judged by the results they produce rather than the aspirations they purport to represent. In saying this, incidentally, I do not mean to deny the potential utility of legal rules that are themselves aspirational and are unaccompanied by enforcement mechanisms. Rather, I mean that even in such cases, since it is far from self-evident that the good aspirations produce good results, only the good results should interest us. Indeed, well-intended rules and institutions may produce harmful results on the whole.

Professor Burke-White points to various global problems—WMD proliferation, terrorism, infectious disease, and the like. He does not claim that perfect solutions may be found for these problems, and he acknowledges a handful of UN problems, such as the Security Council’s frequent deadlocking and antiquated membership, the political inclinations of the General Assembly, and the excessive bureaucracy. He argues only that no international institution can take certain kinds of lawmaking steps regarding these issues better than the UN. He shows that the UN has taken many such lawmaking steps and that proponents hope that such steps will lead to reducing the net harm produced by these problems. He thus concludes that the UN is “urgently needed.” Nowhere does he actually demonstrate that these lawmaking steps actually reduce the net harm produced by the problems. Indeed, if one looks at the actual examples cited by Professor Burke-White, it seems clear that the UN has not had a positive effect at all.

Despite an impressive outpouring of words, the UN has done little effectively to address the problems mentioned by Professor Burke-White—like terrorism prevention, global climate change, and proliferation of weapons of mass destruction—and in some ways has even exacerbated them. The UN has done nothing to prevent North Korea from obtaining nuclear weapons, and it seems highly unlikely that the UN will do anything effective to prevent Iran from completing its plans to obtain such weapons. The UN has played a

useful role in collecting some kinds of information about Al Qaeda, but has actually undermined other antiterror efforts. Not only did UN organizations develop cozy relations with Hezbollah, but one of the findings of the Oil for Food investigation was that UN money indirectly subsidized Palestinian suicide bombings.

I've no doubt that there are global wrongs for which there are available solutions—even if only partial—that are blocked by strategic or collective action problems. However, in the main, the UN shows no sign of being a useful mechanism for resolving these problems.

#### CLOSING STATEMENT

William W. Burke-White

While working under mosquito netting in Gulu, Uganda, where I am doing research on the political effects of the International Criminal Court, I am using an intermittent supply of electricity from a generator to power my laptop and access Professor Bell's response. I am taken aback not only by the professor's tone, but by his apparent desire to change the boundaries of the narrow argument of this debate. The argument I have set forth is that "the active engagement of the Security Council and a range of other UN organs in the processes of international lawmaking has never been more necessary." Professor Bell has responded to my intentionally narrow argument with a full-blown and energized—even angry—attack on the whole UN.

Perhaps my read of Professor Bell's response is in part influenced by the conditions in which I am attempting to respond, but I doubt it. This is, after all, a place in which the UN may be the only entity contributing to the welfare of the local population. First, the professor steps outside the debate's set boundaries to argue "that the UN makes a net negative contribution to aggregate international welfare." This does not respond to my basic claims about the importance of the UN to the creation of international legal rules, particularly in the face of present global challenges. I am simply not going to follow him into an argument about the more general contribution of the UN to international welfare—not because of my precarious electricity source, but because that is not our task in this debate. Instead, I shall limit this counter response to those of the

professor's arguments that address the UN's role in international lawmaking and to my basic claims regarding the importance of international legal rules, particularly in the face of present global challenges.

Professor Bell's most significant claims with respect to the UN's international lawmaking function are that the rule of law does not promote international peace and security and that international law is not a "global public good." Hence, it would follow from his argument that, even if the UN were an efficient lawmaker, the resultant legal rules are a burden on, not a benefit to, global welfare. This argument has little merit. It would be interesting to debate the level of contribution international law makes to international peace and security or public welfare, but to deny any contribution stretches the limits of reality. At the very least, international law provides three important functions that impact international peace and security and global public welfare: coordination, constraint, and process. First, international legal regimes allow cross-border coordination on issues ranging from the protection of diplomats to the protection of mountain gorillas, from the smooth transit of aircraft to the accurate delivery of international post. Second, international legal rules provide constraints on state behavior. These constraints may not be absolute, but they do increase the costs of defection and pressure states to conform their behavior to agreed-upon standards in areas like the conduct of war and the protection of human rights. Third, even where international legal regimes do not result in agreed-upon standards of behavior, they often create processes for cooperation and dispute settlement amongst states that in turn may promote international peace and security. Professor Bell is right that state behavior may often fall short of the rhetoric of legal rules, but those rules still generate pressures on state behavior and make considerable contributions to the conduct of international affairs and domestic governance.

Despite Professor Bell's contention that international law does not promote public welfare, he acknowledges "some usefulness in having a treaty clearinghouse as well as a small commission that attempts to codify various parts of international law." He suggests, however, that this function would be better carried out by "a small academic department." Admittedly, a small academic department might be a less costly producer of draft treaty texts, but it would lack the legitimacy, global voice, and institutional backing afforded the ILC by its position within the UN system. Would that my academic department had the global clout to draft international treaties! But,

alas, even Penn and Fordham Law Schools are unable to supplant the ILC and the UN.

I turn now to Professor Bell's specific responses to my arguments that the UN is necessary as an international lawmaker, particularly at the present moment. Unfortunately, only a very small portion of Professor Bell's comments address the issues at the heart of our debate, and his analysis does nothing to change my basic position.

I argued first that the UN affords the possibility of broad and, perhaps even universal, involvement in the creation of international legal rules. I never suggested that all states will join all treaties drafted under UN auspices. States will only ratify treaties when they deem it in their interests—for whatever reasons—to do so. However, because all states are represented at the UN and maintain missions in New York, drafting treaties through the UN increases the likelihood that a significant number of states will be aware of a treaty process and involve themselves in it. Such participation, in turn, increases the likelihood that the ultimate text of a treaty will reflect the interests of such states and that they will at least consider ratification. Such wide participation is often critical to addressing pressing global challenges for which broad-based coordination and cooperation is needed.

Second, I argued that international lawmaking through the UN offers critical legitimacy for international legal rules. Professor Bell responds by claiming that the UN's reputation is "quite limited" and "purchased by distributing funds and political favors." His view of the UN is clearly very negative. But, as he admits, his views are "outside the mainstream." Some powerful states may at times be frustrated by the UN, particularly when it seeks to block their international aims. Yet, in much of the rest of the world, the UN does in fact carry global legitimacy. I write this response from an internally displaced persons' camp in northern Uganda. Here there may be frustration that the UN has not been able to end the twenty-year conflict, but the array of UN relief organizations are recognized as a critical lifeline for the population and because of this, the UN is held in extraordinarily high regard. It is this regard—which is by no means limited to northern Uganda—that carries over into the lawmaking arena and gives the UN an unrivaled ability to generate compelling international legal rules.

Third, I suggested that creating international law through the UN results in greater diversity and equality of outcomes. To be clear, in many aspects of international law diversity and equality may not be appropriate goals. Hence, bilateral or regional treaties are often the

most effective international legal instruments for interstate cooperation. However, when responding to truly global challenges or addressing subjects that require world-wide coordination, diversity and equality in international lawmaking may be the best way to ensure wide-spread compliance with the resultant legal rules. The inclusion of diverse views may water-down legal instruments or produce results that do not appeal to certain states. If certain states want thicker legal regimes than treaties with diverse participation may afford, they are able to enter into supplemental agreements amongst themselves. Even relatively thin treaties that generate widespread compliance, however, can have a significant and positive impact on addressing global threats or promoting worldwide coordination.

Finally, I argued that international lawmaking through the UN offers a reduction in contracting costs. Professor Bell disagrees, suggesting that the UN merely shifts costs to different budget lines. Neither Professor Bell nor I have actual budget figures for international treaty drafting within and without the UN. But, simple logic recognizes that the UN already has the infrastructure in place to undertake international treaty negotiations. That decreases the marginal cost of each new lawmaking process. In the case of multilateral treaties drafted outside the UN, much of the sunk costs of that infrastructure would have to be expended anew for each separate treaty regime. Equally, operating outside the UN, states would need to make considerable incremental financial outlays to participate in ad hoc treaty drafting processes, whereas most states already have legal representation at the UN. The efficiency and reduced contracting costs that come with these permanent institutions make it easier to undertake treaty drafting processes, facilitate cost-effective state participation in those processes, and increase the likelihood of the successful conclusion of treaty instruments. Without the UN's infrastructure, the depth and scope of international treaty rules regulating state behavior would probably be far more limited. Though one's normative view could differ, for me at least, a considerable number of those instruments promote global welfare.

I agree with Professor Bell that specialized institutions might be able to perform some of these international law making functions more efficiently than the UN. But, none can offer the collective benefits and public goods provided by the UN in the creation of international legal rules. An International Treaty Depository could quite cheaply maintain records of international agreements in force. Law professors could dream up potential treaty clauses. Conference centers could host ad hoc treaty negotiations. However, such

individualized bodies would lack the participation, legitimacy, equality, and established infrastructure of the UN and would be unlikely to produce effective, much less respected, international legal regimes.

I would be among the first to suggest scores of reforms that would make the UN more effective generally or as an international lawmaker specifically. The UN is far from perfect, but it is the best institution we have available to generate new international legal rules. Its contribution to the creation of international law is significant, and the UN is likely to continue to lead such processes for the foreseeable future.

#### CLOSING STATEMENT

Abraham Bell

Professor Burke-White is quite right to identify in my writing a distinctly negative tone directed toward the UN—the subject of our discussion. While I have nothing but the highest respect for Professor Burke-White, I think it is appropriate to have a negative attitude toward an institution that does more harm than good for the world. Of course, whether the UN is such an institution is a point on which Professor Burke-White and I clearly disagree.

Professor Burke-White suggests that it is beyond the scope of our debate to discuss the overall utility of the UN, but he continues to make claims that go a fair way toward erasing the distinctions between that debate and the narrower debate on the UN's contribution to international law. Additionally, and just as importantly, Professor Burke-White missteps by claiming that international law is a positive utility good, (as I would call it, rather than public good)—a claim with which I heartily agree in some cases—and then describing international law uniformly, as if the positive utility of agreements on uniform air traffic rules demonstrates the positive utility of human rights treaties. On this last point, of course, I disagree very strongly.

Let me begin with the latter point first.

International legal rules are made for a variety of reasons. Some legal rules are made in order to ease international cooperation on matters like the flow of international post or in order to create reciprocal and easily understood rules of the treatment of diplomats. As I said earlier, the UN makes a valuable contribution to the

production of such innocuous rules by helping codify them through the ILC. And, as I also said, this contribution could also be made just as easily by a small academic body without the attendant bureaucracy of tens of thousands and a budget of billions.

I doubt that an international consortium of top academics would enjoy significantly less legitimacy and goodwill for this limited function than the UN. Moreover, these are precisely the kinds of treaties for which such legitimacy and goodwill are not terribly necessary to sign up customers. Incidentally, Professor Burke-White argues that I am wrong to view the UN's legitimacy as limited in scope primarily to its distribution of largesse. He then brings as an example the high legitimacy enjoyed by the UN in Uganda due to the UN's distribution of aid and suggests that this legitimacy carries over into the lawmaking world. I rather think that his example makes precisely the point that I was trying to make about the kinds of legitimacy enjoyed by the UN. In addition, Professor Burke-White suggests that "powerful states" are the chief objectors to the "global legitimacy" carried by the UN. But all states, great and small, as large as the US or as small as Lebanon, do a wonderful job of recognizing the legitimacy of UN action that regards others, while ignoring the legitimacy when it conflicts with their own agenda.

Other legal rules are not made to ease cooperation, but to send messages, often in direct opposition to the actual results of the rules themselves. Thus, for example, legal treaties on human rights are apparently made not to create or cement uniform standards of human rights, but, rather, to distract criticism. Thus it is that human rights treaties have demonstrably failed to lead to better human rights records. The General Assembly has played an indispensable role in creating such kinds of treaties. However, I do not consider the results to be positive utility goods, no matter how high-minded the sentiments that appear in the words employed by the treaties.

Professor Burke-White misapprehends my argument if he reads me to say that international law never produces positive utility. But the agreement that it is sometimes good hardly demonstrates that it is all the time, or even most of the time.

And now to the second issue of the UN as a whole.

Let us assume, *arguendo*, that I am right about the overall negative contribution of the UN to world utility. If that is the case, are any of Professor Burke-White's arguments about the importance of the UN to lawmaking persuasive? Should we support a multibillion dollar institution with multiple world headquarters and a permanent bureaucracy of tens of thousands so that more states will be aware of a

treaty-making process? Or to more precisely regulate the minutes of debate among delegates of various potential signatories? Or to be sure that treaty advocates remember to work through the whole rolodex and touch base with all potential signatories? Why is this sort of subsidy necessary? Are coordination costs like telephone calls and ad hoc conferences that high? Professor Burke-White suggests viewing the UN bureaucracy and structural costs as sunk. However, the enormous operating budgets, as well as the opportunity costs of continued devotion of physical assets like realty and less tangible assets like diplomatic efforts and time are not sunk. They represent the potential for enormous savings.

This brings us to the elephant in the room.

There are some kinds of potential international laws that would make a positive contribution to global utility but that are not adopted due to free-riding, defections and other strategic moves. These strategic obstacles could be overcome by certain kinds of collective action mechanisms. Thus, were the UN this sort of mechanism, it would play an indispensable role in the production of some types of international law. However, as it is configured, the UN does not, has not, and never will play this role. It is true as well that there are real international public goods (albeit, impure), i.e., goods of supra-national scale that will not be provided by competitive forces among states. Thus, in theory, there is a net positive contribution to global utility to be made by a supplier of such goods. However, the UN has never been, nor will it ever be a cost-effective and reliable supplier of such goods. The valuable contributions that could be made by a truly effective global collective action mechanism for combating military aggression or human rights predations therefore remain theoretical, and cannot be associated with the UN.

Without these contributions, what does the UN contribute to justify the enormous outlays, and, indeed, the undermining of other, potentially more effective means of collective decision making? I'm afraid that I cannot think of any justification. Certainly the justifications mentioned by Professor Burke-White, such as treaty participation, could be easily accomplished through less costly institutions than the UN. Stated otherwise, although I recognize that the UN produces items of value as well as items that harm, what little good it produces is not worth the price of the UN's continued existence.

If one agrees with me that as a whole the institution of the UN

produces more costs than benefits, then this would seem definitively to rule out continued operation of the UN for any purposes, including for lawmaking. However, this is not to say that there should be no international institutions that contribute to lawmaking. There's no reason that a body like the ILC that has hitherto been associated with the UN could not continue to operate under a less costly bureaucratic canopy, and under a different formulation. There's no reason why state delegations could not meet, even regularly, in order to negotiate and adopt treaties. In other words, there's no reason to forgo producing such positive utility goods as are to be found in international lawmaking in a post-UN world.

Finally, let us return to the broad claim made by Professor Burke-White's original piece and not referenced in his rebuttal—"international lawmaking through the UN may be the best and possibly only means to promote international peace and security through the rule of law"—as well as the narrower claim central to both of his pieces: the "active engagement of the Security Council and a range of other UN organs in the processes of international lawmaking has never been more necessary."

Let me address each claim in turn.

I think I have already adequately expressed my skepticism about the ability of the UN to promote international peace and security by means of international lawmaking, as well as international law enforcement, or, indeed, any of the other means available under the UN Charter. While there may be individual incidents in which the UN has made a positive contribution to international peace and security, on the whole, the UN's contribution, when taking into account organizational and other associated costs, has been negative. Thus, as I wrote earlier, even if the UN is the institution *best* situated to promote international peace and security, it is still not a *good* institution. Professor Burke-White would judge the contributions of UN lawmaking on peace and security positively on the basis of contributions on "issues ranging from the protection of diplomats to the protection of mountain gorillas, from the smooth transit of aircraft to the accurate delivery of international post." I trust it is evident why I think this is a non-sequitur. Alternatively, he sees a positive contribution in speculated pressure on states to behave better in the arenas of "the conduct of war [and] the protection of human rights," as well as "processes for cooperation and dispute settlement amongst states that [] *may* promote international peace and security" (emphasis added). Yet, such empirical evidence as there is suggests that his speculations are wrong and that the effects are just the

opposite.

As to the second claim, I think it is ill-founded too, but I should preface my explanation with a linguistic note. As I wrote previously, it makes no sense to talk about what is *needed* when we should be talking about whether particular acts or institutions are worthwhile. We may need world peace and a Security Council that creates and preserves world peace, but that doesn't mean we are going to get them. So let me take Professor Burke-White's claim to be that the active engagement of the Security Council and other UN organs in the processes of international law is beneficial. Here, once again, I find no grounds for agreement, aside from an ILC subject to the caveats I already discussed.

The General Assembly, notwithstanding an entirely dispensable and largely ceremonial role in some ILC-driven treaties, has primarily "contributed" to international law by producing a raft of human rights treaties that do not protect human rights, a number of anti-terrorism treaties that do not prevent or diminish terrorism, and some war and military-related treaties that do not improve global welfare with respect to war. At the same time, it has overseen the treaties' non-implementation and taken other routine action in such a fashion as to actually diminish respect for human rights, increase terrorism and foment conflict. It has also abused the goodwill of those who believe in the principles of human rights and peace in order to extract huge rents for the unworthy and dishonest.

The Security Council, for its part, has carefully done little to nothing to encourage compliance with the high-minded fluff nursed into full-fledged treaties by the General Assembly. The Security Council has engaged in quasi-legislation, such as the antiterrorism Resolution 1373 mentioned by Professor Burke-White, but to dubious effect. Thus, for example, while Resolution 1373 calls upon states to

[f]reeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities,

various UN organizations as well as many Security Council member states continue to cooperate with and provide funds to persons and entities that facilitate terrorist acts as defined by the same International Convention for the Suppression of the Financing of

Terrorism of 9 December 1999 that is referenced by Resolution 1373.

I have not yet mentioned the International Court of Justice (ICJ), a body that has played a useful role in the development of some doctrines of international law, despite also setting back other doctrines in a handful of horribly politicized and legally indefensible decisions. Like the ILC, the ICJ could exist independently of the UN, as it did prior to the UN Charter under a different name and formulation. Indeed, the ICJ would probably benefit from being cut loose; ICJ independence would end such political distortions of the Court's appointment and decision-making procedure as the ICJ sitting in judgment on Israel's anti-terror actions in 2004 while the UN-controlled appointment procedures made Israel the only state in the world ineligible to have a judge sitting on the Court.

To sum up: there are some valuable lawmaking capacities in the UN, but none that could not be more valuably provided outside of the UN. As the UN is an institution whose net contribution to global welfare is negative, it would be better to move these lawmaking capacities out of the UN forthwith.