

Law-Making Processes in the UN System — Some Impressions

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The Charter of the United Nations gave to the General Assembly the role of "... encouraging the progressive development of international law and its codification."¹ During the past half century, great strides have been made towards codifying and developing parts of customary international law in the form of Conventions. In the great majority of cases, Conventions on legal matters have been adopted by diplomatic conferences convened by the General Assembly, following work by the ILC, which is currently celebrating its 50th anniversary. An outstanding example of this process is provided by the Vienna Conference on the Law of Treaties which codified and developed the rules on that topic.² Shortly thereafter, the law of the sea was revised by the Third United Nations Conference on the Law of the Sea ("LOS Conference"), an entirely different type of conference in many important respects.³

This chapter reviews many of the processes of codifying and developing the rules of international law which have been used during the past 50 years. It does so primarily by making comparisons between the processes used in regard to the law of treaties and those used for the law of the sea, processes in which the author participated as a delegate. The chapter gives

¹ Article 13 para. 1 lit. (a).

² Official Records of the United Nations Conference on the Law of Treaties, A/CONF.39/11, 2 Vols. For an account of the Conference, see I. M. Sinclair, "Vienna Conference on the Law of Treaties", *ICLQ* 19 (1970), 47 et seq.; and for a survey of the resulting Convention, see his *The Vienna Convention on the Law of Treaties*, 2nd edition, 1984, and P. Reuter, *Introduction to the Law of Treaties*, 2nd English edition, 1995.

³ Official Records of the Third United Nations Conference on the Law of the Sea, United Nations Documents Vol. I to XVII.

the writer's personal impressions of the two Conferences, without attempting to give complete accounts of them,⁴ and offers some conclusions on the different processes of law-making under the auspices of the United Nations.

I. Impressions of the Two Conferences

1. Subject Matter

Treaties range in scope and character from bilateral transactions of a purely contractual nature through regional arrangements to universal conventions forming part of the general international order. Included in this latter category are the Charter of the United Nations and major law-making conventions such as the Vienna Convention on Diplomatic Relations. The law of treaties has to take account of and provide for this extreme range of legal instruments. The law governing agreements is clearly one of the fundamental parts of international law and, as such, it may be described as "lawyers' law", that is to say, a subject of interest primarily to practitioners and professors of international law. Although political leaders or experts in a particular field may become involved with the conclusion or the implementation of a particular treaty, they are unlikely to have occasion to take positions or express opinions regarding treaty law as such. Indeed, the conference in Vienna in 1968 and 1969 was attended almost exclusively by practising lawyers, including several members of the ILC.⁵ Many delegates were diplomats serving in the legal sections of Foreign Ministries⁶ and several others were professors with established international reputations.⁷ Many delegates went on to enjoy prominent careers as

⁴ For an authoritative account of the Third Conference of the Law of the Sea, see T. Koh and S. Jayakumar, "The Negotiating Process of the Third United Nations Conference on the Law of the Sea", in: M. H. Nordquist (ed.), *UNCLOS 1982. A Commentary*, Vol. I, 29, 1985.

⁵ Apart from Sir Humphrey Waldock, who served as Special Rapporteur in the ILC and as an Expert Consultant at the Conference, the President of the Conference, Mr. Robert Ago, the Chairman of the Committee of the Whole, Mr. T. O. Elias and the Chairman of the Drafting Committee, Mr. M. K. Yasseen, were all members of the ILC.

⁶ Including Riphagen (Netherlands), Thierfelder (Germany), Kearney (United States), Devadder (Belgium), Krishna Rao (India), Khlestov (Soviet Union), and Vallat (United Kingdom).

⁷ Including Professors Verosta and Zemanek (Austria), Sørensen (Denmark), Reuter and Virally (France), Castren (Finland), Dupuy (Holy See),

international lawyers, including in a few cases judges of the ICJ.⁸ There existed by the 1960s a rich state practice⁹ which underlays a large part of the roles of customary law on treaties, but no previous attempt had been made by the international community to establish conventional rules of law on the whole subject.¹⁰ The exercise at the Vienna Conference was one of codification, clarification and progressive development of existing customary law.

The law of the sea is also a basic part of international law, regulating states' uses of the seas and oceans. In some ways, it is akin to a Law of Property for states. Before the middle of the present century it, also, could be said to be "lawyers' law", leaving aside the occasional dispute about the breadth of the territorial sea.¹¹ However, these days the law of the sea is no longer the sole preserve of lawyers. Statesmen, diplomats and environmentalists follow the subject closely. Major interests are involved: state sovereignty, ownership of resources, communications, strategic defence, environmental protection, access to the sea for the landlocked states and scientific research, to name just a few. The LOS Conference which began in earnest in 1973 with a pre-session meeting before the final session in Jamaica, was a conference of politicians, diplomats and lawyers. Some of the prominent delegates, being already ministers in Governments, went on to be Prime Ministers¹² and Foreign Ministers¹³ whilst others became judges at the ICJ,¹⁴ the International Tribunal for the Law of the Sea¹⁵ and

Briggs, Sweeney, and McDougall (United States), Stuyt (Netherlands), Zourek (Czechoslovakia), Jimenez de Arechaga (Uruguay), Rosenne and Meron (Israel), Matine-Daftary (Iran) and Arangio-Ruiz, Sperduti, Barile, Capotorti and Malintoppi (Italy).

⁸ Including Ruda (Argentina), Fleischhauer (Germany), Ago (Italy), Elias (Nigeria), de Castro (Spain), Tarazi (Syria), El-Erian (UAR, Egypt) and Jimenez de Arechaga (Uruguay).

⁹ In English, *McNair's Law of Treaties*, 2nd edition, 1961, was the leading work, drawing on British practice.

¹⁰ The Harvard Research Project produced a Draft Convention in 1935, but that was a private initiative. The League of Nations Committee of Jurists considered the conclusion and drafting of treaties to be a subject for codification, but the Conference of 1930 did not have it on the agenda.

¹¹ R. Jennings/A. Watts, *Oppenheim's International Law*, 9th edition, Vol. 1, Parts 2 to 4, 611.

¹² Mr. Warioba of Tanzania, who later became a member of the International Tribunal for the Law of the Sea.

¹³ Mr. Castenada and Mr. Sepulveda (Mexico).

¹⁴ Notably Mr. Evensen (Norway) and Mr. Aguilar (Venezuela).

¹⁵ Many members attended parts or all of the Conference as delegates or members of the Secretariat of the United Nations.

the Appellate Body of the World Trade Organisation.¹⁶ Although many delegations were led by international lawyers, others were not. For instance, the British delegation was led not by the Attorney-General (as had been the case at the first LOS Conference in 1958) but instead by Mr. David Ennals M.P., the Minister of State for Foreign and Commonwealth Affairs, and by a series of senior diplomats (the first was Sir Roger Jackling, previously Ambassador in Bonn and one of the authors of the Quadripartite Agreement of 1971 on Berlin). Like the Conference itself, the delegation was much larger than that for the Vienna Conference. The British Delegation included at least two of the legal advisers of the Foreign and Commonwealth Office, as well as serving Naval Officers and shipping, fishing, hydrocarbons, nodule mining, scientific and environmental experts. Representatives of industry, drawn from mining, shipping and oil companies, were attached to the delegation as advisers. A few other delegations, especially during the session held in Caracas, included well-known international lawyers, notably Professor Oda and Professor D.P. O'Connell. The contrast in the make-up of delegations between this Conference, on the one hand, and the Geneva Conference of 1958 and the Vienna Conference 1968 to 1969, on the other, was striking.

As with the Law of Treaties, the LOS Conference had to review a rich state practice developed over very many years, but with the significant difference that a previous (and not entirely successful) attempt had been made to codify and develop the rules in the Geneva Conventions of 1958. The exercise at the LOS Conference was one of progressive development, consolidation and reform of existing customary and conventional law. In this element of reform, the LOS Conference was unique among the law-making Conferences held in the era of the United Nations.

2. Origins of the Conferences

The idea of codifying and developing the Law of Treaties sprang from the work programme of the ILC, created by the General Assembly. The Law of Treaties appeared on the ILC's initial list of topics suitable for codification, drawn up in 1949.¹⁷ The topic had earlier appeared on a similar list drawn up by a Committee of Experts of the League of Nations, but the report had not been acted upon as a result of doubts as to the feasibility of

¹⁶ Mr. Beeby (New Zealand).

¹⁷ *ILCYB* 1949, 281. The list was based on the work of Sir H. Lauterpacht.

codifying the whole of treaty law.¹⁸ These doubts had largely disappeared by the 1950s, although some experts still questioned the wisdom of concluding a treaty about the law of treaties.

The origins of the Third LOS Conference are more complex: three factors may be recalled. The failure of the Geneva Conference of 1958 and 1960 to reach agreement upon limits of national jurisdiction, notably the territorial sea, led to opposition to the Geneva Conventions of 1958 on the part of certain states. A second factor was the advance of technology, which produced at least two different effects. It rendered the definition of the continental shelf adopted at Geneva completely open-ended and thus unsatisfactory.¹⁹ It had also led to the making of a forecast in the mid-1960s that manganese nodules could soon be won at great profit from the deep sea-bed.²⁰ (The forecast has turned out to be incorrect.) A third factor was the wish of the United States and the Soviet Union to stabilise the Law of the Sea along agreed lines so as to prevent further unilateral claims. These three factors came together in the General Assembly and resulted eventually in the all-embracing agenda for the conference.

3. Preparations

The Vienna Conference was prepared over a lengthy period of 17 years, by the ILC working in consultation with Governments, principally in the Sixth Committee (Legal Questions) of the General Assembly and additionally through written comments. No fewer than four special rapporteurs²¹ worked on the topic and produced proposals in the form of draft Articles for the ILC. Each session, the Sixth Committee of the General Assembly debated the draft articles in the light of the comments received, adding useful commentaries. The revised draft articles formed the basic document for the Vienna Conference.²² In short, the preparatory work was thorough and highly professional.

¹⁸ The report is printed in: Sh. Rosenne, *League of Nations Conference for the Codification of International Law*, 1975.

¹⁹ Article 1 of the Convention on the Continental Shelf.

²⁰ Notably by J. Mero, *The Mineral Resources of the Sea*, 1965; E. Luard, *The Control of the Seabed. A New International Issue*, 1974. Mr. Luard later became the Minister in the Foreign Office with responsibility for the Delegation to the Conference.

²¹ Professors Briery, Lauterpacht, Fitzmaurice (who favoured a code rather than a Convention on the topic) and Waldock.

²² *ILCYB* 1956, Vol. II, 254.

The preparatory work for the LOS Conference was done by the First Committee of the General Assembly (Disarmament and International Security) and its subsidiary body, the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (commonly known as the Sea-Bed Committee) which met from 1970 to 1973. In 1970, the two Committees drafted the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction.²³ The Sea-Bed Committee also produced in 1972 an agreed agenda for the Conference in the form of the List of Subjects and Issues, running to 25 items.²⁴ In 1973, the Sea-Bed Committee produced a final report, but this was very far from being a basic document, such as a set of draft Articles, for the Conference.²⁵ Instead, the report ran to six volumes and contained a large number of purely national proposals, as well as the complete texts of the Geneva Conventions of 1958. To sum up, it is clear that the preparations were thus shorter and less mature than in the case of the Vienna Conference.

4. The Representation and Aims of the Main Groups

At the Vienna Conference, 110 states were represented, compared with a total of 126 UN Members in 1969. The political aims of Western States can be summarised as having been to codify the Law of Treaties in the form of a Convention which would command widespread support, and to avoid destabilising existing treaties. This meant that many Western States adopted a cautious attitude towards Part V of the basic document, concerning the termination and invalidity of treaties. The East European states were preoccupied with an extraneous political aim: securing an advance in the status of the German Democratic Republic (GDR). Accordingly, they pressed the proposition that all states were entitled to participate in general multilateral treaties, especially that on the Law of the Treaties. This "all States" proposal was opposed by the Western States, which did not recognise the GDR and had no interest in the late-1960s in enhancing its status, especially at a time when access to Berlin was regularly a source of East-West tension. This issue was a major political factor at the Conference, but there is little trace of it in the Convention. (This is fitting since the issue proved to be ephemeral.) For their part, some newly-independent

²³ A/RES/2749 (XXV) of 17 December 1970.

²⁴ A/CONF.62/29.

²⁵ Doc. A/9021, Final Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction.

states in Africa, Asia and Latin America and the Caribbean were concerned with the question of certain treaties which had been imposed upon them in the past. They wished to escape from the inequity of such unequal treaties. In other words, historical and political factors (principally East/West and to a lesser extent North/South) played important roles.

The LOS Conference, which began in December 1973 (less than five years after the Vienna Conference), was attended by 160 states (a large increase) and, in a new departure, by several national liberation movements (NLMs), such as the African National Congress, the Southwest Africa People's Organisation and the Seychelles People's United Party (before the independence of the Seychelles). The NLMs were authorised to attend as observers, being seated with national delegations behind nameplates and microphones (thereby making the Conference quasi-universal). This policy of including NLMs in the discussions took on great significance when universal participation in the resulting Convention came to be sought. Many former NLMs, upon independence, were able to move quickly to become States Parties, because they had taken part in the work of the Conference and were familiar with the terms of the Convention.

Important political aims of the Group of 77 (a Group which made a far greater impact than at Vienna) were to secure the acceptance of the principle of the Common Heritage of Mankind and to bring about a new international economic order. This led to a North/South alignment of forces in the First Committee of the Conference. The Group of 77 also wished to protect their coastal members from distant water vessels which might fish, pollute or conduct research in front of their coasts, a second North/South aspect. For the rest, geographical factors were influential. Thus, coastal states from many regions wished to increase their sovereignty and jurisdiction over their coastal waters. Maritime states, that is to say states with a large number of merchant and/or warships, were interested in maintaining the freedoms of the seas and the exclusive rights of flag states over their vessels. In marked contrast with the Vienna Conference, the United States, the Soviet Union, France, Japan and the United Kingdom cooperated closely in the "Group of Five", especially on strategically important issues such as innocent passage and transit passage through straits used for international navigation, thereby reducing East/West tensions. Landlocked states, which are found in all continents, had a shared interest in securing better arrangements for access to the sea across the territory of transit states.²⁶ To sum up, political, economic, strategic

²⁶ Koh and Jayakumar, see note 4, 68 et seq.; S. von Schorlemer, "Blocks and Groups of States", in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, Vol. 1, 72, Mn. 16, 1995.

and, above all perhaps, geographical factors played important roles at the Conference. East/West rivalries were subordinated to the pursuit of common goals in most instances. North/South divisions were mainly over the pursuit of a new economic order.

5. Working Methods

The Vienna Conference followed what may be described as the “classic” procedure for UN Conferences called to consider proposals by the ILC. The Conference adopted without substantive debate the standard Rules of Procedure²⁷ for UN Conferences (based on those for the General Assembly and previous Vienna conferences on legal topics). Two subsidiary bodies were created: in addition to the Plenary, there was a Committee of the Whole (COTW) and a Drafting Committee. The idea of having two Main Committees was rejected by small states.²⁸

Discussion fell into three clearly marked stages, following some brief organisational meetings in Plenary. As the first stage, the Conference worked as the Committee of the Whole. Without a general debate, the COTW considered each Article of the basic text in turn, following the order of the ILC’s draft. Different delegations put forward written amendments. Most mornings, at 08.30 the delegations received from the Secretariat of the Conference several new proposed amendments and often had little time to consider them before repairing to the Hofburg at 10.30. Each basic Article, together with the amendments, was then debated. On major issues of principle, such as how to interpret treaties, a vote would be taken as soon as the list of speakers was exhausted on the question of whether or not an amendment should be referred to the Drafting Committee. Sometimes the Committee was divided in the vote. On certain amendments, there were many abstentions. A simple majority was enough and the outcome turned sometimes on a handful of votes. (This happened also at the Geneva Conference on the Law of the Sea held in 1958 and 1960²⁹ both on primary and secondary issues.)

As the second stage in the consideration of an issue, the Drafting Committee met. This was a group of 15 Delegations which included native

²⁷ A/CONF.39/11. For a study of the operation of these rules, see R. Sabel, *Procedure at International Conferences*, 1997.

²⁸ Sinclair, see note 2.

²⁹ At the second UN Conference on the Law of the Sea, the main proposal failed to be adopted by a vote of 54–28 (including the 3 votes of the Soviet-Union, Belorussia, and the Ukraine) –5 because it just failed to achieve a two-thirds majority. Official Records, 13th Plenary Mtg., p. 30.

speakers in the five working languages, Chinese, English, French, Russian and Spanish, as well as the five Permanent Members of the Security Council. In practice, the drafting Committee was also a negotiating and conciliating group. It tried to find a form of words which would best take account of the majority view as expressed in the Committee of the Whole. In practice, the Drafting Committee, meeting early each morning to review texts referred to it a day or so beforehand, adjusted the ILC's basic draft articles in the light of those amendments which had commanded support in the Committee of the Whole. It then submitted to the Plenary a written report which was introduced by the Chairman (Ambassador Yasseen of Iraq). He made there several important statements explaining and even glossing the proposed new text. These statements, being part of the *travaux préparatoires* of the Convention, elucidate some of its precise wording. At the third and final stage, a debate was held in Plenary on the basis of the text proposed by the Drafting Committee. At this stage, a draft article had to achieve a two-thirds majority, abstentions being disregarded. Voting was by show of hands or by a roll call.

The Conference held two sessions totalling 14 weeks, in 1968 and 1969, when a Convention was adopted by a vote of 79 in favour, 1 against (France)—19 abstentions (mainly Eastern European States). The published records of the Convention are comprehensive: good *travaux préparatoires* exist. Although informal consultations did take place, off the record, they were concentrated mainly on political issues such as the "all States" proposal of the Soviet bloc, the concept of *ius cogens*, the question of "unequal treaties" and the settlement of disputes. Good records exist on the latter three issues. The Conference followed a clear path from the outset: working its way through the ILC's draft articles from beginning to end. Any difficulties tended to be resolved by means of formal debates and early resort to voting, rather than by talking through the problem over long periods of time among those delegations primarily concerned.

At the Law of the Sea Conference, the procedures were strikingly different. There were no clearly defined stages, nor a pre-ordained pattern for the work. There was no basic text at the outset, only the list of 25 subjects and issues plus the six volume report by the Sea-Bed Committee. In practice, the report played little or no part in the discussions. Many proposals advanced in the Sea-Bed Committee and included in the Report were re-introduced into the appropriate Committee of the Conference, usually with refinements, as national proposals by one or more delegations. On procedure, the way forward was often unclear, so that improvisation was required. Some delegations arrived at Caracas believing that a text had to be drawn up at that session. At different stages during the session (and also during later ones), the General Committee and the Plenary held lengthy meetings in order to take stock of the situation as it

stood at the time and eventually to decide upon the future procedure of the Conference.

The Conference established three main committees:

- the First Committee on Deep Sea-Bed Mining;
- the Second Committee on the “classic” Law of the Sea (including the whole of the content of the Geneva Conference of 1958); and
- the Third Committee which dealt with Marine Pollution, Marine Scientific Research and the Transfer of Marine Technology.

In addition, the Plenary acted as a Main Committee for such issues as dispute settlement and final clauses. However, it was always the aim to combine the results of their work into a single Convention, in order to avoid the possibility of States repeating the “picking and choosing” seen after the Geneva Conference of 1958 in regard to the four Conventions and the Optional Protocol on the Settlement of Disputes. The approach of seeking a single Convention led to the idea of the “package deal.”³⁰

The Third Conference also had a Drafting Committee of 21 members; but, according to the rules of procedure, it was not to act in any way as a negotiating body. China, France and the United Kingdom were not members since, having been given the choice between enjoying membership of either the General Committee or the Drafting Committee (deprived of any wider mandate), they all chose the former. In practice, the Drafting Committee did not function until towards the end of the conference, when it divided into Language Groups which concentrated on linguistic concordance of the six languages (Arabic being the addition), as well as on ensuring clear and consistent drafting, rather than issues of substance.³¹

After lengthy debates at the start of the Conference, the standard Rules of Procedure for UN conferences were changed: several novelties were introduced. As regards decision-making, the Rules provided that it should seek to work by way of consensus, in accordance with the “gentlemen’s agreement” reached before the opening session.³² The industrialised coun-

³⁰ R. Jennings, “Law-making and Package Deal”, in: *Melanges offerts à Paul Reuter. Le Droit International. Unité et Diversité*, 1981, 374; H. Caminos and M. Molitor, “Progressive Development of International Law and the Package Deal”, *AJIL* 79 (1985), 871; *Oppenheim’s International Law*, see note 11, 726; R. Wolfrum, “The Legal Order for the Seas and Oceans”, in: M. H. Nordquist (ed.), *Entry into Force of the Law of the Sea Convention*, 1985.

³¹ L. D.M. Nelson, “The Work of the Drafting Committee”, in: Nordquist, see note 4, 135.

³² A/CONF.62/30/Rev.3. Rule 37 sets out the requirements for voting. The Gentlemen’s Agreement reached in the General Assembly on 16 November 1973 was endorsed by the Conference on 27 June 1974.

tries pressed for this approach because the developing states, coordinating in the Group of 77, represented a majority in a vote. It was only when efforts to reach consensus had been exhausted that the possibility of having a vote arose (Rule 37). The required majority was kept at two-thirds (despite proposals to raise it) but with the proviso that at least a majority of participants in the session were included in the two-thirds majority. This prevented a proposal being adopted in a low vote with a large number of abstentions. These changes in the standard Rules of Procedure were made primarily because the industrialised countries, from both East and West, feared that they would be in a minority on North/South issues.

The following highlights from the procedural aspect may be noted. In 1974 at Caracas, the Plenary agreed its rules of procedure, held a general debate and assigned items to different Committees or to the Plenary itself. The three Committees discussed the items assigned to them. A large number of proposals were tabled, especially in the Second Committee, nearly all in the form of draft articles for inclusion in a Convention. Midway through the nine week session, there was uncertainty about the best way to conclude the discussions. After discussion, it was decided that a document setting out the “Main Trends” should be prepared.³³ During the remainder of the session, discussions addressed the question of what were the main trends on each issue. The document, when it appeared, set out alternative formulae on all major issues. In 1975, a debate was held on the “Main Trends” document with a view to indicating to the Chairman where the preponderant weight of opinion lay on each set of rival formulae. After renewed uncertainty over the best way forward, the Plenary decided to issue a document called the Informal Single Negotiating Text (ISNT), prepared on the authority of the Chairman of each main committee and coordinated by the President of the Conference, Ambassador H. S. Amarasinghe of Sri Lanka.³⁴ This was a very significant procedural decision, resulting in the appearance of a key document as far as the work of the Second Committee was concerned. The decision affected the outcome of the entire Conference.

In addition to the official meetings, there were meetings of various informal and differently composed negotiating groups: the Evensen Group,³⁵ the Fiji/UK Group on Straits,³⁶ and others. These meetings were quite different from the official meeting of the Conference, or even those

³³ A/CONF.62/L.8/Rev.1 (Second Committee). Official Records Vol. III, Annex II, Appendix I.

³⁴ A/CONF.62/W.P.8.

³⁵ *UNCLOS 1982. A Commentary*. Vol. I, 106.

³⁶ S. N. Nandan and D. H. Anderson, “Straits used for International Navigation”, *BYIL* 60 (1989), 159 et seq., (162).

of regional groups or the Group of 77. No trace of the groups can be found in the rules of procedure: they were *ad hoc* initiatives, yet they discussed substantive questions in parallel with official meetings. They drew up sets of articles which were passed to the Chairman of the relevant Committee. In that way, they influenced the preparation of the ISNT and eventually the outcome of the Conference. In the summer of 1975 and in 1976, there took place in the Second Committee Article by Article readings and debates on the ISNT and the Revised Single Negotiating Text (RSNT). These debates were held in informal working groups: there were no official records. They were marked by the absence of procedural manoeuvring and voting which attended earlier conferences. Discussion concentrated on questions of substance. Criticisms of proposed articles were voiced. Some new ideas were advanced, in the form of non-papers containing amendments: there were even oral amendments.³⁷ Problems peculiar to single states were raised, weighed by the working group and, in instances where the general feeling was that a problem was genuine and could fairly be taken into account, an adjustment was made to the text.³⁸ On major issues, the Chairman heard where the weight of opinion lay. The debates led to the preparation of the Revised Single Negotiating Text.³⁹ Later, after further such debates, there appeared the Informal Composite Negotiating Text (ICNT),⁴⁰ which brought together into a single text the three texts from each main committee. These lengthy debates, in which in the Second Committee there were regularly over a hundred speakers on each paragraph or sentence under review, resulted in the refinement of much of the text into one of high intrinsic qualities.

During this time from 1974 to 1977, the President of the Conference was also holding informal meetings in Plenary about the question of the settlement of disputes. In 1975, there took place the now famous weekend in Montreux which adopted the so-called "Montreux formula" on the choice of court or tribunal for the settlement of disputes, now contained

³⁷ Article 113 contains the sentence: "This provision shall apply also to conduct calculated or likely to result in such breaking or injury", proposed orally by the present writer as a delegate of the United Kingdom following a pipeline accident in the North Sea.

³⁸ Article 7 para. 2 was inserted in order to take account of concern by Bangladesh over the delta of the Ganges-Bramaputra. The last phrase of article 7 para. 4 was inserted to cover the fact that Norway's baselines to and from a low tide elevation which had no installation on it had been found by the ICJ to be not contrary to international law in the Norwegian Fisheries Case.

³⁹ A/CONF.62/W.P.8/Rev.1.

⁴⁰ A/CONF.62/W.P.10.

(albeit with major modifications) in article 287 of the Convention. In 1977, several negotiating groups were created on outstanding controversial issues. The Plenary took another very significant procedural decision to the effect that changes in the ICNT would be made only if they attracted substantial support and would improve the prospects of reaching overall consensus.⁴¹ In other words, it became very difficult to change the drafts, especially in the Second Committee, but not impossible. The Collegium, that is to say the President, the Chairman of the three main committees, the Chairman of the Drafting Committee and the Rapporteur General of the Conference (a post not created by the Vienna Conference), was empowered to decide upon changes to the ICNT and the draft Convention which followed it. The Collegium was not mentioned in the Rules of Procedure. No previous Conference had such a body, nor had the officers enjoyed such great influence. In April 1982, the Conference proceeded for the first time to take a vote on a question of substance (in the event, on the crucial issue of the adoption of the text of the Convention and its associated Resolutions) after no less than eight years of working by way of consensus. In the vote, 130 states were in favour of the draft Convention, 4 voted against (including the United States) and 17 (including Germany and the United Kingdom) abstained.⁴² Most of the states which did not support the Convention were opposed to the deep sea-bed mining provisions: the others perceived particular problems over matters such as delimitation. The courageous decision by President Koh to go ahead in April 1982 and adopt the text of the Convention despite the known opposition of the industrialised countries to Part XI has been vindicated by later events in the 1990s. Speaking of that decision in 1996, Ambassador Satya Nandan (who was closely involved as Rapporteur of the Second Committee) referred to “an impossible atmosphere” which had existed in 1982. He continued:

“It was evident then that prolonging the negotiations was not necessarily going to resolve the outstanding issues in that Part of the Convention. The decision taken to proceed to the adoption of the Convention without the support of some important countries was based on the fact that it was important to preserve and consolidate the progress that had been made in achieving broad agreement on almost all parts of the Convention other than the deep sea-bed mining. The alternative was to put at risk all that had been achieved, knowing full well that the

⁴¹ A/CONF.62/62.

⁴² Official Records, Vol. XVI, p. 154 (Record of the 182nd Plenary Mtg.).

prospects for reaching an agreement on the deep sea-bed mining regime at that time were slim."⁴³

As matters have evolved during the 1990s, it can now be seen, first, that agreement on all parts other than Part XI has been further consolidated both by the entry into force of the Convention and by state practice, and, second, that the Agreement of 1994 on the Implementation of Part XI has resolved the outstanding issues over the regime for deep sea-bed mining.

The Conference held no less than 11 long sessions between 1973 and 1982, extending to just over 100 weeks. The language groups of the Drafting Committee held as many as 293 meetings. The Conference was much longer as a result of the initial absence of a basic text, the length of the agenda and the adoption of the method of working by way of consensus. The one issue on which there was no consensus, namely the regime for deep sea-bed mining, led to the main vote at the Conference. In a sense, the vote was a sign that the negotiating process had failed on this issue. At the same time, the lengthy discussions on other issues produced texts of high quality which commanded full or virtual consensus. The Conference displayed innovatory features from beginning to end. The official records are not comprehensive in that major discussions took place in meetings which were informal and unrecorded: as a result, the *travaux préparatoires* are incomplete.⁴⁴

Procedural innovation also attended the start in 1990 of the UN Secretary-General's informal consultations about problems perceived by industrialised states with Part XI of the LOS Convention.⁴⁵ In 1990, once the agenda had been agreed, the UN Secretariat, departing from its usual role, presented "Information Notes" (defining issues and listing options for possible solutions) for discussion at each round of consultations (to the exclusion of proposals by delegations or a basic text). A further novelty was the appearance of the "Boat Paper", the product of an informal group of delegates who put forward as a basis for negotiation a draft Agreement which represented the position of none of them. They all had problems with something or other in the text, problems which were thrashed out during the remaining stages of the process. It was also necessary to turn informal consultations into formal proceedings, a change brought about

⁴³ Statement by Ambassador S. N. Nandan at a symposium in Hamburg on 20 October 1996.

⁴⁴ Many informal documents appear in: R. Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents, 1982–1988*.

⁴⁵ For some accounts see contributions in: ZaöRV 55 (1995), issue 2; and M. H. Nordquist et al. (ed.), *Entry into Force of the Sea Convention, 1995* and ICLQ 42 (1993), 654 et seq.; ICLQ 43 (1994), 886 et seq.

by the report made by the Secretary-General of the United Nations to the General Assembly⁴⁶ and the latter's resumed debate on the item on its agenda entitled "Law of the Sea." The resulting Agreement on the Implementation of Part XI of July 1994,⁴⁷ adopted by the General Assembly in its normal way in such instances as the Annex to a Resolution, also contains novel features, notably on the methods of establishing consent to be bound by the Agreement, on its entry into force and on its provisional application. No votes were taken during the consultations. Consensus was reached at the end of the consultations, with only a very few statements of qualifications or reservations. The vote in the General Assembly was requested by the co-sponsors of the draft Resolution (adopting the text of the Agreement) for the sole reason that a vote would provide a record of those delegations which had consented to the adoption of the Resolution and the appended Agreement for the purposes of latter's article 7 para. 1 lit. (a) on provisional application.

The UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, which was concerned with the implementation of some of the fisheries provisions in the LOS Convention, managed to work throughout without recourse to voting. Discussions, many in informal session, proceeded on the basis of working papers put forward by the President of the Conference, Ambassador Satya Nandan (Fiji). National proposals played only a minor role. There was no drafting committee stage. On 4 August 1995, the Conference adopted by consensus the Agreement for the Implementation of the provisions of the UN Convention on the Law of the Sea relating to the Conservation and Management of such stocks.⁴⁸ The need to prepare versions of the final text in all the working languages delayed the opening for signature of the text until December 1995. The Agreement forms an additional part of the general framework for the law of the sea established by the LOS Convention.

⁴⁶ UN Doc. A/48/50. The Report had attached to it the Draft agreement worked out in the consultations.

⁴⁷ The Agreement formed the Annex to A/RES/48/263 of 28 July 1994. In accordance with its terms, the UN Secretary-General as the Depositary opened the Agreement for signature for 12 months from 29 July 1994. The text was published as a UK White Paper, Cm 2705. The Agreement entered into force with the ratification of the Netherlands in mid-1996.

⁴⁸ A/CONF.164/33 of 4 August 1995. For an assessment, see D. H. Anderson, "The Straddling Stocks Agreement of 1995 — An Initial Assessment", *ICLQ* 45 (1996), 463.

6. Outcome of the Vienna and Law of the Sea Conferences

The two Conferences had two things in common: each adopted a single Convention, which then took over 10 years to enter into force. The Vienna Convention has 85 Articles,⁴⁹ whereas the LOS Convention has 320 Articles plus nine Annexes.⁵⁰ Both Conventions deal fully with the subject matter of treaties (albeit only ones between states) and the sea, respectively. There are topics in the Vienna Convention which continue to give rise to doctrinal difficulties: examples are the rules about reservations, especially in regard to human rights conventions,⁵¹ and those about the modification by subsequent instruments.⁵² However, it can be said that most doctrinal difficulties were satisfactorily resolved. The LOS Convention is virtually comprehensive in its treatment of jurisdictional issues to do with the sea: the provisions concerning prescriptive and enforcement jurisdiction over wrecks lying in different zones or areas offshore represent a rare example of incompleteness. In addition to the Convention, the Vienna Conference also adopted an Optional Protocol on the Settlement of Disputes, whereas by a deliberate decision that matter was dealt with as an integral part of the LOS Convention in its Part XV. Both Conferences adopted Resolutions in the Final Acts.

More than 25 years after its adoption, the Vienna Convention on the Law of Treaties has 84 (May 1998) parties, drawn from all regions of the world. This number is less than half of the international community, there being 191 states on the UN Secretariat's unofficial list. At the same time, the Convention has influenced state practice by parties and non-parties alike. It has been widely cited by international tribunals, including the ICJ,⁵³ as a statement of customary law. It has been followed by international organisations in their practice and has inspired the subsequent Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations of 21 March 1986. The Convention is not actively opposed by any group of states, although the issue of *ius cogens* remains sensitive for some. Inertia may be the best explanation of the relatively small number of ratifications.

⁴⁹ UK White Paper Cmnd. 4818.

⁵⁰ UK White Paper Cmnd. 8941.

⁵¹ A topic now under consideration by the ILC: see Report of the ILC on its 49th session in 1997 (Doc. A/52/10).

⁵² A topic reviewed by the Institute of International Law, see Yearbook Vol. 66 (1995), 437 et seq.

⁵³ For example, in the jurisdictional phase of the Fisheries Jurisdiction Cases brought by the United Kingdom and Germany against Iceland. See ICJ Reports 1973, 3 et seq. and ICJ Reports 1973, 49 et seq. (175).

Fifteen years after its adoption, the Law of the Sea Convention has 125 (May 1998) states parties, representing approximately two-thirds of the community of states, and the number is rising rapidly.⁵⁴ At present, the numbers from the East European region and the West European and Others Group are still both relatively low on account of dissatisfaction with the original regime in Part XI and the need for time to prepare at the internal level for ratification of the Convention and the Implementation Agreement of 1994 together. The Convention has influenced state practice, the work of international organisations and the decisions of international tribunals, including the ICJ.⁵⁵ The opposition to Part XI has been met: a few individual states still oppose particular provisions in the Convention for local or historical reasons, but there is no longer a centre of opposition such as that to Part XI during the years before 1994.

In many respects, both Conventions form part of the basic international legal order, or part of the framework of international relations in the contemporary world.

II. Impressions of the Legislative Processes

1. Decision-Making Processes at Conferences and the Generation of Rules of Law

An important element in international law remains customary law, based on uniform state practice accepted as law. Indeed, as recently as 1963, a leading work contained the following:

“The best view is that international law is in fact just a system of customary law, upon which has been erected, almost entirely within the last two generations, a superstructure of ‘conventional’ or treaty-made law.”⁵⁶

Much of the law of the sea has been shaped by state practice, particularly that of coastal and maritime states, over many decades. By way of contrast, landlocked states have had very little effect upon the development of customary law in this field, for obvious reasons. Conventions, which play

⁵⁴ During 1994, there were 10 new parties, during 1995 this swelled to 13 and in 1996 to 27.

⁵⁵ For example, ICJ Reports 1984, 165 et seq. (253) — Gulf of Maine Case and ICJ Reports 1986, 14 et seq. — Nicaragua Case.

⁵⁶ *J. L. Brierly's Law of Nations*, Sir H. Waldock (ed.), 6th edition, 1963, 71.

an increasingly important role in the codification and progressive development of international law, are the product of a "parliamentary" process. At both Conferences, despite their differences in methodology, there were majorities and groupings. Certain issues were decided by votes or by weight of numbers in negotiations. For example, at Vienna, voting was routine. Although there was no voting on individual provisions at the LOS Conference, at a certain stage the group of landlocked and geographically disadvantaged states exercised a great influence since they numbered 65. In other words, had a vote been called on a proposal which they all disliked, together they would have represented a "blocking third" of the delegations at a Conference, the Rules of Procedure of which provided for a two-thirds majority. The proposal would not have carried because it would have failed to achieve a two-thirds majority. This calculation strengthened the negotiating position of the group as a whole. Their influence was a clear example of "parliamentary" procedures at work.⁵⁷ Their influence was brought to bear on some issues for the first time. Historically, the landlocked countries had played no obvious role in shaping the rules of international law about fishing, for example. Yet arts. 69 and 70 of the Convention recognise certain rights on the part of landlocked states and geographically disadvantaged states. The inclusion of the articles was the result of pressure by the group of landlocked states which joined together with another group of states which are disadvantaged because, for geographical reasons, they cannot acquire a full zone of 200 nautical miles. This outcome was the result of political forces and, equally, democratic. The two articles formed an element in the "package deal"⁵⁸ represented by the Convention. However, this process clearly differs from the processes whereby customary law is formed where the practice of those states which are directly involved in a particular activity is accorded special weight.

Conventions in the legal field, whether codification conventions such as the Vienna Convention or more complex ones like the LOS Convention, have tended to influence state practice from the moment of their adoption. They can be said to represent the verdict by the international community on a set of issues. They contain a coherent set of propositions of law on a particular topic. They are the outcome of the negotiations and thus may represent "a negotiated text". As long as relations among the delegations did not effectively break down, the outcome is likely to command considerable respect by the participating States, even if it bears

⁵⁷ For a full account of their issue see S. Vasciannie, *Landlocked and Geographically Disadvantaged States in the International Law of the Sea*, 1990.

⁵⁸ On the significance of this element, see references note 30.

“the mark of the compromise surrounding (its) adoption.”⁵⁹ It may be recalled also that this *dictum* regarding negotiated texts was established in a case involving the United States, a state which had voted against the adoption of the text of the Convention and withheld its signature (albeit for reasons to do with another part of the Convention). Furthermore, state practice regarding the concept of the Exclusive Economic Zone (EEZ) was greatly influenced by the widespread support voiced for it during the session at Caracas and by the detailed articulation of the concept in the Informal Single Negotiating Text in 1975. In other words, the assessment by many states of what was lawful was determined in 1975 and 1976 by having regard to two factors: first, events at the Conference and the situation prevailing there well before its conclusion, and, secondly, state practice in the form of the claims and reactions to them of other states, especially ones in the same region. In the North Atlantic in 1976 there was experienced a phenomenon which can truly be described as a “domino effect” as one coastal state after another enacted legislation creating 200 mile EEZs or fishery zones, with the result that 1 January 1977 was seen as a watershed by many of them. Adopted conventions and, exceptionally, a widely supported draft of a part of a convention can affect state practice, both in making claims or in reacting to claims made by others, in such a way as to generate new rules of international law. Where, as in the case of the LOS Convention, reservations to an adopted Convention are not permitted, the effect may well be to strengthen the regime of the Convention, and to do so even before its entry into force.

2. Law-Making Conventions

Oppenheim’s *International Law*⁶⁰ draws a distinction between treaties which lay down “general rules of conduct among a considerable number of states” and all other treaties. The former are characterized as “law-making treaties”. It could also be said that after a time such treaties, headed by the Charter of the United Nations, form part of the fundamental legal order at the international level. They are not so much law-making as “law-stating” instruments. They influence the practice of the parties *vis à vis* other parties and also towards non-parties in many cases. They even influence the practice of non-parties in many instances in circumstances where there is no active opposition to a particular provision or regime. In

⁵⁹ Per the Chamber in the Gulf of Maine Case, ICJ Reports 1984, 165 et seq. (246, 294).

⁶⁰ *Oppenheim’s International Law*, see note 11, 1204.

the absence of a strong reason to the contrary (such as existed in the case of Part XI) or positive opposition (such as that shown by certain states towards the rule in article 6 of the Convention on the Continental Shelf, following the ICJ's decision in the North Sea Continental Shelf Cases⁶¹), states have tended to follow the wording of these Conventions in their national legislation and in their considered practice. In similar circumstances, international organisations have done the same, as have international tribunals. Governments may calculate that they are unlikely to be challenged if they follow an agreed article, even if it amounted to progressive development at the time of its adoption and even though the convention was not in force as a treaty, whether generally or for the state concerned. Governments acting as members of an international organisation and the Secretariats of those bodies have acted in similar ways. In the event of a challenge to an action based on such a text, the article provides a ready made explanation or defence. The article is likely to have supporters within the ranks of Governments and there may well be no active opposition to its terms. Sometimes, it may matter little whether the rule is "A" or "B", but it may matter a good deal that there should be a single rule or practice. In that situation, if a Conference chooses rule "B" (even by a majority) and includes it in a Convention, Governments will tend to rally to it even though they may have previously acted consistently with rule "A". This general practice by states, both as principals in international relations and in shaping the practice of international organisations, has influenced the approach of international tribunals, led by the ICJ. For these various reasons, law-making Conventions have been influential over the past half century in shaping the conduct of the international community as a whole, except where there has been a centre of determined and reasoned opposition to a particular provision or set of provisions.⁶²

3. The Concept of the International "Legislator"

In international life, whilst there exists no legislature⁶³ such as a Parliament, Congress or National Assembly, law-making conventions are nonetheless drawn up, a phenomenon which demonstrates the existence of a legislative process at the very least. Can there be said to exist, if not a legislature, at least a *legislator* in some abstract sense? In a well-known passage in its

⁶¹ ICJ Reports 1969, 3 et seq.

⁶² For a full survey see R. Wolfrum, "The Legal Order for the Seas and Oceans", in: Nordquist, see note 45, 161 et seq.

⁶³ *Oppenheim's International Law*, see note 60.

judgment in the Fisheries Jurisdiction Cases, the ICJ indicated its general awareness of proposals about fisheries and conservation of living resources of the sea put forward during the Third UN Conference on the Law of the Sea (indeed, judgment was given on the middle day of the session held in Caracas, 25 July 1974). The judgment continued: "In the circumstances, the Court, as a court of law, cannot render judgment *sub specie legis refendae*, or anticipate the law before the legislator has laid it down."⁶⁴ In the context, the legislator foremost in the Court's mind was the Conference, but the Court was undoubtedly well aware, only five years after its decisions about the status of different parts of the Convention on the Continental Shelf in the North Sea Cases⁶⁵ that any convention resulting from the Conference would have to stand the test of acceptance or rejection in Governments' decisions over signature and ratification, as well as in state practice. Perhaps the Court, led as it was at that time by Judge Manfred Lachs, was using the term in the sense employed in continental Europe, namely the general processes by which law is made.⁶⁶

4. Reform of the Law of the Sea

The concept of reform in a legal context amounts to a radical improvement upon the *status quo ante*. Reform presupposes a coherent situation which it is desired to change for the better, possibly by adapting it to technological or other developments and new ideas. As such, the concept goes further than codification and progressive development by attempting actively to change and improve the existing law. Like technical revision in the light of practical experience, reform is a sign of a maturing legal system in that it attempts to build upon the *acquis*. At the Vienna Conference, there were important elements of progressive development (e.g. *ius cogens*) but the idea of law reform was hardly present, if only because there existed no previous general convention on the topic. At the LOS Conference, fundamental change in the regime of the Geneva Conventions of 1958 was very much on the agenda from the outset. For example, the whole approach to the issue of the limits of national jurisdiction was new, as was the treatment of the archipelagic question and the protection of the marine environment. To take a particular instance, at Caracas during the discussion of the agenda

⁶⁴ ICJ Reports 1974, 3 et seq. (24).

⁶⁵ The Court held that arts 1 and 2 were reflective of customary law, but not article 6: ICJ Reports 1969, 3 et seq.

⁶⁶ On the concept of the legislator in relation to the LOS Conference, see P. Allott, "Power Sharing in the Law of the Sea", *AJIL* 77 (1983), 1 et seq. (5).

item about the High Seas, some delegations argued for no less than the abolition of the whole concept of the high seas and its replacement by that of “ocean space”, bringing about a “revolution” in the Law of the Sea. This approach was opposed by the present writer, speaking for the British delegation, as too destabilising and unnecessary.⁶⁷ The result of the Conference can be seen, in many ways, as legal *evolution*, but not *revolution*.

Thus, the preamble to the Convention notes that developments since 1958 and 1960 “have accentuated the need for a new and generally acceptable Convention on the law of the sea”. After noting also the interrelated nature of the problems, it goes on to refer to “the desirability of establishing ... a legal order for the seas”, so as to meet specified goals, the achievement of which would help realise a “just and equitable” economic order. In the operative provisions, significant elements of the old law, including indeed much of the Convention on the High Seas, have been retained. However, very significant alterations have been made, together amounting to law reform. The agreement on the limits of national jurisdiction marks a major development. The introduction of the EEZ between the territorial sea and the high seas is a radical innovation by any standards, altering the fundamental dichotomy defined in the Geneva Conventions.⁶⁸ The EEZ has had a profound effect upon international law, as well as upon the economics of many states. In particular, it has affected the international fishing industry very considerably. It may be perceived as an element in a new economic order, but ironically some of the main beneficiaries have been developed states facing the open oceans. The rules on the limits of the territorial sea and on passage (innocent, transit or archipelagic sealanes passage) were also reformed, as well as aspects of the law on the continental shelf. Acceptance of the concept of the archipelagic state, following rejection of proposals at the Geneva Conference in 1958, has profound effects for such states as well as for other states including neighbours. Finally, the law on the high seas was reformed in some ways (flag state duties were clarified,⁶⁹ “pirate” broadcasting was outlawed,⁷⁰ hot pursuit was extended to the EEZ and the continental shelf,⁷¹ and improved protection afforded to submarine cables).⁷² These latter reforms, the result of proposals formulated to a large extent (somewhat ironically again) by the UK

67 Official Records, Vol. II, Second Committee, p. 237.

68 A point made by Ambassador Owada (Japan) during the inaugural meeting of the International Sea-Bed Authority, held in Kingston Jamaica on 16 November 1994.

69 In article 94.

70 In article 109.

71 In article 111 para. 2.

72 By article 113.

delegation,⁷³ represent progressive development of the Geneva law proposed in the light of experience gained after 1958. The process gained strength from the inclusive approach which was adopted, first towards participation in the Conference and then in the generous time devoted to the consideration of all points of view, in the effort to work by way of consensus and achieve “balance.”⁷⁴

5. The Amendment and Adjustment of Law-Making Conventions

Once concluded, a Convention which codifies and develops rules of international law, if it has general support in the international community, quickly acquires the status of part of the accepted order of things. As such, it becomes very difficult to amend the Convention by any formal process. Even if weaknesses are detected the tendency has been to avoid seeking an amendment for fear of reopening the previous negotiations, with the attendant risk of reopening the whole Convention and seeing regressive, rather than progressive, development of the law. A review of the Vienna Convention on Diplomatic Relations by the British Government in 1985, in the aftermath of the shooting incident at the Libyan Embassy, concluded that:

“in the Vienna Convention is a codification of international law and practice going back many hundred years which was re-examined carefully by the international community before it was agreed in 1961. As such it is almost universally respected. It has provided a framework which is clear but nevertheless leaves room for common sense in its detailed interpretation and application. We have made extensive international soundings on the feasibility of amending the Vienna Convention through renegotiation. There is a widespread consensus that attempts to do so would not succeed. They could in fact create more problems than they would solve by opening up issues on which disagreements could surface and thrive.”⁷⁵

⁷³ In A/CONF.62/C.2/L.54, tabled together with the other Member States of the European Community.

⁷⁴ A term used by B. H. Oxman in his account of the Eighth Session of the Conference, “The Third UN Conference on the Law of the Sea. The Eighth Session (1979)”, *AJIL* 74 (1980), 1 et seq.

⁷⁵ White Paper on Diplomatic Privileges and Immunities, Cmnd. 9497.

Instead, the preferred solution has been to seek to improve implementation by the parties of the existing provisions, without reopening them.

Where there is dissatisfaction on the part of the section of the international community with such a Convention, there is a tendency for the states concerned to withhold signature and ratification. This happened to the Geneva Conventions of 1958 in the case of many developing countries, particularly ones from Latin America, Asia and Africa, which wanted wider limits of national jurisdiction. Withholding also occurred in the case of the LOS Convention, this time on the part of industrialised countries because of Part XI. In the case of the Geneva Conventions, the eventual result was the convening of a totally new Conference with a wide mandate to review the whole of the law. In that process, no-one pressed hard for a formal amendment of any of the Geneva Conventions, even though they were treaties in force which contained provisions about their own possible amendment. Instead, the Conference decided, in effect, to reform them, making many radical changes but at the same time repeating (and in a sense "re-enacting") many of their provisions. This repetition of rules from the Geneva Conventions has further consolidated those rules, contributing thereby to historical continuity.

In the case of Part XI, informal consultations were held between 1990 and 1994 with a view to addressing the problems voiced by the industrialised countries. Once again, procedural innovations abounded. The result was the adoption by the General Assembly of the Agreement of the Implementation of Part XI, which also breaks much new ground.⁷⁶ The Agreement disapplies specific provisions in Part XI and applies new ones. This amounts in effect to a substitution or even a modification. However, it deliberately does not formally or textually amend Part XI: moreover, the amendment provisions of the Convention (which was not in force at the time) were not followed. Instead, a new instrument was drawn up which has to be read as one with Part XI and which prevails over it in the event of inconsistency. Similarly, as its title indicates, the Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks avoids any amendment of the LOS Convention. Instead, the Agreement spells out in detail the content of the simple duty to cooperate contained in arts 63 para. 2, 64 and 117 of the Convention and provides for the implementation of the duty at the national, subregional, regional and global levels. This interpretation of

⁷⁶ On the status of the Agreement, read at the symposium on the entry into force of the Convention on the Law of the Sea in: *ZaöRV* 55 (1995), 273 et seq., including papers of R. Wolfrum and D. H. Anderson.

those articles in the Convention has now to be approached in the light of the Agreement, having regard to article 31 para. 3 lit. (a) of the Vienna Convention on the Law of Treaties (subsequent agreements between the parties regarding interpretation).

To sum up, there is recent evidence of an emerging tendency to avoid the formal amendment of Conventions codifying or developing rules of international law for reasons to do with the need to maintain the current *acquis* or legal stability, but yet to allow for the modification of such Conventions by means of additional, supplementary instruments. The latter may take the form of implementation agreements which elaborate, or develop further, principles laid down in a basic instrument without formally amending it. The LOS Convention is a prime example of an instrument which creates a general framework of rules and principles and which contemplates or allows for the possibility of further elaboration of its terms by competent international organisations in the form of Guidelines or new Conventions.

By way of contrast, however, in the case of technical Conventions in the maritime field, such as MARPOL⁷⁷ and SOLAS,⁷⁸ formal amendment is provided for expressly in their final clauses, both in regard to the main provisions and the Annexes, and amendment is now regularly undertaken within the IMO. Safety standards must be improved and new technology provided for. Unusually, amendment by means of a system of tacit consent is permitted by the Amendment Articles and this procedure of tacit consent is often employed, in the interest of avoiding delays in the introduction of higher standards. In other words, there exists a different attitude on the part of Governments towards the question of amendments in the case of technical Conventions, a difference which can best be explained by their technical, as opposed to law-making, character.

III. Conclusions

Since 1945, thanks to the United Nations and the ILC, much of international law has been codified and clarified in the form of Conventions. Something of a golden age was experienced in the 1960s when three Vienna Conventions on Diplomatic Relations, Consular Relations and the Law of Treaties were adopted. Some codifications remain outstanding in the

⁷⁷ Convention for the Prevention of Pollution from Ships 1973/1978 (Consolidated Edition 1991, IMO).

⁷⁸ Convention on the Safety of Life at Sea (Consolidated Edition 1992, IMO).

ILC, notably the topic of state responsibility, but the golden age has given way to a less productive period, although there have been positive results (notably concerning international watercourses and international criminal law) recently.

The importance of thorough preparatory work cannot be over-stressed and an expert body such as the ILC is often best placed to prepare drafts for a diplomatic conference.⁷⁹ However, the Commission may not be best suited to the task of law reform, at least where political elements predominate and there exists an understandable demand for an all-inclusive approach to the question of participation in what amounts often to a quasi-legislative process. In such a case, a fully representative group of the various, often opposed, political interests may be the best preparatory body. The lack of adequate preparations may serve only to complicate and prolong the deliberations once they begin.

In many areas of the law, there is a natural reluctance to reopen (or to allow others to reopen) successful negotiations which have led to the adoption of a Convention and to seek to amend it (especially textually). This reluctance has been manifested in the case of the Vienna Conventions and now the LOS Convention. However, it does not attend technical Conventions where technological advances and heightened expectations over safety call for matching legal advances in the form of amendments to the Conventions.

Decision-making by conferences is now often by way of consensus, rather than voting. Consensus-working was institutionalised at the LOS Conference in new Rules of Procedure. This method of work prolongs the negotiations and can lead on occasion to ambiguity, sometimes deliberate, as well as to "Pyrrhic victories"⁸⁰ over dissatisfied minorities, if what is reached amounts in fact to a false consensus. Such an outcome would represent a partial or total failure of the negotiating process. Against that, working by way of consensus, if successful, can produce carefully balanced, often more detailed, texts which attract wider support and prove to be long-lasting. States may be willing to accept a set of balanced texts as a

⁷⁹ On the work of the ILC during its first 40 years, see I.M. Sinclair, *The International Law Commission*, 1987; and "The Impact of the Unratified Codification Convention", in: A. Bos et al. (ed.), *Realism in Law Making. Essays in Honour of W. Riphagen*, 1986.

⁸⁰ A term used by B. Simma, "Consent: Strains in the Treaty System", in: R. St. J. Macdonald et al. (ed.), *The Structure and Process of International Law. Essays in Legal Philosophy*, 1983, 485, 488.

sort of “package”, even though some points may not be ideal in their particular circumstances. There is less likelihood of there existing a dissatisfied minority which, having been outvoted or disregarded, simply withholds consent to the resulting Conventions. Universal participation in the LOS Conference was a source of strength in the negotiating process since no views went unheard. Indeed, some account was taken of many minority or even individual points of view, often caused by particular historical or geographical circumstances, where the majority was persuaded that a particular point of view had some merit or force and could be accommodated to a certain extent in the text. Being open to all entities, the conference pursued the consequential objective of seeking universal participation in the resulting Convention. The same objectives inspired the Secretary-General’s successful consultations called to address the problems of industrialised states with some of the terms contained in Part XI of the LOS Convention as adopted in 1982. The working methods of the LOS Conference influenced the conduct of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.

Reservations, because they tend to weaken a legal regime contained in a Convention, may mark something of a failure in the negotiating process. Ideally, all genuine concerns should be raised in the negotiations and taken adequately into account in the text of the instrument as adopted at the end. There is then less need for governments to consider making a reservation. Conversely, the prohibition of reservations tends to strengthen the legal regime represented by a Convention, especially once it has acquired a critical mass of support in the form of ratifications, state practice or practice by international organisations.

“Parliamentary processes” in the international community bring forces into play which do not attend the processes of making customary law. Whilst such processes are democratic, the results can be surprising, especially for states which have helped to shape customary law by their historic practice. The views of states upon the reform or abolition of rules of law which they have not helped to shape are perfectly legitimate, whether they are newly independent states or states which for geographical reasons did not add to the *corpus* of state practice on a particular issue. Their endorsement of the rules helps to strengthen the law.

A diplomatic conference which is open to all states and other similar political entities in the world and which is called in order to negotiate and conclude a convention regulating a legal topic of general interest may be the nearest equivalent in the international community to a legislature. Such conferences follow deliberative processes and take decisions at a procedural level. However, the differences between such conferences and legislative organs probably still outweigh the similarities. Such conferences clearly form part of the “legislator”, viewed as a process.

Finally, the question is posed whether or not Brierly's view⁸¹ of international law — a system of customary law on which a superstructure of Conventions had been erected — remains valid. The superstructure has grown since 1963 and the law, on this view, may have become "top-heavy". The role of customary law remains important for several reasons, including the existence of *non-parties and gaps in the articles*. However the work of the United Nations over the past 50 years has tended to diminish the role of customary law as the law-making processes have produced conventional law.

⁸¹ See note 56.