Part III Technique—Innovation in Treaty-Making at the United Nations, Ch.30 The Negotiation of Multilateral Treaties at the United Nations a negotiator's view

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(p. 615) Chapter 30 The Negotiation of Multilateral Treaties at the United Nations a negotiator's view

WHEN discussing negotiation, it is common to distinguish between negotiating a treaty and negotiating the settlement of a dispute, though disputes may sometimes be settled by a treaty.[2] Most studies have addressed negotiation as a method of dispute settlement, where it holds pride of place as the most common method, especially for the settlement of bilateral disputes.[3] The negotiation of multilateral treaties is a distinct matter. (p. 616) While multilateral treaties may in fact settle bilateral and other disputes (as, for example, the United Nations Convention on the Law of the Sea undoubtedly did[4]), that is not seen as their primary aim.

Since its creation, the United Nations (UN) has been at the heart of multilateral treaty-making, including as regards what are sometimes termed "law-making" treaties (that is, treaties that set out general rules of law potentially applicable to all states).[5] Over the last 70 years, a large number of treaties have been negotiated within or under the auspices of various UN organs,[6] and a variety of procedures have been employed.[7] This chapter reviews some of the options available for treaty-making at the UN,[8] and does so from the point of view of negotiating parties.[9] The role of the International Law Commission (ILC), a subsidiary organ of the UN General Assembly, is also highlighted.

The present chapter focuses on the negotiation of treaties within the UN itself, with examples taken from the practice of UN organs, especially in the "law-making" field. It does not address directly the great codification conferences, such as the first Law of the Sea Conference of 1958, the various Vienna Conferences, the Third UN Conference on the Law

of the Sea (1973–1982), or the Rome Conference of 1998. Such conferences have already been the subject of useful writings, including recently.[10]

(p. 617) 1 The United Nations and the Techniques of Treaty-Making

The techniques of treaty-making remain largely uncodified and are inherently flexible.[11] While there are some common elements, each negotiation has its own special features and dynamics. To seek to reduce matters to tidy theories or to generalize is not particularly rewarding, or necessarily welcome to participants. Nonetheless, it is illuminating to look briefly at the different efforts of states and the UN to develop the techniques of treaty negotiation.

Early attempts to codify and develop rules concerning treaty negotiation were made at the time of the League of Nations. The Committee of Experts for the Progressive Development of International Law had the idea of codifying procedural rules for international conferences.[12] The goal of the Committee was to put at the disposal of states rules that they could apply or modify, without being overly prescriptive.[13]

The Committee of Experts established a subcommittee to deal with this question. The subcommittee issued a report noting that codification was possible, as long as the rules were broad enough to give states the necessary freedom to adapt them to specific circumstances.[14] The report also noted that some procedural rules may have a customary status.[15] However, the reactions of states to the report showed that they did not desire to see such rules codified, or considered that, were they to be codified, they should be simply *jus dipositivum* and broad.[16] No further action was taken by the Committee or the League in this matter.[17]

(p. 618) The question of developing procedural rules for treaty negotiation came up again decades later. In its work on the law of treaties, in 1962, the ILC adopted on first reading a draft article 5 entitled “Negotiation and drawing up of a treaty.” The draft article read:

> A treaty is drawn up by a process of negotiation which may take place either through diplomatic or some other agreed channel, or at meetings of representatives or at an international conference. In the case of treaties negotiated under the auspices of an international organization, the treaty may be drawn up either at an international conference or in some organ of the organization itself.[18]

The commentary to this provision stated that, while the contents of the article were more descriptive than normative, the Commission decided to include it “since the process of drawing up the text is an essential preliminary to the legal act of the adoption of the text (…).”[19] In 1965, the Special Rapporteur for the law of treaties proposed, with little apparent enthusiasm, a new draft. There were divided views within the Commission on its usefulness, and it was referred to the drafting committee.[20] After consideration, the drafting committee proposed its deletion, and the Commission agreed.[21]

The Vienna Conference on the Law of Treaties (1968/1969) likewise did not include an article on negotiation. Nevertheless, as finally adopted, the Vienna Convention offers some basic guidance, referring (if only in a limited way) to the requirement of full powers (article 7) and to the adoption of the text of a treaty (article 9).

In the 1970s, upon an Australian initiative, the General Assembly considered an item entitled “Review of the multilateral treaty-making process.” The item resulted in an interesting volume in the UN Legislative Series, which, as has been noted elsewhere, remains of substantial interest today.[22]

In 1998, upon a Mongolian initiative, the UN General Assembly adopted, without a vote, a resolution entitled “Principles and guidelines for international negotiations.”[23] The preamble to the resolution recognized the importance of identifying principles and guidelines for purposes of negotiation, as they could “contribute to enhancing the predictability of negotiating parties, reducing uncertainty and promoting an atmosphere of trust at negotiations.” Its first operative paragraph broadly restates the principles enshrined in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, and reaffirms that they are “of relevance to international negotiations.” The second operative paragraph formulates seven guidelines. These include such statements of the obvious as “States should take due account of the importance of engaging, in an appropriate manner, in international (p. 619) negotiations the States whose vital interests are directly affected by the matters in question” and “States should adhere to the mutually agreed framework for conducting negotiations.” Those guidelines are in fact so broad that it is difficult to assess to what extent they are actually followed in practice. States must be assumed to negotiate in good faith and in full respect of international law, unless proven otherwise.

Perhaps unsurprisingly, no subsequent attempts have been made to establish general rules or principles concerning treaty negotiation at the UN. States seem to prefer to elaborate tailor-made rules for each negotiation. Nevertheless, such rules are not necessarily elaborated anew every time; experience does exist, and states and the UN have built upon it. The Rules of Procedure of the General Assembly, for example, are often used as a basis for negotiations.[24] They are well understood, and the result of long experience of multilateral diplomacy. Indeed, they were originally based largely on the rules of national parliamentary bodies. They aim to guarantee that proceedings are conducted fairly, while ensuring that progress cannot be unreasonably hampered and that business can be conducted efficiently.

2 Negotiating Multilateral Treaties within the UN: A Few Illustrations

This section provides some examples of negotiation of multilateral treaties within the UN. The aim is to indicate the variety of methods that may be employed by negotiators within the various organs of the UN, whether in New York, Geneva, Vienna, Nairobi, or elsewhere. As already mentioned, treaty negotiation is a flexible process, and new ways of negotiating treaties can always be envisaged.

2.1 Convention on the Prevention and Punishment of the Crime of Genocide (1948)

The negotiation of the Genocide Convention took place in the early days of the UN, between 1946 and 1948, at a time when the Organization had little experience of treaty-making, and before the ILC had commenced its work. The negotiation proceeded in a somewhat haphazard way, with the involvement of a range of bodies at various stages.[25]

(p. 620) The negotiation began with a draft resolution proposed by Cuba, India, and Panama,[26] which was considered by a subcommittee of the General Assembly’s Sixth (Legal) Committee. The subcommittee proposed early action with a view to the preparation of a draft convention on genocide and suggested that the General Assembly should request the Economic and Social Council (ECOSOC) to undertake the necessary studies and prepare the draft convention.[27]

On December 11, 1946, the General Assembly, upon the recommendation of the Sixth Committee, adopted resolution 96(I), requesting ECOSOC to undertake the necessary studies to draw up the draft convention. ECOSOC decided to entrust both the Commission on Human Rights and the Secretary-General with undertaking studies and preparing drafts.[28] The Secretariat prepared a study in 1947, which included a draft convention with

commentaries.[29] This draft was prepared by the Secretariat with the assistance of the very distinguished legal experts: Pella, Lemkin, and Donnedieu de Vabres.

Later in 1948, ECOSOC established an ad hoc committee, which produced a second full draft convention.[30] This draft was sent to the General Assembly for further discussion.

It was during that year in the General Assembly, and particularly in the Sixth Committee, that the Convention started to "take shape."[31] A new draft was prepared, which was sent to a drafting committee. The latter presented a new text in late November 1948, which was further discussed and adopted by 30 votes to none.[32]

The final draft was submitted to the plenary of the General Assembly, which adopted the Convention on December 9, 1948.

The successful conclusion of this important convention, within the UN, might have been followed by similar action on other topics. In fact, however, for the next two decades (and with the exception of treaties in the field of human rights), the major "law-making" conventions were all negotiated at diplomatic conferences. These were held under the auspices of, but not within, the UN. The diplomatic conference had been the traditional forum for negotiating a multilateral convention, and was probably deemed more suitable for the concentrated and deliberate negotiation required for the adoption of a well-considered and well-drafted treaty text. It was not until 1968/1969 that another major convention was negotiated within the UN itself.

2.2 Convention on Special Missions (1969)

Earlier conventions on diplomatic law (the Vienna Conventions on Diplomatic and Consular Relations of 1961 and 1963 respectively), like the 1958 Geneva Conventions on the Law of the Sea, were adopted at diplomatic conferences convened by the General Assembly to negotiate on a specific topic, on the basis of draft articles drawn up by the (p. 621) ILC. The Convention on Special Missions, however, was drawn up and adopted by the UN General Assembly.[33] It was negotiated within the Sixth Committee, over two sessions in 1968 and 1969, on the basis of a draft that the ILC had prepared at the request of the General Assembly.

In many ways, the procedure within the Sixth Committee followed that of the diplomatic conferences. The Sixth Committee formed a working group (corresponding to the Committee of the Whole of a conference). After discussion of amendments, texts were referred to a drafting committee, where much of the negotiation of the text took place.[34]

2.3 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (1973)

The Internationally Protected Persons Convention was drawn up rapidly, with a succession of terrorist attacks on diplomats no doubt instilling a sense of urgency among UN delegates.[35] Perhaps because it largely followed precedent in the antiterrorism field (The Hague and Montreal Conventions of 1970 and 1971 respectively), it was considered suitable for adoption within the Sixth Committee, without the need for a diplomatic conference. But that may have led to a certain politicization, since it was adopted by the same organ that was simultaneously dealing with the very controversial agenda item on "International terrorism."[36]

It was the ILC itself that, in 1971, indicated to the UN General Assembly that, if requested, it would prepare at its 1972 session a set of draft articles on the protection of diplomats.[37]

Later in 1971, the Assembly requested the ILC to study as soon as possible the question of the protection of diplomatic agents, with a view to preparing draft articles.[38]

In the course of a single session in 1972, the ILC adopted a set of draft articles and submitted them to the General Assembly.[39] In doing so, it departed from its usual methods. (p. 622) It did not appoint a Special Rapporteur, but instead acted through a working group. That same year, the General Assembly considered the ILC's report, and decided to take up the matter in 1973 with a view to the elaboration of a convention by the Assembly.[40]

The Sixth Committee negotiated the text of a convention on the basis of the text prepared by the ILC, and the General Assembly adopted the Convention in December 1973.[41] Somewhat unusually, the resolution by which the Convention was adopted became an important part of the negotiation. The resolution included a hard-fought-over paragraph, recognizing that the Convention could not in any way prejudice the exercise of the legitimate right to self-determination and independence, in accordance with the purposes and principles of the Charter, and—uniquely, it is believed—decided that the resolution, "whose provisions are related to the annexed Convention, shall always be published together with it."[42] This shows the risk of politicization of negotiations with organs of the UN, which is perhaps greater in New York than at Geneva or Vienna conferences.[43]

2.4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

The UN Torture Convention of 1984 was negotiated within an informal working group of the Commission on Human Rights, over some six years.[44] It was largely in the hands of human rights specialists, not generalist international lawyers. This may account for some of its novel provisions.

In December 1977, the General Assembly requested the Commission on Human Rights to draft the text of a Convention,[45] based on the General Assembly's 1975 Declaration on Torture.[46] The Commission entrusted this task to an informal inter-sessional working group,[47] which received drafts from the International Association of Penal Law and the Swedish government, the latter being chosen by the Commission as the basis for deliberations.

(p. 623) Negotiations within the informal inter-sessional working group lasted some six years, from 1978 to 1984. Eventually the working group succeeded in completing a draft convention, which the Human Rights Commission transmitted to the General Assembly. Two controversial questions remained: the competence of the Committee against Torture to issue country-specific comments and suggestions under article 19; and the mandatory character of the inquiry procedure under article 20. Most states wanted to adopt the Convention quickly, and Western states in the Third Committee of the General Assembly gave in to certain demands of the socialist states (which resulted in articles 28 and 19(3) of the 1984 Convention).[48]

It will be seen that the Convention was negotiated entirely within the UN organs responsible for human rights: the Commission on Human Rights, an informal inter-sessional working group of the Commission, and the Third Committee of the UN General Assembly. As noted previously, that no doubt influenced the drafting of the convention.

2.5 United Nations Convention against Corruption (2003)

The UN Convention against Corruption of 2003 followed close on the heels of the UN Convention against Transnational Organized Crime of 2000, and the negotiating processes were similar.[49]

An open-ended intergovernmental ad hoc committee for the negotiation of a convention on corruption was established by General Assembly Resolution 55/61 on December 4, 2000. Its terms of reference were taken note of in Resolution 56/260 in 2002.[50] It followed the Rules of Procedure of subsidiary bodies of the General Assembly.[51]

An informal preparatory meeting took place in Buenos Aires in December 2001. Fifty-six states attended, and 26 proposals were submitted for consideration. This resulted in a consolidated draft text that was submitted to the ad hoc committee in Vienna.[52] The ad hoc committee started its work on January 21, 2002, and held seven sessions. It finalized its work on October 1, 2003, and submitted a draft convention to the General Assembly.[53] Negotiations took place in Vienna, at the headquarters of the United Nations Office on Drugs and Crime (UNODC).

A number of points may be noted concerning this negotiation. The participation of NGOs, for example, was important, as it is for the negotiation of other major conventions nowadays. The ad hoc committee in fact allowed NGOs without consultative (p. 624) status with ECOSOC to participate on a case-by-case basis.[54] There was also a technical workshop on asset recovery, with invited experts to provide the negotiators with technical information.[55] Additionally, the ad hoc committee established a “consistency group” to ensure the consistency of the draft convention in all UN languages.[56] The importance of ensuring that the different language versions correspond is sometimes overlooked in the rush to sign a convention, which can negatively impact the final outcome. It is necessary to factor in, at an appropriate (late) stage, some process for ensuring that the different language versions are correct.[57]

2.6 United Nations Convention on Jurisdictional Immunities of States and Their Property (2004)

The ILC recommended in 1977 to the General Assembly the selection of the topic *Jurisdictional immunities of States and their property* for codification and progressive development.[58] That same year, the General Assembly invited the Commission to commence work to this end.[59]

The drafting of the Convention was a protracted affair, and some consider its adoption as a “minor miracle”:[60] there was a long lapse of time between the adoption of the final draft articles by the ILC in 1990 and the adoption of the Convention by the General Assembly in 2004. During this period, attention focused on five issues identified as most problematic, with the Sixth Committee referring the matters back to the ILC. This process was less than ideal, and some have suggested that it affected the coherence of the final text.[61] Be that as it may, the negotiation of the Convention also illustrates the variety of methods that can be employed within the UN for purposes of treaty-making, and how it can facilitate the conclusion of treaties that touch upon sensitive issues.

(p. 625) While in 1990 the ILC recommended to the General Assembly that it convene an international conference to examine the draft articles and conclude a convention, the timing was not good. But soon there were fundamental changes in international relations, some directly relevant to state immunity. Instead of convening a conference, the General Assembly established an open-ended working group of the Sixth Committee. The working group’s mandate was to consider states’ written comments and observations on the ILC’s draft articles and the views expressed in the General Assembly in order to facilitate the adoption of a convention. It would also continue to examine the question of convening a conference.[62]

The working group held meetings in 1992 and 1993, but no agreement was reached with respect to several substantive issues.[63] The General Assembly subsequently decided that informal consultations should also take place,[64] but these did not result in progress. In 1994, the General Assembly decided to defer the consideration of the topic until 1997, inviting states to submit comments on the Sixth Committee's work in the interim.[65]

In 1998, the General Assembly once again decided to establish an open-ended working group of the Sixth Committee to consider the outstanding substantive issues related to the draft articles. This working group met in 1999 and 2000. It also invited the ILC to present any preliminary comments it may have on those outstanding issues.[66] The ILC established a working group to deal with this request, which submitted a report by 1999.

In 2000, the General Assembly established an Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, which was to meet in 2002 for two weeks to further the work done, consolidate areas of agreement, and resolve outstanding issues.[67] The Ad Hoc Committee met in three annual sessions, from 2002 to 2004. It decided to establish a Working Group of the Whole[68] and, when necessary, informal consultative groups to deal with specific substantive issues.[69] The Committee adopted a final report and submitted it to the General Assembly in 2004.[70] Later that year, the General Assembly adopted the Convention.[71]

3 Lessons to Be Drawn

Before starting any treaty-making process, one should always ask two basic questions: Is a treaty really necessary to regulate the issue at hand, and, if so, what is the proper time to start negotiations? The answer to these questions will depend on many factors, (p. 626) including the subject matter of the possible treaty and the political context in which negotiations would take place. Vision and knowledge of the law are needed to get the answers right, and doing so is crucial because the success or failure of negotiations may depend on it. It could be assumed that when negotiations are highly protracted or when a treaty has little adherence (some examples have been given previously), these questions may have not been addressed correctly.

Once the decision to move toward a treaty has been taken, good preparation in advance of negotiations ("pre-conference phase"[72]) is of vital importance. As experience shows, when a negotiation takes place within the UN itself, advance preparation will usually include the preparation (or selection) of a basic text. In contrast to negotiation in a conference, there is in principle no need to agree in advance on rules of procedure, arrange the venue, set up a secretariat, decide on the length and number of sessions, etc. Negotiating within the UN can be considered to be less costly in these aspects and others (political, accommodation, and security),[73] although, of course, actual costs will be allocated to the UN Secretariat. The services of the UN Secretariat, including translation services and the possibility to negotiate in all UN official languages, are an asset. The UN may furthermore be considered a neutral place to negotiate treaties.

A possible additional advantage of negotiating a treaty within the UN is that it is always possible to request UN expert bodies for contributions at any stage of the negotiation. This was the case, for example, when the General Assembly asked the ILC to present comments in 1998 in respect of the draft articles on jurisdictional immunities of states and their property.

The role of the ILC in the treaty-making process, and particularly at the preparatory stage, deserves special mention.[74] The ILC is a primary means by which the General Assembly implements its function under Article 13.1(a) of the UN Charter of "encouraging the progressive development of international law and its codification."[75] In 1979, the ILC recalled that "the preparation of draft articles by the International Law Commission, a primary task inherent in its functions, has become an undertaking frequently leading to the

elaboration of multilateral treaties, constituting to that extent part and parcel of the (p. 627) contemporary multilateral treaty-making process."[76] The ILC specified that "[i]t is not for the Commission to elaborate multilateral treaties or conventions, but rather to prepare drafts susceptible of providing a basis for the elaboration of such treaties or conventions by States, should the General Assembly decide to make a recommendation to that effect."[77] In the same report, the Commission set out its "methods and techniques of work … as applied in general to the preparation of draft articles," as well as "other methods and techniques employed by the Commission."[78]

It is not the role of the ILC to prepare final texts of treaties. Therefore, and bearing in mind the subtleties of the Commission's own working procedures, care should be taken not simply to adopt drafts submitted by it at face value without proper discussion once they reach the negotiation process, for example in the Sixth Committee. Doing so could undermine the acceptability of certain multilateral treaties, as may have happened with the Convention on Special Missions.[79]

When deciding to negotiate a treaty within the UN, the question of where exactly in the UN to negotiate (that is, in which organ) immediately comes up. As shown in the previous section, negotiations in the past have taken place within a range of organs: the General Assembly's Sixth and Third Committees, the ECOSOC, the former Commission on Human Rights, and so on. Negotiations can of course take place in other organs as well. There are thus many options, and states can benefit from the different institutional arrangements that can be set up to carry out negotiations, as well as from the expertise of the representatives in the different UN organs. For example, negotiations of the UN Conventions against Corruption and Transnational Organized Crime were greatly enhanced since they took place in Vienna with the support of the UNODC.

The working methods, practice, and atmosphere within each of the UN organs varies, though in principle they all follow similar Rules of Procedure. A most important consideration is that the representatives of the member states in the various organs have different backgrounds, knowledge, and skills. This can greatly affect the drafting of a text.

Each organ has a plenary where general (and sometimes politicized) exchanges of views take place, which enable the negotiators to assess where negotiations are heading. Drafting committees are also crucial. They are usually (and ideally) composed of a smaller number of people and deal not only with drafting but also, at times, substantive points that cannot be settled in plenary. A consideration to bear in mind in this context is the importance of having comprehensive *travaux préparatoires* as well as good and accessible records.

As experience shows, it is also common practice within the UN to establish ad hoc committees or working groups to carry out substantive negotiations, which allows work to be done in a more informal manner (without records, and often with only a very (p. 628) concise report). An atmosphere of confidentiality is sometimes important, especially when sensitive issues are being discussed.[80]

Choosing the right chairperson may be of the outmost importance, as the success of a negotiation may largely depend on his or her skills in guiding the discussions. For example, Gerhard Hafner's able chairmanship of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property between 2002 and 2004 was crucial in bringing the work on that topic to a successful conclusion. The role of the chair of the Drafting Committee may likewise be vital.[81] Other members of the bureau may play an important role. As suggested previously, having participants who are experienced in multilateral negotiations and are good at drafting, and in the main languages,[82] may prove highly beneficial.

Because the UN works on an annual cycle, states negotiating treaties in that forum usually have ample opportunity to carry out inter-sessional work. This is important because it gives states enough time to reflect on the debates and discussions, to prepare thoroughly, and to hold informal discussions among themselves. However, having too much time to do something is not necessarily a good thing: the lack of pressure and the feeling that work can always be done the next year can prolong negotiations unduly and may be counterproductive. A central question here is how urgent are the adoption and entry into force of the desired treaty.

The choice of decision-making procedure may be critical, as was seen in relation to the Arms Trade Treaty of 2013. This was negotiated at a conference convened by the General Assembly, the rules of procedure of which required consensus for all non-procedural decisions. Three States (Iran, the Democratic People's Republic of Korea, and Syria) voted against the text of the treaty on the last day of the conference (March 28, 2013). Just five days later, on April 2, 2013, the General Assembly proceeded to adopt the text by vote (154-3-23), and opened the Treaty for signature.[83] And the importance of the choice of procedure was seen again in relation to the 2017 Treaty on the Prohibition of Nuclear Weapons. When the UN disarmament bodies could not take things further (because they operate by consensus), the UN General Assembly, by Resolution 71/258 of 23 December 2016, decided to convene "a United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination," and further decided "that the conference shall convene in New York, under the rules of procedure of the General Assembly unless otherwise agreed by the conference." (p. 629) A Treaty on the Prohibition of Nuclear Weapons was adopted by the Conference on July 7, 2017, by a vote of 122:1 (Netherlands):1 (Singapore). Some 69 member states did not take part in the conference, including all of the nuclear-weapon States.

The choice of forum may determine the choice of procedure; for example, a subsidiary organ of the General Assembly is likely to follow the voting rules in the General Assembly's Rules of Procedure. In practice, however, many treaty negotiations proceed on the basis of consensus, at least until the very last stages (when it may be necessary to vote down a recalcitrant participant). A whole range of options are possible: consensus, unanimity, simple or two-thirds majority. The choice will have an important impact on how negotiations are carried out.[84] The advantages of working toward a package deal ("nothing is agreed until everything is agreed") should be considered.[85]

When it comes to the choice of forum, there are two main routes open to states: a diplomatic conference and negotiation within a principal or subsidiary organ of the UN.

One of the main differences between negotiating within the UN or in a conference is the atmosphere and the people involved in each one of these fora. It is one thing to negotiate a treaty in a conference, where the representatives of states (diplomats and experts in the relevant field) are sent from capitals to carry out one specific task in a limited period of time. They can be expected to be specially chosen for and focused on the task at hand and to participate actively. A completely different matter is negotiating within a UN organ, where states' representatives are usually diplomats (often generalists and not necessarily lawyers) serving their respective missions who have a great number of other issues to address besides negotiating a treaty. It can be expected that less effort will be put into the negotiating process. Of course, states can deploy experts to their missions when a treaty is being negotiated within a UN organ, but that is not usually the case. Also, as mentioned previously, because the UN works on an ongoing annual basis, there is often a feeling that things can always be delayed, and the lack of pressure may cause a loss of momentum.

These issues were considered by the ILC in the 1950s, in terms that are still relevant today, when it considered what recommendation to make under Article 23 of its Statute on how states should proceed with its draft articles on *Diplomatic intercourse and immunities*. In 1957, Fitzmaurice (who favored a code rather than a convention) pointed to the (p. 630) disadvantages that the examination of the draft articles by the General Assembly might have, as opposed to examination at a conference:

It was most improbable either that the General Assembly would simply approve a draft convention in the form in which it was submitted by the Commission and open it for signature, or that it would convene a special conference to consider it, as it had done in the case of the draft articles on the law of the sea. It would be much more likely to examine it itself, *with far less time for careful study of it than the Commission had been able to afford; and in those circumstances, any changes it made might not be for the better*.[86]

A year later, the matter was still being discussed within the Commission. Mr. García Amador explained that:

> many conferences were held under the auspices of the United Nations. Some, such as the United Nations Conference on the Law of the Sea, had been very technical, but in the case of the draft articles before the Commission, no specialist knowledge was required. He therefore agreed with Mr. Alfaro; because of the need to reduce the number of conferences to a minimum, and because the subject was straightforward, the General Assembly might well, after discussion, submit the draft convention to Members for signature.[87]

The Secretary to the Commission (Mr. Liang), however, explained that:

> Except for the Convention on Genocide, he could recall no case in which the General Assembly had examined a draft convention in detail, article by article, and recommended it forthwith to States. He thought that it was unlikely that the General Assembly would itself examine the draft and commend it to Members for signature. The Assembly had a heavy agenda each year; furthermore many of the delegations did not contain more than a small number of lawyers.[88]

In the event, the ILC decided to recommend to the General Assembly that the draft articles should be recommended to member states with a view to the conclusion of a convention.[89]

The result of this decision was the highly successful Vienna Conference on Diplomatic Intercourse and Immunities, which was held over a single session in 1961. The high-level expert participation, and the fact that delegates were able to devote themselves full-time to the negotiations in Vienna, presumably contributed greatly to its success. Negotiation within an organ of the United Nations (such as the Sixth Committee) would be unlikely (p. 631) to have led to as satisfactory an outcome. On the other hand, there are cases, such as the 1973 Internationally Protected Persons Convention and other counterterrorism conventions, where the subject matter is such that negotiation within the UN itself is effective and efficient. The decision on the forum can be critical. It will be interesting to see what choice is made if the General Assembly ever decides to move toward a convention on the Responsibility of States for internationally wrongful acts.

4 Conclusions

While the brief account of the negotiation of a selection of multilateral treaties within the UN provided in Section 2 of this chapter indicates the great variety of negotiating procedures, it is also possible to draw some general lessons, as was done in Section 3. Some of these are particularly relevant to negotiating within the UN proper, taking into

account its unique characteristics, while others apply to negotiations more generally, regardless of forum.

However, as indicated in Section 1, notwithstanding the wealth of treaty-making practice within the UN, there has been only limited attempts to gather the experience together and draw up general guidelines or best practices. Indeed, experience suggests that each negotiation is different and flexibility is of the essence. That is hardly a surprise. Indeed, perhaps the most important factor is the least predictable: the human element. Negotiations are hugely influenced by the quality and qualities of the individual negotiators, especially the officeholders, the chairperson, and bureau members. Among the qualities required are a profound knowledge of the subject, and its political background. And perhaps above all common sense and patience. The experience and abilities of key players are often more important than their nationality; although it can in fact be an advantage if the leaders of the negotiation come from a state that is less directly involved in the negotiations. The quality of the secretariat members involved is also often important.(p. 632)

Footnotes:

1 Barrister, 20 Essex Street, London; Member of the International Law Commission. The author thanks Alfredo Crosato Neumann for his invaluable assistance in preparing this contribution.

2 Carl-August Fleischhauer, "Negotiation" in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol III (North Holland 1981, add. 1995) 535–37; Kari Hakapää, "Negotiation," in Rudiger Wolfrum (ed), *Max Planck Encyclopedia of Public International* Law (OUP 2013). The 1999 UN Principles and Guidelines for International Negotiation (UNGA Res. 53/101) state, in their fourth preambular paragraph, "that international negotiations constitute a flexible and effective means for, among other things, the peaceful settlement of disputes among States and for the creation of new international norms of conduct."

3 Negotiation is mentioned first in Article 33, para 1, of the UN Charter. The 1988 Manila Declaration on the Peaceful Settlement of International Disputes states that "States should bear in mind (…) that direct negotiations are a flexible and effective means of peaceful settlement of their disputes" (para 10). On negotiation as a method of dispute settlement, see *Handbook on the Peaceful Settlement of Disputes* (United Nations 1992) 9–24; JG Merrills, *International Dispute Settlement* (6th edn, CUP 2017) ch 1; John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (OUP 2000); Fred Charles Iklé, *How Nations Negotiate* (Evanston 1964); John Kaufmann, *Effective Negotiation: Case Studies in Conference Diplomacy* (Martinus Nijhoff 1989); VD Pastuhov, *A Guide to the Practice of International Conferences* (Carnegie Endowment for International Peace 1945); *Multilateral Environment Agreement: Negotiator's Handbook* (UN Environmental Programme 2007) at https://unfccc.int/resource/docs/publications/negotiators_handbook.pdf accessed January 15, 2019.

4 As the tribunal in the *South Sea China Arbitration* noted, "[t]he Convention was a package deal that did not, and could not, fully reflect any State's prior understanding of its maritime rights. Accession to the Convention reflects a commitment to bring incompatible claims into alignment with its provisions, and its continued operation necessarily calls for compromise by those States with prior claims in excess of the Convention's limits" (*The Republic of the Philippines* v. *The People's Republic of China,* PCA Case N° 2013–19, Award of 12 July 2016, para 262).

[5] Modern treaty-making may be traced back at least to the Peace of Westphalia (1648) and the Congress of Vienna of 1814/1815. The Hague Peace Conferences of 1899 and 1907 marked an important stage. The League of Nations produced a number of important treaties, though its major codification exercise, culminating in the Codification Conference of 1930, is generally regarded as having been less than successful.

[6] The numbers increase considerably if one takes account of those adopted within the wider UN system, including the specialized agencies and the International Atomic Energy Agency. Regional and subregional organizations, such as the Council of Europe, the Organization of American States, the African Union and ASEAN, are also much involved in treaty-making.

[7] In 2016 the General Assembly referred to the possibility of requesting the Secretary-General to provide information on all procedural options regarding possible action on the basis of the articles on responsibility of states for internationally wrongful acts of 2001 (see: UNGA Res. 71/133 (19 December 2016)). Whether the articles should take the form of a treaty or not has been much debated by states since they were adopted, and the Secretariat's response will be of much interest.

[8] Similar considerations may also apply to negotiations within specialized agencies and regional organizations.

[9] For a view from the Secretariat, see chapter 3 by Stephen Mathias in this *Handbook*.

[10] Kirsten Schmalenbach, "Lawmaking by Treaty: Negotiation of Agreements and Adoption of Treaty Texts" in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 87–110. It has been argued that "[m]any of the functions served by international conferences are nowadays equally capable of being performed either by a separate conference convened for a specific purpose or alternatively through the medium of a plenary gathering of the principal organ of an international organization" (*Satow's Diplomatic Practice* (OUP 2017) 586). This is perhaps so, but the characteristics of each forum may have an impact on the way those functions are carried out.

[11] George Korontzis, "Making the Treaty," in Duncan B. Hollis (ed), *The Oxford Guide to Treaties* (OUP 2014) 179.

[12] The Committee decided to analyze the following question: "S'il est possible de formuler des règles à recommander pour la procédure des conférences internationales, ainsi que pour la conclusion et rédaction des traités, et quelles pourraient être ces règles". See Comité d'experts pour la codification progressive du droit international, Rapport au Conseil de la Société des Nations sur les questions qui paraissent avoir obtenu le degré de maturité suffisant pour un règlement international (Questionnaires n° 1 et 7), adopté par le Comité à sa troisième session, tenue en mars-avril 1927, at 105. See Robbie Sabel, *Rules of Procedure at the UN and at Inter-Governmental Conferences* (3rd edn, CUP 2017) XX–XX.

[13] Comité d'experts pour la codification progressive du droit international, Comité d'experts (n 12) 105.

[14] ibid 106.

[15] ibid 107.

[16] ibid, comments by Austria (at 138), United Kingdom (at 145), Chile (at 148), Denmark (at 151), United States (at 161), France (at 165), Norway (at 178), Romania (at 201), Sweden (at 238), Switzerland (at 251), and Egypt (at 259).

[17] Sabel (n 12) XX; *Satow's Diplomatic Practice* 595; Raymond Cohen and Paul Meerts, "The Evolution of International Negotiation Processes" (2008) 13 *Intl Negotiation* 149–56.

[18] (1962-II) YBILC 166. The text was proposed by Roberto Ago, who saw it as an essential preliminary to the draft articles that followed. There was, however, little support for this provision among members of the Commission, who did not see it as indispensable (see: (1962-I) YBILC 245).

[19] (1962-II) YBILC 166.

[20] (1965-I) YBILC 40–43.

[21] ibid 255. See also Korontzis (n 11) 179.

[22] "Review of the Multilateral Treaty-Making Process" (1980) UN Doc ST/LEG/SER.B/21. See chapter 3 by Stephen Mathias in this *Handbook*.

[23] UNGA Res 53/101.

[24] Sabel (n 12); Korontzis (n 11) 183.

[25] Hirad Abtahi and Philippa Webb, *The Genocide Convention. The Travaux Préparatoires* (Martinus Nijhoff 2008); Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009); William A Schabas, *Genocide in International Law* (CUP 2009) 59–90; Christian Tams, Lars Berster, and Björn Schiffbauer (eds), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (CH Beck 2014) 35–38.

[26] Abtahi and Webb (n 25) 3.

[27] ibid 32. It was also suggested by some members of the subcommittee that the draft convention should be prepared by a small committee of jurists, but this was not taken forward.

[28] ibid 43–60.

[29] ibid 61.

[30] ibid 1110.

[31] Tams, Berster, and Schiffbauer (n 25) 11.

[32] ibid 12.

[33] See chapter 27 on diplomatic and consular relations by Duquet and Wouters in this *Handbook*. On the Convention on Special Missions, see Andrew Sanger and Michael Wood, "The Immunities of Members of Special Missions" in Tom Ruys, Nicolas Angelet, and Luca Ferro (eds), *Cambridge Handbook on Immunities and International Law* (CUP, 2019) 452–80.

[34] John W Young, "The United Kingdom and the Negotiation of the 1969 New York Convention on Special Missions" (2014) 36(1) The Intl History Rev 171–88.

[35] Michael Wood, "The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents" (1974) 23 ICLQ 791–817.

[36] An item entitled "Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes" was included in the agenda of the General Assembly in 1972, in response to the attack by the Black September on Israeli athletes at the Munich Olympics.

[37] (1971-II(2)) YBILC 352, paras 133–134.

[38] UNGA Res 2780 (3 December 1971).

[39] (1972-II(2)) YBILC 309–323, paras 54–69.

[40] UNGA Res 2926 (28 November 1972).

[41] UNGA Res 3166 (14 December 1973).

[42] As indeed it is, in UN publications, for example, in *The Work of the International Law Commission* (9th edn, United Nations 2017) 144.

[43] The controversies that arose when negotiating antiterrorism conventions and resolutions in the 1970s (terrorists/freedom fighters) foreshadowed the debate that has, since the year 2000, stalled the negotiations within the Sixth Committee of a comprehensive convention against terrorism (see chapter 8B by Rohan Perera in this *Handbook*).

[44] J Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff 1988); Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (OUP 2008).

[45] UNGA Res 32/62 (8 December 1977).

[46] UNGA Res 3452 (9 December 1975), "Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."

[47] UNCHR Res 18 (7 March 1978).

[48] Nowak and McArthur (n 44) 5.

[49] For a brief account of the negotiation process of the latter Convention, see: "Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions" UN Doc A/55/383 (2 November 2000).

[50] Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption (United Nations 2010) vii. The terms of reference are available in UN Doc A/AC.260/2 (8 August 2001).

[51] "Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on the work of its first to seventh sessions" UN Doc A/58/422 (7 October 2003), para 23.

[52] ibid, paras 19–20.

[53] ibid.

[54] ibid, paras 24–26.

[55] ibid, paras 36–43.

[56] ibid, para 98.

[57] The importance of ensuring the consistency between languages versions has been highlighted in the context of some of the other major conventions. With respect to the UN Conference on the Law of the Sea, for example: "The procedure adopted by the Drafting Committee for carrying out its task was novel. The Committee operated on three levels. On the first level there were the language groups of the Drafting Committee representing the six languages of the Conference (…) The language groups were open to all delegations whether members of the Drafting Committee or not (…) On the second level there were the co-ordinators of the six language groups who met under the direction of the Chairman of the Drafting Committee (…) Finally, on the third level was the Drafting Committee itself (…) The use of language groups by the Drafting Committee is a unique and particularly significant feature. They served an important technical function in that their existence

enabled all language versions of the text to be examined more closely than would otherwise have been the case and in many cases by those who participated in the negotiations" (LDM Nelson, "The Drafting Committee of the Third United Nations Conference on the Law of the Sea: The Implications of Multilingual Texts" (1986) 57 British Ybk Intl L 171–74.

58 (1997-II(2)) YBILC130, para 110.

59 UNGA Res. 32/151 (19 December 1977).

60 Roger O'Keefe and Christian J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013) xxxviii.

61 ibid xxxix.

62 UNGA Res 46/55 (9 December 1991).

63 O'Keefe and Tams (n 60) 6. On the negotiation of the 2004 Convention, see also Arnold Pronto and Michael Wood, *The International Law Commission 1999–2009* vol. IV (OUP 2010) 13–20 (with bibliography).

64 UNGA Res 48/413 (9 December 1993).

65 UNGA Res 49/61 (9 December 1994).

66 UNGA Res 53/98 (8 December 1998).

67 UNGA Res 55/150 (12 December 2000).

68 UN Doc. A/57/22, para 8.

69 UN Doc. A/58/22, para 9.

70 UN Doc A/59/22.

71 UNGA Res 59/38 (2 December 2004). While it has not yet entered into force, the Convention has proven to be quite influential since many of the rules contained therein have been considered to reflect customary international law.

72 Schmalenbach (n 10).

73 *Satow's Diplomatic Practice* (OUP 2017) 587.

74 As shown in the previous section, other UN expert bodies, such as the Commission on Human Rights, can also play an important role at the preparatory stage of a negotiation. However, their role has not been as prominent as that of the ILC.

75 Bruno Simma, "Article 13," in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) 525–51; Rosalyn Higgins et al, *Oppenheim's International Law, United Nations* (OUP 2017), ch 25 (Promotion of International Law). While the Statute of the ILC distinguishes between progressive development and codification, providing for different procedures for each, the Commission has not in practice observed this distinction, adopting instead what it has termed "consolidated method and techniques of work." See: Observations of the International Law Commission on the review of the multilateral treaty-making process, submitted pursuant to UNGA Res 32/48 (UN Doc A/CN.4/325), ILC Report 1979, vol II, Part One, at 183; Donald McRae, "The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission" (2013) 111 Kokusaihō gaikō zasshi 75; Michael Wood, "The UN International Law Commission and Customary International Law," Morelli Lecture, 27 May 2017, *Gaetano Morelli Lecture Series, E. Cannizzaro (ed.), Methodologies of International Law* (forthcoming 2019).

76 "Observations of the International Law Commission on the review of the multilateral treaty-making process, submitted pursuant to General Assembly resolution 32/48," UN Doc A/CN.4/325, in (1979-II(1)) YBILC 183, para 24.

77 ibid, para 25.

78 ibid, paras 34–63.

79 Young (n 34) 184.

80 Many debates between delegates are not recorded officially, and there are limited documents that can serve as *travaux préparatoires*. Sometimes informal summaries of general exchanges of views are provided, but these are not intended to be official records of the discussions. See eg "Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996," UN Doc A/58/37 (2 April 2003), paras 9 and 13.

81 Eg MK Yasseen at the Vienna Conference on the Law of Treaties.

82 Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 387–90.

83 UNGA Res. 67/234B (2 April 2013). For a brief account of the negotiation, see Stuart Casey-Maslen, Andrew Clapham, Gilles Giacca, and Sarah Parker, *The Arms Trade Treaty: A Commentary* (OUP 2016) 9–13.

84 Hakapää (n. 2), para 10; Korontzis (n 11) 183–84. According to one very experienced author, states should first set out their goal in terms of participation in a treaty (is it desirable or indispensable that a certain number of or all states become parties to the treaty?), then decide on a provision on entry into force accordingly (how many ratifications are needed for the entry into force?), and finally agree on the rule on decision-making procedure ("consensus if possible" if universal participation is only desirable; if universal participation is indispensable then consensus is the only way): Guy De Lacharrière, "Suggestions pour Négocier Mieux un Droit International Plus Efficace," in Jerzy Makarczyk (ed), *Essays in International Law in Honour of Judge Manfred Lachs* (Martinus Nijhoff 1984) 149, 156–57.

85 Robert Y Jennings, "Law Making and the Package Deal," in *Mélanges offerts à Paul Reuter* (Pedone 1981) 347–55; G. de Lothaire, "Aspects Juridiques de la Négociation sur un Package Deal à la Conférence des Nations Unies sur le Droit de la Mer," in *Essays in Honor of Erik Castren* (Finnish Branch of the International Law Association 1979) 30–45; Hakapää (n 2) para 10.

86 (1957-I) YBILC 88, para 67 (emphasis added). For an account of the debate, see Kai Bruns, "On the Road to Vienna: The Role of the International Law Commission in the Codification of Diplomatic Privileges and Immunities, 1949–1958," in Paul Behrens (ed), *Diplomatic Law in a New Millennium* (OUP 2017) 54–71.

87 Yearbook of the International Law Commission, 1958, vol 1, at p 199, para 71.

88 ibid, para. 76.

89 Yearbook of the International Law Commission, 1958, vol 2, at p 89, para 50.