



10-1-1961

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Recommended Citation

Arthur N. Holcombe, *Improvement of the International Law-Making Process*, 37 Notre Dame L. Rev. 16 (1961).

Available at: <http://scholarship.law.nd.edu/ndlr/vol37/iss1/3>

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THE IMPROVEMENT OF THE INTERNATIONAL LAW-MAKING PROCESS

by Arthur N. Holcombe*

If Dean O'Meara had invited us to discuss the next step (singular) in extending the rule of law among the nations, I surmise that we all would have chosen the same topic and reached the same conclusion. The topic would have been the Connally Reservation and the conclusion would have been that it should be repealed. Our symposium might have been short but it certainly would have been sweet. But he wisely gave us discretion to discuss other steps than the particular one to which we would all have given top priority. I choose to talk about a step which I think should have a place high on any list of important measures for extending the rule of law among the nations, though I would not put it first at this time, under existing circumstances.

I

One of the next steps, then, is to develop the United Nations from a center of cold-war propaganda into an agency for making international law. I do not mean to assert that the UN is now nothing but a center of cold-war propaganda. Of course the UN possesses other important functions and renders valuable services to the whole society of so-called sovereign states.¹ But the extension of the rule of law is an urgent necessity, if there is to be a satisfactory basis for international order in this troubled world of ours.² As of now the rule of law in world affairs is gravely impeded by the lack of adequate law-making facilities.

What are the existing facilities for international law-making?³ In the first place there are general conferences called for the purpose of making agreements for the solution of particular problems. If successful, they result in multilateral treaties which legally bind the states that ratify them. The United Nations was established in this way. This was also the method by which the Statute of the International Atomic Energy Agency was framed and adopted, and the other great statutes of recent years establishing the various specialized agencies of the family of nations.

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1 The latest important contribution to the extensive discussion of this controversial subject is *GOALS FOR AMERICANS: THE REPORT OF THE PRESIDENT'S COMMISSION ON NATIONAL GOALS* (1961). See especially p. 30.

2 An excellent discussion of this subject is contained in *The Midcentury Challenge to U.S. Foreign Policy*, *PROSPECT FOR AMERICA* (1961). See especially what appears under the caption *The Nature of Order in the World*, pp. 35-37. This publication is one of the Rockefeller Panel Reports.

3 A comprehensive and systematic discussion of this question is beyond the scope of the present paper. For a stimulating treatment of the larger aspects of the international law-making process, see William O. Douglas, *The Rule of Law in World Affairs*, (Center for the Study of Democratic Institutions, Santa Barbara, California, 1961.) For a philosophical analysis of the problem of an international order under a rule of law see Walter Millis, *A World Without War*, (Center for the Study of Democratic Institutions, Santa Barbara, California, 1961.) Both these brilliant studies are published under the auspices of the Fund for the Republic. Another valuable recent contribution to this discussion is Jorge Castaneda, *The Underdeveloped Nations and the Development of International Law*, 15 *INTERNATIONAL ORGANIZATION* (Winter, 1961), 38.

Another method of international law-making is the adoption of amendments to the United Nations Charter. This method has not yet been used, but the way in which it might be used is well illustrated by the Statute of the International Court of Justice. This was enacted along with the Charter itself, and takes the form of an annex to the Charter. There seems to be no limit to the international legislation that might be adopted by this method except that implied in the statement of purposes of the United Nations in the first chapter of the Charter. The existence of a regular process for amending the United Nations Charter opens up an almost boundless field for making laws in the public interest of the peoples of the world.

II

The need for such legislation is plain to see. One kind of need is that for clarification of existing international law in cases where its uncertainty breeds disputes which call for settlement before they become serious threats to the peace of the world. A ready example is that of the regulation of fishing rights in territorial waters under the law of the sea. Where do territorial waters and exclusive fishing rights stop, and the high seas, equally open to all fishermen, begin? The international conference of 1958 in Geneva for the purpose of codifying the law of the sea did some excellent work, but in the face of the bitter controversy over the Icelandic fisheries was woefully unable to settle the problem of the extent of territorial waters and fishing rights. The problem of fixing the limit at three, six or twelve miles from shore is one which cannot be solved by any judicial body, bound by known rules of law, but only by a body of politicians, capable of compromising differences between the interested parties on some acceptable, though not necessarily rational, basis. It is a problem, not for the World Court, but for the legislative branch of the United Nations.

Another kind of need for international law-making is that for changing the law in cases where the existing law is unsuited to the changing conditions of this troubled age and failure to find a better law threatens more trouble than it is prudent to invite. A ready example is that of the Antarctic Continent. The experience of the International Geophysical Year, in which exploring parties of scientists from many countries successfully worked together for the advancement of science, showed the solid superiority of peaceful cooperation between the Powers over strenuous rivalry to secure special advantages in the development of the Continent under the traditional rules governing acquisition of title to new found lands. Under the spur of the scientific spirit international diplomats successfully negotiated the Treaty establishing an equitable international regime for Antarctica. New and better rules of law for this intriguing area took the place of the old to the great gain of the cause of pacific settlement of international disputes.

A third need for international law-making is that for suitable regulations dealing with areas where there is no law at present capable of preventing the development of grave threats to the peace from the prospective clash of competitive national interests. These areas are the bed of the high seas, the air

over them, and above all outer space. The exploitation of the immense natural resources in the floors of the oceans, which apparently lies ahead in no distant future, and more immediately the exploitation of the opportunities which are rapidly opening up in outer space for competitive national enterprise, involves unprecedented cases of international conflict. It is not to judges, but to law-makers, that is to say, to politicians, that the peoples of the nuclear age must look for acceptable adjustments between the conflicting interests of the major powers in these areas. Now that the prospect of earthly satellites, capable of untold mischief in the interest of cut-throat competitive Leviathans, is directly before us, the need for new law is urgent.

III

The existing methods of international law-making are not good enough for the strenuous conditions of the nuclear age. Multilateral treaty-making takes too much time. The framing and adoption of the United Nations Charter took more than four years from the first suggestion of a new international order at the conference between Roosevelt and Churchill in August 1941 at Argentia Bay to the ratification of the Charter by the Soviet Union which put it into effect in October, 1945. The establishment of the International Atomic Energy Agency took nearly as long. The process began with Eisenhower's address to the UN General Assembly in December, 1953, and ended with effective ratification in July, 1957.

This law-making process is also too laborious and uncertain in cases where the needed legislation is not of the greatest importance. Special conferences for the negotiation of multilateral treaties involve the duplication of work that might be more conveniently accomplished by the regular organs of the United Nations. This was impressively demonstrated in the framing of the Statute of the International Atomic Energy Agency. The final stage of the negotiations took place at the United Nations headquarters in New York during a session of the General Assembly with much the same personnel in attendance. Ratification may even be indefinitely postponed, as in the case of the proposed International Trade Organization. In fact the requirement of ratification seems unduly burdensome in cases where prompt legislative action is desirable, if there is to be any action, in pursuit of acceptable adjustments of disturbing conflicts between vigorous Powers.

There is the further difficulty of amending legislation originally enacted in the form of a multilateral treaty. The amendment must first be considered and approved at another international conference. Though eventually ratified by enough states to put it into effect, it may not be ratified by precisely the same states, and the ensuing complications may be perplexing to judges and frustrating to statesmen. This particular problem may be avoided by enacting the legislation originally in the form of an amendment to the UN Charter. Ratification of proposed amendments by the prescribed two-thirds of the Member States makes an amendment binding upon all, but still the process may be excessively slow as well as laborious.

If international legislation is to be a convenient as well as an effective method for the pacific adjustment of international disputes, constituting threats

to the peace of the world, the process must be quicker, easier, and more certain. Law-making by the method of amending the UN Charter may not always be more convenient than by negotiating a multilateral treaty at a special international conference and may not necessarily be quicker or easier, though it offers that possibility. But utilization of the UN for international law-making opens the door to a simpler process than that of either multilateral treaty-making or Charter-amending. By dispensing with the requirement of ratification, legislative action by the UN would be much quicker and easier and, if the subject-matter were not too controversial, should be equally acceptable to the Member States. How much simpler such a legislative process might be, and still be acceptable to the Member States, is the topic I wish to explore further in this discussion.

This is a topic to which the Commission to Study the Organization of Peace, research affiliate of the American Association for the United Nations, has devoted considerable attention. In its eleventh report, entitled, "Organizing Peace in the Nuclear Age," published in 1959 by the New York University Press, there are some timely remarks on the problem of developing a simpler legislative process within the framework of the United Nations.⁴ "The international legislative process," the Commission observed, "refers to the procedures by which rules recognized as having legal force for states are created. Traditionally, the sole method for the deliberate enactment of new international law, as distinguished from the crystallization of customary law, has been the treaty technique, whereby rights and duties are established only for those states which express consent through ratification or acceptance of a given treaty. The need for a more satisfactory method of adapting international law to the requirements of an interdependent world has long been evident, and it is encouraging that states have been willing, in regard to some subjects of minor political sensitivity, to forego the sovereignty-inspired requirement of ratification and to recognize the legal validity of regulations made by majority action in international bodies."

The Report goes on to give some interesting examples of recent international legislation of this kind. "For instance," it observes, "the Assembly of the World Health Organization adopts regulations concerning such matters as international sanitary codes and the potency and purity of drugs moving in international commerce, which bind all members of the Organization except those which expressly claim exemption. The Assembly of the International Civil Aviation Organization adopts a similar procedure with respect to rules of the air and air traffic control practices and the transport of radio-active materials in international commerce." To these examples we may now add that of the International Atomic Energy Agency with its important function of preventing the peaceful exploitation of atomic energy from creating hazards to health and safety, including the hazard of diversion to military purposes. Under the Statute of this Agency its control system is automatically applicable only to projects developed under the sponsorship of the Agency. However, the Agency is authorized to extend the system to facilities developed under other sponsorship upon

⁴ Commission to Study the Organization of Peace, Eleventh Report, ORGANIZING PEACE IN THE NUCLEAR AGE, (New York University Press, 1959) p. 8.

request of the states concerned, and under favorable circumstances the Agency may become the authoritative legislator and responsible administrator of worldwide uniform minimum standards of safety in this emergent field of international cooperation. The Commission's Report, already cited, contains a very interesting discussion of this whole subject in a supplementary paper by Professor John G. Stoessinger.⁵

IV

In its Thirteenth Report, entitled "Developing the United Nations: A Response to the Challenge of a Revolutionary Era," published by the Commission to Study the Organization of Peace last February, the further development of the international legislative process is a principal topic of discussion. It is now clear that following the admission to the UN of many new Member States, springing from the liquidation of obsolete colonial systems, there will be a strong demand in several quarters for an enlarged UN Security Council. Peace-loving statesmen may take advantage of this situation to bring about important improvements in the representative character of that Council and to improve also the deliberative processes of the United Nations, especially the process of international law-making.⁶ "The adoption of a well-considered plan for rehabilitating the Security Council through enlarging and balancing its membership," the Commission concluded, "should enable it to reflect in due measure all the important interests in world politics, and ensure that its consent to any controversial proposal would carry with it general international support. Thus, the Council would become an attractive locus for international negotiations looking toward generally acceptable solutions of the bigger problems which nations have heretofore too often sought to settle by the use or threat of armed force."

May I not quote further from this latest report of the Commission? "Given the adoption of a plan for enlarging the Security Council and improving its representative character, making its composition reflect more realistically the distribution of effective power and influence in the world, it would become practicable to devise a simpler and smoother legislative process than that of international law-making by means of multilateral treaties or amendments to the UN Charter. Heretofore, proposals for the grant of carefully limited and precisely defined legislative power to organs of the United Nations have fallen afoul of well-justified suspicions that the General Assembly, its principal legislative organ, is not a suitable agency for the exercise of important law-making authority. Various proposals for weighted voting in the General Assembly, though based in some instances on schemes that have worked well enough in certain of the specialized agencies, have failed to meet with sufficiently general acceptance.⁷ A fresh act of creative political engineering in the field of international organization is in order. A rehabilitated Security Council would offer for

⁵ *Ibid.*, *Atoms for Peace: The International Atomic Energy Agency*, p. 117-223.

⁶ Commission to Study the Organization of Peace, Thirteenth Report, *DEVELOPING THE UNITED NATIONS: A RESPONSE TO THE CHALLENGE OF A REVOLUTIONARY ERA*, pp. 33, 35-54.

⁷ Commission to Study the Organization of Peace, Ninth Report, *CHARTER REVIEW CONFERENCE*. See especially pp. 34-35.

the first time the possibility of establishing a trustworthy bicameral legislative process within the framework of the United Nations.”

This proposal for a simpler and more convenient international law-making process within the carefully defined and limited competence of the United Nations merits closer examination. It provides that legislative measures should be adopted by a special majority in the Security Council and by an ordinary majority in the General Assembly. Such an arrangement, the Commission's Thirteenth Report contends, would enable each body to check the other and would establish a better balance between them, without making the process as difficult and laborious as that provided for amendments to the Charter. It seems well designed to ensure that approved measures would command the support of the general opinion of mankind, since the influence of the Major and Middle Powers, which would be likely to dominate proceedings in the Security Council, would be limited by that of the Minor Powers and lesser states, which would be paramount in the General Assembly. Such a legislative process should facilitate the acceptance by the Member States of the additional law-making authority so greatly needed by the United Nations to enable it to meet its rapidly growing responsibility for peace-keeping and other services under the strenuous conditions of the nuclear age.

It may be conceded that there is little likelihood of creating a simpler and more convenient process of international law-making within the framework of the United Nations unless the area of such legislative authority is clearly limited and precisely defined. An urgent application of the improved international legislative process is the making of regulations concerning the use of, and the maintenance of order in, outer space. Another almost equally urgent area is that of the high seas, including the air above them and the bed beneath. These are areas of common concern to the global community, in which, as the Committee's Thirteenth Report points out, individual states have acquired at most very limited vested interests and hazy or doubtful legal claims. They are areas with which states have a very limited practical competence to deal on a unilateral basis. It is of vital importance for the United Nations to establish its authority in these realms, both to forestall the intrusion of political and military struggles in them, and to establish the principle that the resources of these areas should be devoted to the use of the world community. A clear understanding that the improved international law-making process is to be restricted in its practical application to such definite and limited areas as these should open the way for its introduction.

A different area in which there is urgent need for an improved international law-making process is that in which the harmony of the established state system may be interrupted by the arbitrary action of individual so-called sovereign states with special interests that may be adverse to those of the whole society of states. Examples are familiar enough: the limits of territorial rights on coastal waters and in the submerged lands beneath them; the regulation of navigation in straits and canals connecting portions of the high seas, and in international rivers giving access to the high seas; and the utilization of the waters of international rivers for irrigation and the generation of power where

riparian states are unable to agree upon reasonable arrangements. This sector of the international field of legislative action is relatively uncultivated. As the Commission to Study the Organization of Peace concedes in its latest report, there must be much political plowing and planting before the world can reap a legal harvest. But it is a frontier which we cannot afford to neglect. A tolerable future world order will rest on the willingness of states to entrust points of potential friction among themselves to the care and supervision of the organized community. "Politics," to borrow again the language of the Report,⁸ "must use law to moderate the play of political forces; just as law must rely upon politics to produce the adjustments which are essential to keep a legal order an instrument of stability and growth rather than of repressive rigidity."

The extension of the rule of law into these areas by improving the international law-making process is indispensable, if the rule of law is to serve mankind well in an age of rapidly changing political, economic, and social conditions. But, one may ask, what assurance is there that such a legislative procedure as has been described will actually produce acceptable adjustments of the conflicting interests of the various states concerned in these highly controversial areas? Up to now the United States has generally looked for the electoral majorities needed for the support of its policies in the United Nations primarily to its military allies. With its fellow members of NATO, SEATO and the Organization of American States it could account for forty votes in the General Assembly, which was ample for control in the earlier years before the liquidation of obsolete colonial empires. At this moment, however, there are ninety-nine members with more to come in the near future, and the problem of maintaining American leadership in the United Nations is more difficult.

How American leadership could be sustained under the altered conditions is conveniently illustrated by the recent action of the Fifteenth General Assembly on the seating of the delegation from the infant Congo Republic which had been named by President Kasavubu.⁹ The United States, after a delay of two months, finally pressed for a vote on November 22nd, despite strong opposition by the partisans of the deposed Premier Lumumba. The action desired by the United States was taken by a majority of fifty-three in favor of seating Kasavubu's delegates, with twenty-four opposed, and nineteen abstentions. This majority was found by holding thirty-seven of the forty military allies, and picking up sixteen additional votes from various types of neutrals. The only member of NATO to reject American leadership was Canada, which abstained. The only one of the Asian allies to hold out against American leadership was Pakistan, which also abstained. Of the twenty Latin American Republics, Venezuela abstained, but Cuba, alone among the military allies, voted against the United States. Of the additional votes, exactly one-half came from newly liberated French colonies in tropical Africa, demonstrating perhaps the influence of DeGaulle rather than that of the Americans. The rest were widely scattered, Spain, the Union of South Africa, Austria, and sundry small states, Cyprus, Jordan, Nepal, Laos, and the Malagasy Republic.

8 Thirteenth Report, pp. 43-44.

9 UN Official Bulletin (Temporary Edition) Nov. 22, 1960.

Fortunately for the United States an ordinary majority was sufficient for seating a contested delegation in the General Assembly. For more important matters a two-thirds majority would have been necessary. It is evident that the United States must look beyond the ranks of its military allies for support, even if an improved legislative process should be introduced, requiring only a simple majority of the votes in the General Assembly for the enactment of controversial legislation. An attempt to base American legislative leadership on the support of the democracies in the United Nations would fare no better. There are too many dictatorships of various kinds among the Member States. If the rule of law is to be extended by introducing an improved law-making process into the family of nations, there is no alternative to recourse to the method of a consensus among the leading Member States.

This was the method originally contemplated by the framers of the Charter. It is necessary to return to it, and to try once more to make the Charter work according to the original plan. The framers did not intend that the operation of the Charter should be dependent upon general agreement among all the Member States, but they did intend that important action should not be taken without the consent of all five of the holders of permanent seats in the Security Council. While the cold war continues to rage, such consent is not possible. Extension of the rule of law in international affairs by improving the international law-making process, it must be recognized, is not to be expected until peace is made by the cold-warring Powers.¹⁰ The essential ingredient in such a peace is an agreement by these Powers to establish the rule of law among themselves and for all the others. This may appear to be impracticable. Is it more practicable, we are bound to ask, to maintain a state of cold war indefinitely without its turning hot? The world cannot be governed by appearance. It can be governed only by reason and the law.

¹⁰ For a persuasive account of what may be done in the existing state of the world to extend the rule of law, see Louis Henkin, *Toward a 'Rule of Law' Community*, in *THE PROMISE OF WORLD TENSIONS* (Harlan Cleveland, ed.) 17-42. This timely volume was published under the auspices of the Council on World Tensions, Inc.