have been cited in cases. The Code of Medical Ethics has been similarly influential. Some provisions were incorporated into the convention against torture. The code thus has had a lawmaking effect and has influenced behavior. There is now a need for a code protecting the activities of defenders of human rights, such as Andrei Sakharov and Helsinki Watch. The Sub-Commission has handled this issue ineffectively; it is now before the Commission with a consensus approach. Such a code would be particularly useful for the specialized agencies to promulgate.

Lastly, resolutions are the medium in which new rights—or to borrow Carol Vassar's terminology, the "third generation of rights"—are articulated. Examples are the rights to development, solidarity, the environment and the common heritage of humankind. Rights such as these are often indefinite and imprecise and therefore difficult to define. I wonder whether the right to development, which came up with no prior study, is an individual or a collective right. Some Third World countries think the right to development includes a new economic order, while Western countries think it refers to individual equal opportunity. Conflict occurred when the term was introduced in the Third Committee; there was no agreement on its meaning. The Western nations have tried to moderate the language used to describe the right to development. Nonetheless, for most U.N. members it is an important right despite the lack of definition. Similarly, there is no agreement regarding the meaning of the right to peace and security. The right to the environment was recognized at the 1972 U.N. Conference on the Environment. A right to political participation was suggested in 1983 by Yugoslavia. Even a right to tourism, a right to sleep, and a right not to be killed in war have been proposed. Resolutions regarding such rights pose certain dangers. These rights may cheapen the currency of human rights or be used to block other rights.

Finally, a word of caution. While there is a need for criteria, fitting rights into categories is difficult because the definition of rights is to a large extent a political exercise. These difficulties notwithstanding, conformity with standards and procedures legitimizes discussion of human rights. Standard-setting in human rights is needed to flesh out the 1966 covenants, in the same manner that civil rights law in the United States fleshed out the 14th Amendment.

**Remarks by Paul C. Szasz**

As some of you may recall, this is not the first time I've discussed the "international legislative process" at an Annual Meeting of the Society and in other learned fora. On those previous occasions I asserted that this insufficiently appreciated process is one that functions effectively—though obviously not perfectly—and thus constitutes an important justification for international organizations such as the United Nations. To illustrate this thesis, I referred most particularly to the area of human rights, in which an impressive catalogue of important instruments has been created in just four decades on the worldwide and increasingly also on regional levels.

Recently, however, several learned commentators have challenged this very illustration, by asserting important if not grave imperfections in the process of legislating human rights in the United Nations, and we are assembled here to examine these charges—not, of course, as a court but rather as an academic conclave. In this brief presentation I propose to consider first whether the charges of defective workmanship or machinery are justified and then what reforms might be undertaken.

*Director, U.N. General Legal Division; Mr. Szasz spoke in his personal capacity; the views presented herein are not necessarily of the organization.*
There are evidently two ways of judging the quality of any process: a deductive one that examines and evaluates the output and an inductive one that considers whether the design and actual operation of the process is likely to yield an acceptable result. I propose to essay both these critical devices successively, though frankly placing somewhat greater faith in the deductive method, since the inductive one is always liable to the bumblebee paradox: just because an insect so designed is aerodynamically precluded from flying does not mean it actually cannot soar.

In examining the output of the human rights legislative process, it is immediately clear that there cannot be any complaint about insufficient quantity. As of 1982, there were some three-score significant instruments: conventions and declarations, and the output has not abated in the past few years. For example, the 40th General Assembly adopted or endorsed six quite diverse instruments, such as the U.N. Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, the Basic Principles on the Independence of the Judiciary, the Model Agreement on the Transfer of Foreign Prisoners, and the Recommendations for the Treatment of Foreign Prisoners—surely an impressive list. Indeed, if there is any complaint at all about quantity, it is about a potential excess, an embarras de richesse. In particular, it has been suggested that human rights treaties are being promulgated at a rate that exceeds the capacity of governments to absorb them, i.e. to take steps to become parties and to regulate their domestic rules and conduct accordingly. But surely, if that be the case the response should be to increase the capacity for national absorption rather than to restrain the formulation of instruments that address urgent and important problems.

That brings me to the second criterion for judging output: the appropriateness of the instruments being produced. Do they respond to real and urgent problems? Do they overlap unnecessarily and confusingly, or do they leave any significant gaps? Again, I don’t believe there could be any serious complaint on that score. Within the past decades the three instruments that are generally considered as constituting the international Bill of Human Rights (The Universal Declaration of Human Rights [1948], and the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights [1966]) have been supplemented by a number of specialized ones addressed to various particular problems as to which more detailed treatment was considered desirable. Naturally, this approach—which is consequent on an inherent feature of the international legislative process, necessitating that sets of rules be incorporated into discrete legal instruments, rather than be woven into the ideally seamless tapestry of a fully codified legal system—leads to some apparent overlaps. For example, a principle, such as the prohibition of torture, is expressed first as a goal in a general declarations (Universal Declaration of Human Rights, article 5), then as an obligation in a specific instrument (International Covenant on Civil and Political Rights, article 7), which is later expanded into a detailed declaration (Declaration on the Protection of All Persons from Being SubJECTED to Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment), leading finally to a still more specific treaty (Convention against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment), as well as to recognition in a host of other important instruments. Of course, this process occasionally results in the tentative expression of a new principle that may, on further examination, prove to be misguided, premature or entirely unsuitable as a human rights standard, but this lack of viability necessarily becomes evident when an effort is made to formulate and to reach agreement on the
necessary specifics, and thus the aborted principle remains as a mere statement, perhaps cluttering up but not obstructing the international legal landscape seriously.

The third aspect of the output of a legal process is still harder to judge: its technical quality, *i.e.*, the extent to which a particular instrument satisfies the felt need to which it is addressed, how comprehensible and coherent it is in its several linguistic versions, and whether any of its provisions are in conflict with each other or, more likely, with those in other legal instruments. During the past years the more important human rights instruments have been exposed to extensive multiple legal scrutiny by governmental authorities deciding whether to become parties, by international supervisory bodies considering national reports mandated by these instruments; finally, and perhaps most critically, by the academic community carrying out its scholarly functions. I am not aware that any of these examinations has resulted in the discovery of any major flaw. There are indeed minor discrepancies, ambiguities and some theoretically possible conflicts. But, on examination, most of these will be found to result not from any technical faults in the formulating process but generally from political imperatives reflecting the need to achieve a text acceptable collectively (by consensus or by a commanding majority) to the international community as a whole, as well as individually to the many governments that must decide on whether to become parties. As in national fora, the international political process does not yield legal instruments that are ideal either from the point of view of any of the participants or particularly from that of an outside academic observer. Here too the maxim; “The best is the enemy of the good,” applies, and any attempt to reach for perfection is likely to result in an excessive prolongation of the negotiating process and perhaps even in instruments acceptable to very few governments.

Naturally, no attempt to speed the legislative process or even to achieve consensus can excuse the introduction of contradictory provisions within an instrument or the disregarding of obligations under earlier valid treaties. Fortunately, there appear to be few, if any such defects. When real or, more likely, only apparent or potential conflicts appear, it will be found that these are due not to inadvertance but rather to genuine tensions between not fully reconcilable values such as: (1) the desire to protect certain individuals or groups may conflict with the dictates of absolute equality; (2) the achievement of justice for victims of crimes may conflict with the due process rights of accused perpetrators; or (3) completely unrestricted free speech may conflict with the rights of individuals or groups subjected to intolerable attacks. At each stage of their developments different societies will resolve these conflicts in different ways through a special dynamic balance of the rights in question; any attempt, however, at least at the current low level of integration of the international community, to find a universally and permanently acceptable balance is not only doomed to failure, but would run the risk of paralyzing the legislative process we are examining. In other words, some incompatibilities are likely to persist in international human rights instruments, and each government will have to sort these out, as best it can, through selective ratification or the use of reservations.

All in all, an examination of the human rights instruments so far promulgated by the United Nations does not seem to suggest any urgent need to reform the process of formulating these instruments. Folk wisdom would then recommend that we refrain from fixing what “ain’t broke.” Nevertheless, not wishing to be accused of a Panglossian inability to perceive that even adequate machinery might be susceptible of improvement, I would now like to proceed with the second part of this exercise, an inductive examination of this legislative process, both with a view to discovering any faults and in any event to propose improvements.
Evidently, such an examination can be facilitated by comparing the actual process against some standard or ideal, and in recent years some expert students of international human rights helpfully have proposed particular sets of procedures designed specifically for this purpose. Instead of choosing among these suggestions, however, I propose to rely on the recent product of a lengthy examination of the general formulation of multilateral treaties by the Legal Committee of the U.N. General Assembly. After three years of study by a Working Group of the Sixth Committee, in 1984 the General Assembly in effect endorsed the Final Document on the Review of the Multilateral Treaty-Making Process, which in 18 paragraphs addressed some 7 aspects or stages of that process and also added two general recommendations. As many of the suggestions in that document are also of direct relevance to international human rights legislation, I propose to use it as the guide to our necessarily brief inductive examinations of U.N. work in this area. Nevertheless, before doing so, I must disclose that this document itself is the product of a similar exercise in international drafting and that in order to achieve a consensus on its adoption the proposed reforms that were examined had to be reduced to the lowest commonly acceptable denominator or in some instances were deleted altogether.

The first treatymaking aspect dealt with in the document is the initiation of the multilateral treatymaking process. Paragraph 1 urges states desiring to initiate the process to take into account the extent to which the proposed subject is already regulated by international law, the extent the international community is interested in the subject matter and in particular in its international regulation, whether a multilateral treaty offers the optimal means to achieve the intended objective, and what similar treatymaking activities are taking place elsewhere, as to which paragraph 17 invites other international organizations to make annual reports to the United Nations. Paragraph 1 thus in effect invites potential initiators of legislative proposals, which in the human rights area are not always states, to exercise self-restraint. In this area, at least, it would appear that in the past either sufficient restraint was usually shown or the machinery did not prove to be easy to start unless the state(s) concerned persisted either because they had a weighty moral concern or a perceived self-interest in urging a new project.

Paragraph 2 urges the initiator state to support its proposal by an explanatory note, a step any promoter is likely to take if it is serious about a proposal. Paragraph 3 urges the competent organ to assist the evaluation of the proposal by dispatching questionnaires, securing relevant legal and technical data, and preparing studies on state practice; these are steps that are normally taken sometime during the human rights legislative process, though it would probably be best if this were indeed done at this liminal stage, before any expensive negotiating time has been invested in a possibly ill-considered project. This paragraph also urges that careful consideration be given to the choice of the most desirable formulating, negotiating and adopting fora for an eventual instrument.

The second aspect deals with the preparation and formulation of a draft treaty. Here paragraph 4 appears to encourage states to present an initial draft or suggests, as an alternative, that preparation of a draft might be entrusted to a group of experts. Both alternatives have been used in formulating human rights treaties, though quite sensibly the expert route appears to be followed preferentially.

Paragraph 5 calls for soliciting the views of states and competent international organizations as to any preliminary draft, a step that is normally taken.

Paragraph 6 mainly calls for the assignment of the formulation of each multilateral treaty to an appropriate forum; for general human rights treaties (i.e. those not involv-
ing a subject, such as the rights of women, for which another specialized organ exists) these have generally been successively the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights, ECOSOC, and the Third Committee of the General Assembly. Professor Meron has proposed—both here and in his stimulating Editorial Note in the Journal (79 AJIL 664 [1985]—that there be established a U.N. Human Rights Law Commission, but aside from the unlikelihood of creating a new organ at a time when there is a general move to constrict international institutions, the deliberate analogy of the proposed organ to the International Law Commission should give us pause, lest the stultifying procedures of that body be extended to inhibit developments in the so-far productive human rights field. In addition, there would seem to be some advantage in leaving the task of formulating new treaty provisions with an organ primarily engaged in the practical work of considering charges of human rights violations, for Justice Holmes was undoubtedly right in asserting: "The life of the law has not been logic; it has been experience."

Paragraphs 7 and 8 encourage the establishment of drafting committees, particularly to ensure the precision and correctness of the text and the concordance of the various official language versions. In this respect the human rights legislative process could indeed be improved, for such committees are rarely used by any of the organs that formulate human rights instruments. (In this connection it might be noted that the Sixth Committee Working Group had turned down a proposal for the establishment of a standing drafting body of the Assembly.)

The third aspect is that of the conclusion of the formulating process and adoption of a multilateral treaty. Paragraphs 9–12 present a series of recommendations for the adoption stage, generally foreseen to be either the General Assembly or a special conference convened by it. Although so far the Assembly itself has always been the organ to adopt U.N. human rights treaties, as this is sometimes a painfully extended process because of the crowded agendas of the Third and Sixth Committees, more consideration might be given to the convening of ad hoc diplomatic conferences to complete work on certain complicated human rights instruments.

The fourth and fifth aspects deal respectively with facilitating the process of multilateral treaty-making within states and training and technical assistance. These are in effect two responses to the same problem and deal with the important stage of the international legislative process that differentiates it from the domestic one, the need for a treaty adopted by an international organ to be accepted by states individually for the dual purpose of having it enter into force at all and to enter into force for each of the accepting states. Paragraph 13 calls on states to establish domestic focal points for this purpose, and paragraph 14 urges the continuation of existing and the establishment of new bilateral and multilateral training and assistance projects. Certainly, at this time, with a plenitude of existing instruments, few of which have yet achieved nearly as many ratifications as national legal and political constraints would seem to permit, it would appear reasonable that the emphasis in the human rights legislative process might now shift from the formulation and adoption of new instruments to the formal acceptance of the existing ones and then to their implementation.

The sixth aspect is the preparation and publication of records. The recommendation in paragraph 15, that for each treaty-making conference official records be kept and published, is not directly pertinent to the existing conference-less process in respect of human rights. The spirit of that recommendation, however, which is to make available the travaux préparatoires as an aid in interpreting and administering treaties, is of course fully applicable in respect of human rights instruments. In this respect it must be admitted that the U.N. record is inadequate, in that the travaux of its many
instruments in this area have not been adequately published or even assembled by it. In view of the current fiscal constraints on the Organization, however, such historical projects will have to continue to be prepared by academic institutions and be published by private enterprise.

Finally, the seventh aspect deals with the registration and depositary functions. Paragraph 16 requests the Secretary-General to develop, in collaboration with other institutional and national depositaries, some more effective systems for keeping current and making generally available the essential data about the current status of multilateral treaties. Whether such a general enterprise is realized eventually, it would seem desirable if in the meantime a special system could be developed to cover all human rights treaties, or at least the worldwide ones whose texts are included in the quinquennial U.N. compilations.

Thus the conclusion of this brief evaluation of the human rights legislative process against the rather tentative standards recommended by the General Assembly for all multilateral treatymaking exercises does suggest a number of areas in respect to which the process we are considering might indeed be improved. Let us now see that such reforms are undertaken promptly.

PANEL COMMENTS

Professor Meron: The problem, Mr. Chairman, is not only one of cost-effectiveness of the system, nor is it only of the low priority that is now accorded by the Commission and the Sub-Commission to the subject of lawmaking. The problem, which is a very serious one, is of the quality of the instruments. Perhaps it would help if I would direct attention to some of the major defects.

My friend and colleague, John Carey, already reminded us of the recent body of principles formulated by a rapporteur of the Sub-Commission on the rights and duties of groups and individuals. In that document, the rapporteur restated, or formulated in a new language, more than 50 principles of existing human rights law, not clarifying which are principles of existing human rights law, not clarifying which principles constitute restatement of the existing law or which principles or formulations constitute additions to existing rights. Within weeks the secretariat of the International Labor Organization warned the U.N. Human Rights Commission that this body of principles called into question existing human rights.

Another example is the very important International Convention on the Elimination of All Forms of Racial Discrimination. Article 1 of the convention contains a definition of racial discrimination which addresses discrimination in public life. The operative articles of that same convention, however, prohibit discrimination not only in public, but also in private life. No attempt has been made by the drafters to reconcile these conflicts.

Let us take the political covenant, the most important and primary of international human rights instruments. Article 3 of the political covenant, with which you are all acquainted, attempts to ensure equal rights to men and women as regards the civil and political rights set forth in the covenant. Article 26 of the same covenant, which was drafted much later, forgets that basic statement and adds that the law shall prohibit discrimination on any ground, without any reference to whether that right is or is not set forth in the covenant.

In another example from the covenant, article 2 addresses obligations of states with regard to individuals, obligations to be carried out in its territory—I underline, in its territory—and subject to its jurisdiction. The companion instrument, the optional