Part One

RATIONALE FOR THE REVIEW OF THE MULTILATERAL TREATY-MAKING PROCESS

Première partie

RAISONS JUSTIFIANT LE RÉEXAMEN DU PROCESSUS D'ÉTABLISSEMENT DES TRAITÉS MULTILATÉRAUX

Part One

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1. The Foreign Minister of Australia, in his speech to the General Assembly at its thirty-first session, referred to the suggestion which had been made by Australia in the Sixth Committee in 1975[2] that the time was ripe for the United Nations to review the process by which the international community makes multilateral treaties. He said:

> "The ways in which we approach multilateral treaty-making are varied, chancy, frequently experimental and often inefficient. They place great burdens upon the Governments of Member States, especially upon the developing countries, and it is open to question whether the community could not find more economical and efficient methods of drafting conventions."[3]

I. PURPOSE OF THE INITIATIVE

2. The purpose of the present initiative is to occasion examination of the methods of multilateral treaty-making employed in the United Nations and under its auspices. This consideration should be directed towards an assessment of whether the methods employed are as efficient and economical as the needs of the community require or circumstances permit. If the assessment indicates—as seems likely—that there is room for improvement in the methods employed, then the General Assembly should consider the steps which may be taken to achieve this.

3. It must be emphasized that the proposal relates exclusively to the methods by which the texts of multilateral treaties are prepared within the United Nations. The initiative looks forward, but not backward. Though it must necessarily start from the procedures which have been followed in the past, its intention is to secure an improvement in the techniques which will be used in the future. The initiative is in no way concerned with the substantive content of treaties, except to the extent that the subject-matter of a treaty may be relevant to the identification of the best procedure to follow in preparing it. Nor is it intended that the present initiative should extend beyond the process of multilateral treaty preparation. The dimensions of the exercise are sufficiently great, and the effort in itself sufficiently worthwhile, to justify emphasis at the present time on its limitation to the treaty-making process alone.

II. Extent of United Nations treaty-making activity

4. The United Nations seeks to fulfil the purposes stated in Article 1 of its Charter by both proposing courses of political conduct and preparing for international acceptance a wide variety of multilateral conventions. The agenda of every session of the General Assembly contains a significant number of items which relate to various stages in the United Nations treaty-making process. Of the 124 items on the agenda of the thirty-first session of the General Assembly, no less than 17 involved multilateral treaties under preparation or review covering a wide range of subjects.[4]

5. During the 32 years of the existence of the United Nations, some 80 substantive conventions have been concluded under its aegis, not to mention half as many again in the form of protocols amending or extending earlier instruments. These are listed in the Secretariat's publication entitled *Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions*. In addition, there are those treaties which, though originating in United Nations organs, are not deposited with the Secretary-General. Thus treaty-making activity within the United Nations can be seen to be striking in its extent—as to numbers of treaties concluded and especially as to range and complexity of subjects covered.

6. As a glance at the calendar of United Nations conferences will show, the pace of international legislative activity is intense. In the course of any single year, Members of the United Nations will be expected to participate in the preparation of one stage or another of at least a score of treaties. In addition to involvement in the meetings at which the texts are discussed, Members are obliged to consider in their capitals the policies to be adopted towards drafts, as well as the ratification and often the legislative implementation of texts which have been completed and are found to be acceptable. The burden which these processes place upon the administrative machinery of all States, and especially upon new or small States, requires no elaboration.

7. The extent of multilateral treaty-making cannot be measured exclusively in terms of the United Nations as such. States also have a heavy commitment to treaty-making in the specialized agencies of the United Nations system, in the regional organizations outside the United Nations system and in independent conferences, such as that on humanitarian law. While it is not suggested that the present initiative should be directly focused upon multilateral treaty-making practices in these other bodies, it is evident that they cannot be ignored when identifying the extent to which activity in the United Nations poses a problem for Members.

III. Variety of methods used

8. The methods used for the initial preparation and subsequent development of draft conventions in the United Nations vary widely according to the organ within which the subject-matter is being handled—and sometimes even within the same organ. The technique used in one organ is not necessarily

influenced by the experience of other organs or even by its own past practice. Moreover, there is no manual of treaty-making techniques which records the methods used and which can serve as a guide to the best methods to be employed in the future.

9. As the list of treaties under consideration at the thirty-first session of the General Assembly shows, at any given moment treaty-making activity tends to be concentrated in certain fields. There is nothing fixed about this distribution, which is bound to alter as times and political conditions change. But for the moment it is evident that the most active areas are: nuclear testing and weapons limitations; controls in the use of other weapons; outer space; human rights; the law of the sea; and international legal matters generally.

10. The process of producing a treaty differs in each of these fields. Treaties of a technical legal character are initially prepared mainly by the International Law Commission. The carefully ordered work of this organ provides a helpful standard of comparison and may therefore be referred to more fully. The main elements in the International Law Commission process (though the pattern is not a rigid one) are: appointment of a special rapporteur; the preparation of a special report or series of reports containing analyses, draft articles and commentary; consideration by the Commission at several readings; opportunities for governmental comment on the emerging texts through observations addressed to the Commission or through debate in the Sixth Committee on the annual reports of the Commission; eventually the adoption by the Commission of final draft articles with commentary; consideration in the Sixth Committee of the General Assembly; and, lastly, a diplomatic conference using the final draft articles as a basis of discussion. Thus, we have here a process marked by the initial application of one expert mind to the basic preparatory work, followed by subsequent detailed scrutiny by a relatively small group of additional experts, gradual elaboration of texts bearing in mind governmental reactions and, only when the subject has been thoroughly prepared, the holding of a diplomatic conference. At all stages, the preparatory work is adequately, if not fully, recorded. The method, though open to some improvement, has had a notable measure of success in producing some widely accepted conventions.

11. By contrast with this highly ordered method, one may refer to the experimental and not always satisfactory way in which the treatment of the law of the sea has developed over the last decade. From the decision in 1967 to consider the utilization of the resources of the sea-bed beyond the limits of national jurisdiction, the United Nations has moved on to an expanded agenda covering the whole of the law of the sea; and this has been examined first in an *ad hoc* committee, then in a special committee and now in no less than six main sessions of a diplomatic conference, supplemented by numerous intersessional meetings. The process of negotiation has been far from simple and has been marked by a degree of improvisation (some of it imaginative and possibly of long-term value, but some of it not), which has been time-consuming and has led only slowly to results which are as yet incomplete. And much of what has gone on has taken place in working groups and sub-committees whose deliberations are not recorded. The result is a striking absence of records in an area of debate where records would normally be of major importance as an aid to interpretation.

12. It is, of course, possible to suggest a number of explanations of the differences in method between the law of the sea negotiations, which concluded in 1958, and those now in progress: the present exercise is more "political" than the one which concluded in 1958; it is more creative of new law and less a restatement of existing law; it covers a wider number and range of topics; the international community has grown considerably in size in the intervening period and the process of achieving consensus has become correspondingly more difficult. But, while all these "explanations" are true as statements of fact, they do not, either individually or collectively, explain in functional terms why the Members of the United Nations chose, or acquiesced in, this particular legislative technique for pursuing its objectives from 1967 onwards; and, having regard to the pace at which the conference has moved and the difficulties which it has experienced, there is certainly room for consideration of whether the adoption of different methods might have led to better results.

IV. INQUIRY NOT TO EXTEND TO THE WORK OF SPECIALIZED AGENCIES

13. The two examples just cited serve to illustrate the variety and limitations of treaty-making methods at present employed in the United Nations. This is not the place to multiply them. By contrast, the practice of some specialized agencies is more settled. In the International Labour Organisation, the procedure for the drafting and consideration of a convention is contained in section E of the Standing Orders of the Conference. It is clear and precise in its indication of the steps to be followed, as well as of the respective roles of the Conference, of members and of the International Labour Office, and it gives ample time and opportunity for extensive but orderly consideration by, and consultation of, all the interests concerned. To some extent the same is true in the International Civil Aviation Organization, which performs a comparably specialized task in the preparation of international standards and recommended practices applicable to its field of activity. However, because the conditions prevailing in the specialized agencies are so markedly different from those in the United Nations, it is contemplated that the treaty-making activities of the specialized agencies should be the subject of consideration only in so far as their practices can provide useful indications of possible improvements in United Nations techniques.

V. NATURE OF THE INQUIRY

14. Into what kind of matters might the proposed inquiry enter? It is necessary to probe closely questions which do not appear previously to have been examined in any detail. For example, what is the best first approach to a new topic for treaty-making—an inquiry by a single expert, by the Secretariat or by a committee? If by a committee, then should it be a committee comprising all Members or only some? Should it consist of government representatives

or of experts? Is it right to assume that these are the only alternatives? Should there perhaps be supplementary machinery whose responsibility it would be to co-ordinate the activities of all elements interested in a particular subject and ensure that an appropriate report is prepared which seeks to reflect all points of view? What should be the form of reports—whether of such a body or of any other person or entity? Should they be standardized? How should they present the relevant facts, the legal considerations, the proposals and the comments? Should there be a requirement that an attempt be made to assess the extent and nature of the impact of proposals upon the domestic law of the Member States? Is there a need or scope for an indication of uniform methods of State implementation of treaty commitments? What is the best stage at which to inject the views of States into the treaty-making process? How may such views best be conveyed—by answers to questionnaires, by comments on drafts or by discussion in committees? And when should a proposal be deemed ripe for consideration by a diplomatic conference? Is the present general practice of diplomatic conferences satisfactory? Ought there to be some method of identifying and representing the various groups of interested States so as to reduce the scale of participation in debate? Is the search for consensus, and the width of expression of views which that necessitates, a more efficient method of reaching a collective conclusion than a vote taken after the expression of fewer views? Is it sufficient that when the conference concludes its work it should do so only with a convention? Or should the conference prepare a report containing an explanation or a commentary upon the convention—in a manner comparable to the explanatory memoranda which in some States accompany legislation?

15. The above questions are given only as examples of the many that can be posed in this connection. But they should not be taken as implying that the sponsoring States have a particular view of the answers which should be given or that they consider that these questions are necessarily the most important. The questions are intended only to indicate the kind of detail into which it is desirable now to enter in order that the United Nations may be satisfied that it has at least performed its duty of self-examination in this respect. Moreover, it should be borne in mind that the inquiry could well conclude that, although there is scope for a uniform approach to certain classes of subject, the approach cannot be the same for all classes.

VI. POSSIBLE COURSE OF THE INITIATIVE

16. As to the question of how to proceed in the proposed exercise, it is suggested that the item should be referred to the Sixth Committee for debate, with a view, in the first place, to the adoption of a resolution seeking a detailed study of the subject. This report, which would need to take into account the views expressed and suggestions made in the Sixth Committee debate, should examine in deep detail the treaty-making methods which have actually been used in the United Nations since its inception. It would need to look also at comparable techniques used in specialized agencies and the methods of legislation employed in States. It is to be hoped that this study,

which could be sought from the Secretariat, possibly in co-operation with UNITAR, would be available in time for circulation by early 1979. In addition, Governments, specialized agencies, the International Law Commission and other interested inter-governmental organizations experienced in the preparation of multilateral treaties might be invited to submit by 31 July 1979 their observations on the question. These could also be circulated. The matter could then be further discussed at the thirty-fourth session of the General Assembly in 1979.

17. It would be premature now to suggest with any exactness what steps might then follow. But, if there were sufficient agreement amongst Members, it might then be appropriate to refer the question to a small *ad hoc* committee to consider the matter and perhaps to draft a manual of recommended practices to aid the organs of the United Nations in the selection of the most suitable techniques of treaty-making for use in the prevailing circumstances. The contents of this manual would serve as guidelines. They would not in any way be mandatory; and they would be bound to recognize that no single procedural pattern could be applied to every kind of treaty-making effort. An important objective in this examination would be concern to simplify for States their participation in the treaty-making process and thereby to facilitate so fas as possible the ratification by States of concluded treaties and the domestic implementation of the obligations assumed under such treaties. After the conclusion of the work of the *ad hoc* committee, the matter could once again be considered in the Sixth Committee so that the appropriate conclusions might be drawn.

18. The United Nations is the world's principal instrument of international co-operation. On any view of the matter, it seems inconsistent with the standard of efficient operation which the international community is bound to set itself that, after virtually a third of a century of intense treaty-making activity, it should not have begun to assess the adequacy of its treaty-making methods; and it is time that it should start now.

NOTES

[1] This is based on document A/32/143, and corrigendum dated 18 July 1977 entitled "Request for the Inclusion of An Item in the Provisional Agenda of the Thirty-second Session, Review of the Multilateral Treaty-Making Process, Letter dated 19 July 1977 from the representatives of Australia, Egypt, Indonesia, Kenya, Mexico, the Netherlands and Sri Lanka to the United Nations, addressed to the Secretary-General".

[2] *Official Records of the General Assembly, Thirtieth Session, Sixth Committee,* 1541st meeting, para. 16.

[3] *Ibid., Thirty-first Session, Plenary Meetings,* 9th meeting, para. 191.

[4] The topics included: the principles governing the use by States of artificial earth satellites for direct television broadcasting; incendiary and other specific conventional weapons which may be the subject of prohibitions or restrictions of use for humanitarian reasons; a comprehensive ban on nuclear and thermonuclear tests; the prohibition of military or any other hostile use of environmental modification techniques; prohibition of the development and manufacture of new types of weapons of mass destruction and new systems of such weapons; human rights and scientific and technological developments; torture and other cruel, inhuman or degrading treatment or punishment; elimination of all forms of religious intolerance; adoption law; successions of States in respect of treaties; the non-use of force; hostages; the norms and principles of international economic development law; and the law of the sea.