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Multilateral Treaty-making

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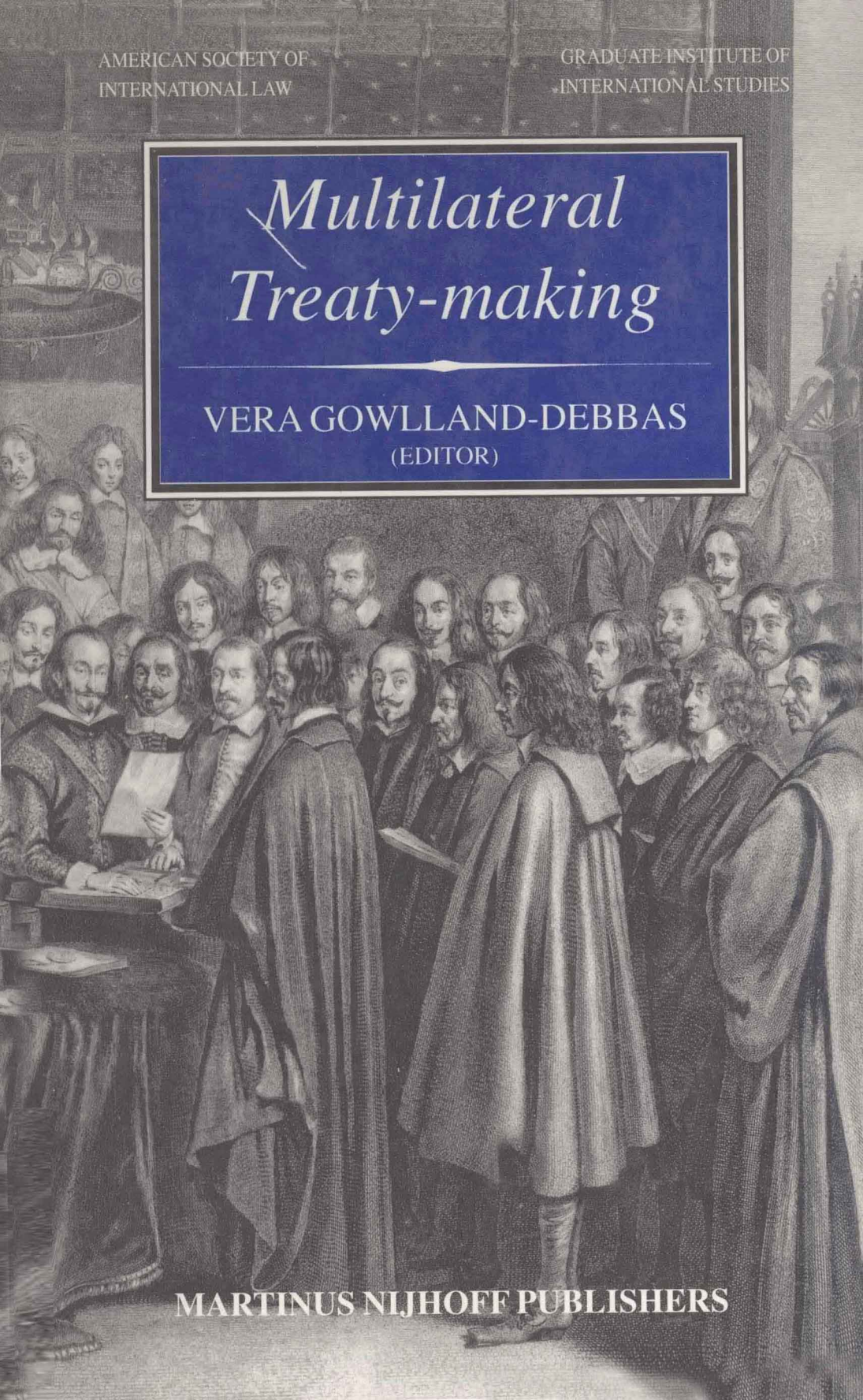

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Multilateral Treaty-Making

The Current Status of Challenges to and Reforms Needed in the International Legislative Process

Papers presented at the Forum Geneva
held in Geneva, Switzerland
May 16, 1998

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Foreword

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Table of Contents

VERA GOWLLAND-DEBBAS

Introductory Remarks

The contributions in this book on multilateral treaty-making emerged from Forum Geneva, held jointly by the American Society of International Law and the Graduate Institute of International Studies in Geneva on May 16, 1998.

The subtitle, "The Current Status of Challenges to, and Reforms Needed in, the International Legislative Process", indicates that multilateral treaty-making has not been examined in a static sense, but placed against the backdrop of the interaction between international legal system and social change. There is no need for any reminder of the vast political, economic, social and technological transformations which have taken place and are still in process in this past decade, although I will refrain from all references to globalization in this context. (In fact, the Forum proceedings took place against the noisy background of anti-WTO demonstrators.)

But there are of course different ways of envisaging this exchange between law and society. One can envisage the legal system as a kind of self-contained black box containing a coherently ordered set of structural and normative arrangements, the systemic character of which can be conceptualized in various ways, such as in the formalist terms of Kelsen's linear pyramidal structure, for whom the fundamental norm serves as a boundary between the legal system and its extra-systemic social environment, or Herbert Hart's union between primary and secondary rules. Within this self-regulating system, law provides its own means of validation (or its sources or rules of recognition) and sanctions violations of its binding norms. From this perspective the international lawyer need not be overly concerned with social change.

One can on the other hand view international law as instrumental, there to promote certain finalities and/or underlying values and interests. From this perspective, the legal system becomes synonymous with the notion of legal order, in the sense of a particular substantive content surfacing at any one time and hence dynamic in the sense of responding to the changing configuration and requirements of the component parts of international society.

It has been pointed out that it is particularly at a time of growing divergence between social mores and legal institutions that doctrine tends to approach the in-

V. Gowlland-Debbas (ed.), Multilateral Treaty-making, 1–9.

ternational legal system as open-ended, empirically and sociologically based, interrelating with other disciplines and with social reality itself. While Kelsen's insistence on the strict autonomy of the law may have taken place in reaction to the brutal transformations of the social order of his time, and in some way constitute an attempt to save the law from destruction through its instrumentalization, it is interesting to note that he was at the same time, well aware of the dilemma created by his postulate of the complete separation of jurisprudence from politics:[1]

> "This is especially true in our time, which indeed 'is out of joint' when the foundations of social life have been shaken to the depths by two World Wars. The ideal of an objective science of law and State, free from all political ideologies, has a better chance for recognition in a period of social equilibrium. It seems, therefore, that a pure theory of law is untimely today. . . ."

Nevertheless, the interrelationship between law and society is a complex one, for the international legal system does not transform everything into law; it is in this way that law succeeds in preserving its detachment from the disturbance emanating from society. In short, law ingests only those legally relevant facts which are to be attributed legal consequences (e.g. State practice, or State will), defining the threshold of normativity that must be crossed. From this viewpoint, law has the paradoxical position of being both open to its international environment with its sociological, political, moral or economic foundations, and closed, because these are reinterpreted according to a specifically legal matrix.

Speaking of thresholds of normativity leads us to the focus of our Forum, that is the rules of recognition, or if one prefers, the sources of international law, more particularly those rules relating to the mode of production and change of the normative system through multilateral treaties, which have been codified in the triptych on treaties – the 1969 Vienna Convention on the Law of Treaties, the unratified 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, and the 1978 Vienna Convention on Succession of States in Respect of Treaties which has recently entered into force.

It must be emphasized therefore that this collection of contributions on multilateral treaty-making focuses on the *instrumentum*, the instrument in which the international obligations are expressed, and not on the *negotium* or content of the agreements themselves, and therefore on the impact of social change on the rules relating to forms and procedures of treaty-making. Yet inevitably, we come to focus on the content, for in certain areas such as human rights or the environment, it is the substance of the norms themselves that have had an impact on the form and procedure of the treaty.

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[1] Hans Kelsen, *General Theory of Law and State* (Translated by Anders Wedberg) (Harvard University Press, Cambridge, Mass., 1945), p. xvii.

Beginning from the classical elements of the definition of a treaty – "an international agreement concluded between subjects of international law, governed by international law, whatever its particular designation" – I would like to raise the following questions, which in part cut across the panels.

Is Multilateral Treaty-Making the Most Appropriate Tool for Meeting the New Needs and Requirements of Current International Society?

Roberto Ago once wrote: "La prise de conscience du besoin de procéder à une codification est pratiquement toujours allée de pair, dans l'Histoire, avec la survenance de la nécessité de codifier, dans une mesure parfois très profonde et rapide, le droit existant au sein d'une société où s'était produit un changement révolutionnaire des structures sociales ou, en tout cas, une transformation radicale de la composition de la société."[2]

This recalls the process of decolonization which had produced tremendous changes in the international environment, both quantitatively in increasing the number of nation-States and qualitatively in changing patterns of interests and claims, and the resulting impact on the sources of international law created by the new States emerging from this process. Requestioning the traditional Eurocentric content of international law elaborated by a small minority of States, the "new" States had called for greater participation in the legal system and more programmatory law better suited to an increasingly heterogeneous and interdependent society, emphasizing both reinforcement of State sovereignty and newly insisted upon State solidarity. This was reflected in their great suspicion of the customary law process and their resort both to the United Nations General Assembly majority voting system as the best instrument for advancing their claims and to multilateral treaty-making in which they could act on the basis of sovereign equality. The result was vast efforts in codification: whether in the form of non-binding General Assembly resolutions and codes of conduct, or in the development of major areas of international law through the great diplomatic law-making conferences. Texts were thus adopted through consensus or majority votes, obtained by a process of compromise, bargaining and package-deals (as for example the 1982 United Nations Convention on the Law of the Sea), although this could and did lead in some cases to subsequent difficulties in ratification or impasse on implementation.

We find ourselves once again in a changed world environment in which the components of international society have been altered both quantitatively as a result of the break up of the Soviet Union and other States in Eastern Europe and qualitatively in the sense of raising new legal claims which in turn have required

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[2] Roberto Ago, "Nouvelles réflexions sur la codification du droit international" (1988) 92 RGDIP, pp. 539-576.

addressing new legal issues demanding codification, as for example, those resulting from State succession, assertion of minority rights and ethnic strife.

In so far as codification and progressive development is concerned, the 50th birthday of the International Law Commission has led to stock-taking over its role. How has this body of experts addressed the question of meeting new needs? The relationship between the ILC and the Sixth Committee reflects the relationship between the legal and the political, but to what extent should new demands emanating from the political body be reflected in the work of the ILC? It is clear that the ILC is in part, sensitive to the changing political climate, not least by virtue of a representation which is not intended to be, but has become, increasingly more diplomatic, and in this sense, as Alain Pellet points out in his Keynote Address on "Responding to New Needs through Codification and Progressive Development", it undermines the complementarity between the expert body and its political counterpart. One can recall in this context, the shift in conceptualization of State responsibility under the impact of the developing and socialist countries, from its original focus on the primary rules relating to State responsibility for injury to aliens reflecting First World concerns over protection of foreign investment, to a focus on the secondary rules encompassing all the legal consequences of unlawful acts; the controversy over State crimes and countermeasures, reflects also certain political tensions between powerful and less powerful States. However, Alain Pellet shows us that the ILC cannot address purely and simply all political claims. Its role, in his view, is not to legislate; law has its limits, and some issues requiring technical expertise or which are politically sensitive are not ripe for codification by that expert body. He advocates rather a role relegated to meeting not new needs but the *real* needs of international society; one, in other words, which addresses its constitutional structure, for "a slowly consolidating international society needs uniform legal rules which transversally cut through all fields covered by international law" bridging over the technicalities and specializations. But codification does not necessarily mean binding instruments: ILC drafts have been made use of by the International Court of Justice, and its work on reservations to treaties may well adopt the flexible form of a declaration.

In his lunchtime address on "The International Treaty-Making Process: Paradise Lost, or Humpty Dumpty?", Charles Brower reminds us however of the current reticence of certain States *vis-à-vis* multilateral treaty-making, who prefer to pick and choose from the content of international law on the basis of customary international law. I would add to the examples he gives, the recent cases of the 1997 UN Convention on Anti-personnel Mines and the 1998 Rome Statute of the International Criminal Court, in which the refusal to join of one State, the United States, despite its participation in the negotiating process and the securing of some of its goals, raises the potential effects which this may have on the treaties' implementation. What is the answer? Brower advocates some privatization of the international lawmaking process, more elaboration of purely customary law, or different approaches to treaty-making, such as so-called "framework" conventions, which he considers may address some of these problems. The point which should

be addressed from the start however, is whether one State or a few States through their reluctance to ratify treaties can or should indeed have the right, in the words of Brower, to "irretrievably shatter" an international treaty-making process to which the majority of the world's States have committed themselves.

WHO ARE INVESTED WITH THIS POWER OF CHANGE AND INTRODUCTION OF NEW RULES?

Who the decision-makers are is crucial to the substantive content of the law, as feminist perspectives of international law have underlined. But in respect of one of the formal requirements of law-making – the legal capacity to conclude treaties – it is evident that we have difficulty in transcending the State-centric Westphalian legacy in order to capture the diversity of social actors which operate today. For it is the rules of the international legal system itself that determine who are its addressees: which entity will be subject to its obligations, benefit from its rights, have competence to make claims or be held responsible for its breaches. As a result, only some of the politically and socially active non-State entities acting on the international scene have been formally bestowed with legal capacity to conclude treaties in their own right. One major example is of course that of international organizations in respect of which the famous *Reparations* case opened the way by recognizing the concept of functional personality. It will be recalled that the ICJ had stated: "(t)he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community".[3]

In this formal sense of treaty-making capacity however, other important and influential actors in the social sphere – namely non-governmental organizations and multinational enterprises – are still relegated to the sidelines of international treaty-making. However, in terms of substantive law-making, i.e. ability to influence the treaty-making process and its substantive content, the importance of the effects of NGO participation should not be minimized. This importance is reflected, for example, in the number of provisions in the Convention on the Rights of the Child owed to pressure from the NGO coalition during the negotiating process, and resulting even in the institutionalization of an NGO role in the treaty's implementation. A further example is the impetus given to the Ottawa conference through the initiation by the NGO Coalition of an International Campaign to Ban Landmines. While in international adjudication, NGO participation in the process has been met with reticence (see for example, Judge Oda's remarks in the *Nuclear*

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[3] *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) ICJ Rep. at 178.

Weapons Advisory Opinion,[4] or the controversy within the WTO dispute settlement framework over acceptance of non-requested submissions from non-governmental organizations[5]), Louise Doswald-Beck's contribution on "Participation of Non-Governmental Entities in Treaty Making: The Case of Conventional Weapons" concludes in relation to the role of NGOs before and during a diplomatic conference, that "there can be no doubt that their influence has been mostly beneficial and actually appreciated by the majority of States". Nevertheless, the question of their representation and the extent to which they can be identified with civil society remains an open and controversial issue.

How are MNEs – undoubtedly influential actors in the social sphere – accounted for in the international legal system? Peter Malanczuk writing on "Multinational Enterprises and Treaty-Making – A Contribution to the Discussion on Non-State Actors and the 'Subjects' of International Law", shows that, at least *de lege lata,* MNEs continue to be more object of international regulation (albeit unsuccessfully) then subject of international law despite the international economic power they exert world-wide; they hence have no formal role to play in the conclusion of treaties. Moreover, he points out that, unlike NGOs, these entities are also notably absent from the arena of international treaty-making, appearing to be more concerned with lobbying at the national governmental level, or exceptionally, at the supranational level, then in promoting their own interests through the international treaty-making process. Nevertheless, they have been involved in an advisory function in the negotiation of certain types of treaties relevant to their commercial activities, as for example, the UN Law of the Sea Convention, the GATT/WTO negotiations or the Chemical Weapons Convention. Generally, the results of globalization and current trends in the UN tend towards stronger co-operation with the private business sector; although, as Malanczuk underlines, there is renewed concern with their accountability on the international plane.

To What Extent Do the Increasing Technicity, Complexity and Interdependence of the Social Environment Have an Impact on the Diversity of Forms Taken by Treaties?

The Vienna Convention's definition of a treaty simply as any international agreement concluded in written form and governed by international law whatever its designation, is not a formalistic one and leaves room for informal accords. But these can assume a variety of forms: soft forms such as Minutes of a meeting (to

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[4] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) ICJ Rep. Judge Oda, Dissenting Opinion, para. 8.

[5] See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body, Decision of 12 October 1998 (WT/DS58/AB/R).

recall the ICJ's decision in *Qatar–Bahrain*[6]), memorandums of understanding (see the *Heathrow airport user charges* arbitration[7]), the host of daily administrative agreements by those who do not hold the treaty-making power, e.g. civil servants, or agreements between States and *subsidiary organs* of international organizations (see for example the tripartite agreements on repatriation of refugees between States of origin and of asylum and UNHCR). These make the shifting boundary between normative and non-normative more difficult to seize and raise the issue of the interaction between treaty law and soft law, also referred to as "*droit sauvage*", "*droit mou*", or even "*droit vulgaire*". But "hard" treaties can also include soft content and here we refer in particular to the impact of relatively new but exponentially growing fields – such as those of economic or environmental law – on treaty-making.

Speaking on the panel on Multilateral Treaties as a Source of International Law, Alan Boyle, in his "Reflections on Treaties and Soft Law", explores three meanings of soft law. Soft law in the form of non-binding instruments can act as alternatives to law-making by treaty, or constitute part of the multilateral treaty-making process itself. Soft law as general norms or principles embedded in a formal treaty, can cover both non-normative undertakings, as well as general rules. Soft law as soft enforcement, can be found in treaties which provide more for "dispute avoidance", then compulsory dispute settlement, i.e. procedures which facilitate but cannot compel compliance. In short, as Boyle states, "(s)oft law is manifestly a multi-faceted concept, whose relationship to treaties is both subtle and diverse."

Is there anything particularly distinctive about treaty-making when we come to treaties on human rights or environmental law? Bruno Simma's contribution on "How Distinctive Are Treaties Representing Collective Interest? The Case of Human Rights Treaties", and Catherine Redgwell's on "Multilateral Environmental Treaty-Making", explore the nature of treaty-making in their respective fields. Does the fact that such treaties may be characterized as representing the collective interest, or constitute dynamic instruments which evolve over time, affect the form of the treaty text adopted or the nature of the obligations created? Both conclude that undoubtedly these treaties have their particularities. The nature of human rights law has had an impact on interpretation, where a teleological approach has been supplemented by a dynamic or evolutionary one; reservations to human rights treaties, including the question of their admissibility and severability have been the subject of active debate, for such reservations go to the heart of traditional social and cultural practices; while the problem of denunciation poses the question of whether there is or should be "an exit option". As for the environmental treaty-

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[6] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility)* (1994) ICJ Rep. at 112.

[7] Award of November 30, 1992. See "Contemporary practice of the United States – Heathrow Airport User Charges" (1994) 88 AJIL, p. 738.

process, this has addressed such issues as how to combine flexibility, hence the choice of framework treaties, with the requirement of technical detail; how to address also the constant evolution of environmental knowledge, scientific uncertainty and irreversibility of environmental harm. These particularities have affected both the form and substance of the treaty and have led environmental treaties to institutionalize change rather than stability, as Catherine Redgwell puts it. Both contributors conclude therefore in their respective fields that such treaties do possess distinctive features and that their legal regime can be said to differ in various regards from that of other multilateral treaties. Both warn however against approaching such treaty-making as a self-contained regime "decoupled from the general law of treaties and of State responsibility", as Simma states.

What is the Current Situation in Respect of Treaty Implementation?

We raise here a classic problem which has always posed difficulties for international lawyers, that of the penetration of treaty law into the domestic order. In turn, this raises the more contemporary problem of who speaks for the State itself at a time when its monolithic image is breaking down and when treaties penetrate into every sphere of citizens' lives. What for example is the role of parliaments when the executive has traditionally been vested with the treaty-making power, for how can one reconcile the latter with the requirements of parliamentary democracy?

"Implementing Treaties in Domestic Law: From 'Pacta Sunt Servanda' to 'Anything Goes'?" is the title of Walter Kälin's contribution. He points to a disturbing trend at the domestic level to avoid full implementation of multilateral treaty obligations by a variety of techniques which soften the effects of ratification. These include the proliferation of reservations which prevent the extension of protection beyond that afforded by the domestic law; the refusal for domestic purposes, of a dynamic interpretation of treaty texts, and the rejection by domestic courts of such interpretation by international judicial bodies, with resultant petrification of the meaning of the treaty; exclusion of the self-executing character of the treaty, without enacting implementing legislation; and finally, non-publication of the treaty. Questioning whether the legitimacy of international treaty-making is declining, he advocates different methods for opening up treaty-making to democratic input. I would add, however, that pushing democratic ideals along the lines of parliamentary scrutiny of treaty-making, may result in the paradoxical position of imposing parochial interests and domestic standards on treaty-making at the cost of the interests of the members of international society as a whole.

Finally, to what extent can we say that some treaty-making is evolving towards legislation, moving away from the view of treaties as contracts, to one in which agreements attempt to subordinate the society of States to the general interest? Francis Maupain focuses on an institution, the tripartite structure of which produces particularities in the legislative process. His contribution on "The ILO's

Standard-Setting Action: International Legislation or Treaty Law?" presents arguments in favour of the quasi-legislative character of international labour conventions arising from the treaty-making process itself. This arises from legislative interpretation of conventions, the ruling out of reservations, and the creation of a fairly integrated single "legislative corpus", as opposed to interpretation of conventions in isolation. The International Labour Conference, he points out, has become an organ capable of adopting and repealing international legislation. Conventions have thus become legal tools whose "raison d'être is subordinated to the more general and fundamental objectives spelled out in the Constitution".

In his Concluding Remarks, Georges Abi-Saab focuses on three axes of multilateral treaty-making: its process, fora, and outcome. He points as well to two sources of complexity: "the multiplicity of actions and the heterogeneity of subject-matters". The dilemma, in the final analysis, is, in his words: "how to accommodate the increasing demand for, and trend towards diversity with the imperative of preserving the unity of the international legal system".

Multilateral Treaties as a Source of International Law

Chair: LARRY JOHNSON