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Chairman: Mr. Manfred LACHS (Poland).

**Reservations to multilateral conventions (*continued*)**

**(a) Report of the International Law Commission covering the work of its third session (A/1858) (chapter II: Reservations to multilateral conventions)**

[Item 49 (a)]\*

**(b) Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: advisory opinion of the International Court of Justice (A/1874)**

[Item 50]\*

1. Mr. AMADO (Brazil) emphasized the importance which his delegation attached to the question of reservations to multilateral conventions. It was not an easy question, as was apparent from the lengthy discussions to which it had given rise. He recalled that three trends had emerged: the general principle of the need for unanimous consent of the other parties; the adoption of the Pan-American system whereby the treaty was in force in its entirety between the parties which had ratified it without reservation and, in the form modified by the reservations, between the parties which had made their participation conditional on reservations and those which had accepted them; and finally the freedom of States to make reservations independently of the acceptance of the other parties. Bearing in mind those different views, the General Assembly had, in its resolution 478 (V), requested the International Court of Justice to give an advisory opinion on the question of reservations to the Convention on Genocide and had, moreover, invited the International Law Commission to consider the legal effect of reservations. Both the Court's opinion<sup>1</sup> and the

Commission's report (A/1858)<sup>2</sup> would be studied by the Sixth Committee. He would meanwhile confine himself to considering the report of the International Law Commission.

2. One of the first to give its views on that question, the Brazilian delegation had supported the traditional principle of the need for the consent of all parties for reservations to be valid. That constituted a rule of customary international law which should be applied if international law was to fulfil its true functions. The need for unanimous consent of the parties resulted from the principle of their autonomy.

3. He refuted the arguments brought forward at the 265th meeting by the Venezuelan representative, who had proposed the extension of the Pan-American practice to all agreements of a humanitarian character. The need for concessions increased in proportion to the increase in the number of contracting parties. Contrary to the Polish representative's assertion in the Sixth Committee (220th and 223rd meetings) at the fifth session of the General Assembly, the majority rule was not applicable in regard to the conclusion of treaties.

4. It was true to say that the Pan-American system had operated for several years with satisfactory results. He had frequently advocated the extension of practices characteristic among American countries to other States, whenever he had been convinced that that would help to foster relations between the States concerned. However, the atmosphere of relations between American countries was very different from that of the United Nations, and the Pan-American solution to the problem of reservations could not be extended to all Member States of the United Nations. In support of that view, he recalled the opinion expressed by Mr. Alfaro, a member of the International Law Commission (A/CN.4/SR.101 and 103).

\* Indicates the item number on the General Assembly agenda.

<sup>1</sup> See *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports, 1951*, page 15.

<sup>2</sup> See *Official Records of the General Assembly, Sixth Session, Supplement No. 9*.

5. Nevertheless, the practice of American States in respect of reservations was far from being uniform. He quoted Mr. Accioly, head of the Brazilian delegation to the Organization of American States, who had stressed the differences of view which existed on that subject within the Pan-American Union. Mr. Amado recalled that during the third session of the International Law Commission, the four members from the Latin-American countries had been divided on that issue. He quoted a study by Mr. Alfaro on the state of the conventions signed under the auspices of the Pan-American Union, in particular, those drawn up during the Sixth Inter-American Conference held at Havana in 1928 (Convention on the Status of Aliens, Convention on the Right of Asylum, Convention on Diplomatic Officers, Convention on Maritime Neutrality, Convention on Treaties, Convention on Private International Law, known as the "Bustamante Code", Convention on Nationality, Convention on Political Asylum). That analysis showed that the liberal nature of the Pan-American system in respect of reservations had not encouraged ratifications. Mr. Amado added that from 1889 to 1948 certain American States had signed only eight out of the eighty-seven conventions concluded under the auspices of the Pan-American Union.

6. He emphasized the fact that his delegation had close ties with the other Latin-American delegations, but that, despite its wish and feeling of sympathy towards them, it was unable to share their desire to extend to the United Nations the rule followed by the Pan-American Union.

7. The Brazilian delegation supported paragraph 24 of the report of the International Law Commission, which rejected as a general solution the criterion of the compatibility of a reservation with the object and purpose of a multilateral convention.

8. As to the question of which States had the right not to accept reservations, he maintained the stand already taken by his delegation and stated that mere signatories, as well as parties which had already ratified the convention, had that power. It was not the right of signatories to object to reservations which should be restricted, but rather the facilities granted to States to modify the content of a treaty already approved by the signatories. He believed, moreover, that to limit the power of making objections to the final participants alone would not result in an increase in the number of those participants.

9. The solutions proposed by the International Law Commission, namely the need for the unanimous consent of all parties for reservations to be valid and the right of mere signatories to submit objections to the reservations made to the text which had been signed, were the result of a thorough investigation of the subject and, in the view of the Brazilian delegation, constituted the best possible solution.

10. In closing, he examined the draft resolution submitted by the United States delegation (A/C.6/L.188). He was surprised at the interpretation of General Assembly resolution 478 (V) given in that draft resolution. The United States delegation considered the Court's advisory opinion as a general solution. However, the opinion given by the Court was relevant only to the reservations relating to the Convention on Genocide, as the Court itself had specified. Furthermore, he was surprised that the United States draft resolution did not mention the work of the International Law Commission on the question of reservations, in view of the fact that the proposal to consult that Commission had come from the United States delegation.

11. Mr. FITZMAURICE (United Kingdom) had listened with interest to the statement made by the Brazilian representative, with which he was in full agreement. He also appealed to the representatives of the American continent to consider carefully that important question before coming to any decision. He was not sure that the members of the Committee had taken into account all the consequences which would result from the adoption of certain proposals, and particularly of the United States proposal.

12. The United States representative had laid particular emphasis on one of the difficulties connected with the classic system: it was sufficient for a single State to raise an objection to a reservation made by another State for the latter to be unable to become a party to the convention. The rule of unanimity was perhaps, in point of fact, over-rigid. However, one should not go to the other extreme, as did the system proposed by the United States.

13. As the Brazilian representative had very rightly stated, acceptance of the fact that a State had the sovereign right to make a reservation did not imply that that State had the right to modify in its own interest a convention already approved by other States.

14. As the representative of France had noted (266th meeting), most of the supporters of the Pan-American system assumed that a State making a reservation was honest and sincere, while a State objecting to that reservation was raising unnecessary difficulties. That was obviously a weak point in their argument.

15. He agreed with the representative of the United States that it was necessary to simplify the position of States which wished to accede to a convention. Nevertheless, States must not be given the right to make any reservations they liked and still become parties to the convention. The Pan-American system was based on the assumption that the majority of States would make reservations only in regard to secondary or formal provisions and not in regard to basic provisions. If that was the case, the system could work satisfactorily, but it was open to doubt whether it would be true of many conventions concluded under the auspices of the United Nations.

16. The United States representative, Mr. Cohen (264th meeting), had pointed out that the system proposed by his delegation did not in fact imply an unlimited right to make reservations; if a State objected to a reservation, the convention would not enter into force between the objecting State and the reserving State. While that argument was correct in theory, it was not valid in the case of law-making conventions. Sir Hartley Shawcross had argued in April 1951, before the International Court of Justice,<sup>3</sup> that unlike multilateral commercial treaties for example, which created a system of bilateral obligations between States, law-making conventions imposed on the parties general obligations which constituted a rule of conduct in relation to the international community. The parties assumed obligations of a moral character and in return received a certain prestige from the sole fact that they were parties to the convention. The danger of allowing reservations was obvious. In the case of ordinary treaties, a reservation could enable the reserving State to escape an obligation, but it also involved the renunciation of an advantage. In the case of a law-

<sup>3</sup> See *Reservations to the Convention on Genocide: I.C.J. Pleadings, Oral arguments, Documents*, page 358.

making convention, the reserving State merely evaded an obligation while giving up no corresponding benefit, and, since it still became a party to the convention, it retained the prestige inherent in that status. Thus the fact that the convention would not be in force between the reserving and the objecting States meant nothing in practice.

17. He asked the Committee to consider what would have happened if the Convention on Genocide had been drafted in 1936 and if Germany had ratified it, but had nevertheless declared that it reserved the right to exterminate the Jews. If certain States had accepted that reservation, Germany would have become a party to the Convention. Obviously, the Convention would not have entered into force between Germany and the States which had not accepted the reservation. But this would merely have meant that vis-a-vis those States, Germany would have retained the right to commit genocide of any kind, while in the case of States accepting the reservation Germany would still be able to exterminate the Jews. Clearly that was a theoretical case, but it demonstrated the dangers of the system.

18. Turning to the arguments advanced by Mr. Maktos, the United States representative (266th meeting), in reply to criticisms made by Mrs. Bastid, the French representative, he noted that Mr. Maktos had said that States should only be able to make reservations which were compatible with the essential purposes of the convention. The question was how to ensure that any reservations made would be of that kind. He had been unable to obtain any satisfactory answer to that question. If a State in fact made reservations of substance and these were accepted (or not objected to) by even one or two other States, the reserving country became a party with the benefit of its reservations.

19. He again showed by theoretical examples how States acting in bad faith could accede to a convention without assuming any real obligation. There would undoubtedly be a tendency to increase the number of reservations and to extend their scope. At the present time, States, realizing that they had not an unlimited right to make reservations, acted with a moderation which would perhaps disappear if that right was given to them.

20. The representative of the United States had also said that there were certain conventions, such as the United Nations Charter, in respect of which no reservations could be accepted. Nevertheless, the United States delegation gave no criterion for determining whether a particular treaty was or was not included in that category.

21. In the opinion of the United Kingdom delegation the only certain criterion was whether the convention contained an article permitting reservations. A Latin-American representative had pointed out that practices were divergent and that there was no positive law in the matter. In fact, the divergencies in practice arose from the rule of law which allowed the parties to particular conventions, or classes of conventions, to agree on a particular system of reservations for those conventions, as was the case in the Organization of American States. In the absence of agreement, however, i.e., in the absence, of an express clause in the convention, the existing rule was that reservations could not be made unless agreed to by all concerned.

22. Finally, Mrs. Bastid had asked the United States representative whether a ratification subject to a reservation to which a State had objected should be counted in cases in which a convention was to enter into force after the deposit of a given number of ratifications. Mr. Maktos had replied that the convention would enter into force between the reserving State and States accepting the reservation, but that it would not enter into force between the reserving State and States objecting to the reservation. There would appear to be some confusion between two questions, that of the entry into force of the convention and that of determining which States were parties to the convention. On the basis of the United States representative's reply it was impossible to say with certainty whether the condition necessary for the entry into force of the convention was satisfied.

23. It had been argued that it was desirable that a convention should enter into force, if only in part. The example of certain international labour conventions had been mentioned. However, as was noted in paragraph 20 of the International Law Commission's report, the established practice of the International Labour Organisation excluded the possibility of reservations to conventions concluded under its auspices.

24. The United States representative had said that some governments could not foresee what reservations they would have to make. That was a real difficulty, but it could not be satisfactorily solved by giving States an unlimited right in that respect. It was therefore necessary to find a middle course between that unlimited right and the rule of unanimity which, while juridically the best, involved certain difficulties. He had no formal proposal to make in that connexion, but he suggested a system in which reservations would have to be accepted by a majority of two-thirds or three-quarters of the parties.

25. The French delegation had emphasized that to adopt the American system would be taking a leap in the dark. While in fact, that system had been practised for the past twenty years, it had operated only in America; and only one case had been recorded of a State party to a convention raising an objection to a reservation. What, however, would happen if objections became more frequent, as would probably occur in connexion with conventions concluded under the aegis of the United Nations? That system, the advantages of which had been highly praised, involved serious dangers. Moreover, certain comments in the annual report of the Director-General of the Organization of American States for the financial year ending 30 June 1950<sup>4</sup> showed that even in America doubts were beginning to be felt in some quarters as to the value of the system. He quoted the following passage from that report:

"The absence of a definite criterion as to the effect of reservations made at the time of signature, adherence or ratification has given rise to various interpretations so different from one another in some cases—as in that of the Economic Agreement of Bogota—that they have made the instrument impracticable, because no State considers it wise to ratify a multilateral agreement whose application varies with each country as a result of numerous reservations"<sup>5</sup>.

26. Far from facilitating the ratification of conventions, that system might well produce opposite results, since States might be reluctant to participate in framing a

<sup>4</sup> See *Annals of the Organization of American States*, Vol. III, No. 1.

<sup>5</sup> *Ibid.*, page 14.

text which might be transformed by a multitude of reservations. At present, since the principle of the inadmissibility of reservations was generally recognized, all parties did their best to overcome any difficulties which might arise and draft the best possible test. If, however, reservations were accepted without any restrictions, States would attach much less importance to the drafting of a convention, since they would always be in a position to resort to reservations.

27. There was a danger of serious confusion if this matter was not carefully dealt with. The Court had given its opinion, which applied only to the Convention on Genocide, and the International Law Commission had given a contrary opinion on the general question of reservations, and would doubtless maintain that opinion when the law of treaties came to be codified. Members of the Committee should therefore reflect well before taking their decision, if they wished to avoid finding themselves confronted later by a contradiction which would then be extremely difficult to eliminate.

28. Mr. CHAUDHURI (India) said that so far two diametrically opposed views had emerged in the course of the general discussion: first, the view advanced by the United States and a number of other delegations and, secondly, the opinion held by the representatives of the United Kingdom, France and Brazil.

29. After careful consideration of the cogent arguments advanced on both sides, and of the opinion of the International Court of Justice and the views of the International Law Commission, the delegation of India felt that one of the principal objects of any multilateral convention was to ensure the universality of that convention to the utmost possible degree. That desire for universality should not, however, lead to the neglect of other equally important considerations, namely, the integrity of a convention and its uniformity of application. In the case of certain multilateral conventions universality was so essential that provision had to be made for reservations, and in such cases it would be desirable to include in the convention clauses explicitly specifying the nature and extent of such reservations as might be made. In every case in which one of those principles had to be sacrificed to the other, however, the principle of universality ought to give way to the principle of the integrity and uniformity of application of conventions.

30. The rule of unanimity had on the whole proved its value and should not, in his view, be jettisoned without imperative cause. The fact that its application had on some occasions caused difficulties should not lead the Committee to take a decision which might create still greater difficulties.

31. At the current stage of the discussion the delegation of India did not wish to make any detailed comment on the proposals and amendments before the Committee, but reserved the right to make the observations, suggestions or amendments it deemed necessary at the end of the general discussion. Broadly speaking, however, it supported the United Kingdom amendment (A/C.6/L.190) to the draft resolution submitted by the United States (A/C.6/L.188). It had also given careful consideration to the modifications suggested by the representative of Israel, in its draft resolutions (A/C.6/L.193 and A/C.6/L.194).

32. Speaking of conventions concluded under the auspices of the League of Nations, of which the Secretary-General was the depositary, he made it clear that whatever draft resolution the Sixth Committee might adopt, it should under no circumstances be applicable to those

conventions, since the Committee's decision related to future conventions and not to conventions concluded in the past.

33. Finally, he emphasized that the advisory opinion given by the International Court of Justice—which was, incidentally, far from representing the unanimous opinion of the Court—could not be considered as applicable to all multilateral conventions, the Court itself having drawn attention to the fact that its comments were limited to the Convention on Genocide.

34. Mr. ALI (Pakistan) did not intend to examine in detail the various opinions expressed during the discussion but wished to make some comments on the question of reservations to the Convention on Genocide.

35. While considering the Court's opinion with all the respect due to it, he keenly regretted that he was unable to accept an opinion which did not take account of the humanitarian aspect of the problem. It was not without value to recall the atrocities committed, for purposes of racial extermination, against groups of human beings, in particular women and children. After seeing such degrading acts, it was comforting to find that the humanitarian feelings which should animate any civilized society had inspired the drafting of the Convention on Genocide. It seemed scarcely conceivable that the giving of a certain flexibility to that convention should now be visualized, and it was in any case contrary to the principles of the Charter, according to which States were determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person". No reservation to the Convention on Genocide could be examined in the light of the so-called criterion of compatibility with the aim and purpose of the Convention. The terms of "compatibility" and "incompatibility" could be given no clear legal definition, and consequently the adoption of that criterion would give rise to the most serious dangers, as the United Kingdom representative had stressed. No one could dispute the fact that the Convention on Genocide, in view of its very nature and scope, could not be the object of any reservation whatsoever.

36. With regard to the more general question of reservations to multilateral conventions, he thought the opinion given by the International Court of Justice in regard to the Convention on Genocide could not, even if it was accepted in that particular case, be extended to multilateral conventions. His delegation approved, in general, the conclusions of the International Law Commission, which had considered the question thoroughly after examining, moreover, the opinion given by the Court. However, he reserved the right to comment on the various draft resolutions and amendments at a later stage in the debate.

37. Mr. BUNGE (Argentina) thought the question of reservations to multilateral conventions was of great importance both theoretically and practically, and the solution ultimately found to the question would depend to a large extent on the Sixth Committee's decision. His delegation therefore thought the Committee should give the question mature consideration before deciding. He thought the Court's opinion and the report of the International Law Commission a valuable contribution.

38. The problem of reservations to multilateral conventions originated in the absence of any express norms laid down by international law. It was deduced, on the analogy between a contract under private law and an international convention, that a modification of any provision of the convention by one of the parties destroyed



the balance which formed the very basis of the convention. To make a reservation was therefore equivalent to proposing a new text for the convention, and the party which had proposed the modification could only remain a party to the original convention if the other parties accepted it; thence the principle of the integrity of conventions and its corollary, the rule of unanimity. But the analogy between private law and international law must not be carried too far, since their only common feature was the principle of the free exercise of the will.

39. In the first place, the principle of sovereignty was foreign to private law; the representatives of States which participated in the negotiation of international conventions had limited powers, since each State reserved the right not to be actually bound until the time of ratification. The institution of ratification was the origin of the right of reservation. In that way it differed widely from private law, where the signature of a contract represented the acceptance by the parties of a text which they had drawn up themselves.

40. In the second place, in private law, contracts governed essentially commercial transactions among persons and, when they contained provisions concerning third parties, were only binding on them or affected them to the extent to which they were accepted. In international law, however, many conventions regulated the activities of peoples, since each government had to sanction the text of the convention in accordance with its constitutional procedure, usually by the adoption of a law. The legislature could not be confronted with a dilemma, a kind of "contract of accession".

41. Finally, contracts under private law and international conventions differed in regard to the actual preparation of the texts: the text of a contract was the result of unanimity among the parties concerned, whereas an international convention was the result of a majority vote, as in the case, for example, of the Convention on the Prevention and Punishment of the Crime of Genocide, which had finally been adopted unanimously<sup>6</sup>, but which was drawn up as a result of a series of majority votes. The majority principle, which facilitated the conclusion of multilateral conventions, also made it essential for States to be granted the possibility of submitting reservations; that was an irrefutable principle.

42. The directives to be given to the Secretary-General for the exercise of his duties as the depositary of conventions might be based on the League of Nations system, put forward again with a few modifications by the International Law Commission, or on a generalization of the principles contained in the advisory opinion of the International Court. The Argentine delegation did not agree with the first system, on the grounds that it was not in conformity with the nature of multilateral conventions and that its application was impracticable. The principle of the integrity of conventions, on which it was based, was open to criticism as leading to an unduly rigid system. Moreover, its disadvantages were parallel to the advantages of the system of the American States. Contrary to what had sometimes been asserted, it was not the system employed by the American States which was inapplicable to the international community, but the rigid League of Nations system, since the requirements of a much larger group of countries needed wide and flexible rules.

43. The principle of universality facilitated the progressive development of international law, as the representative of the Dominican Republic had shown contrary to the assertion of the International Law Commission, according to which the experience of the conventions of the Organization of American States was not conclusive in that connexion. The International Law Commission acknowledged that, in certain cases, it might be preferable to sacrifice the principle of integrity to that of universality, but considered that that should not apply to the majority of conventions, and especially conventions concluded under the auspices of the United Nations. The Argentine delegation did not share that opinion; it considered that an examination of the nature of conventions led to the opposite view, and that, whenever it seemed to be indispensable to safeguard the integrity of the convention, a special clause to that effect should be inserted in the text itself.

44. The Argentine delegation shared the views expressed in the advisory opinion of the Court on the principle of the integrity of conventions. Nevertheless, for several reasons it did not believe that that opinion, which might indeed be appropriate in the special case of the Convention on Genocide, could be generalized. In the first place, the criterion of the compatibility of reservations with the object and purpose of the convention would certainly give rise to dispute if States had the power to decide whether or not a reservation was compatible with the object and purpose of the convention, especially in view of the fact that there was no international organ with compulsory jurisdiction. In the second place, in many cases it would be difficult to determine specifically the object and purpose of the convention in order to decide whether a reservation was or was not compatible with such object and purpose. In that connexion, the Argentine delegation shared the views of the International Law Commission. Finally, the practical result of the Court's opinion would be to establish a presumption *juris tantum*, enabling a State to become party to a convention in spite of the fact that it had submitted a reservation which gave rise to an objection by another State party to the convention, such a presumption being subject to the resolutive condition that the reservation concerned affected the object and purpose of the convention. The Argentine delegation considered that it would be advisable to establish a presumption *juris et de jure*, as in the system of the Organization of American States, which made it possible to define the position of the parties clearly and thus to avoid disputes.

45. In conclusion, he favoured the adoption of the system of the Organization of American States, which did not sacrifice the principle of integrity to that of universality, but made an attempt to reconcile those two principles. Resolution XXIX adopted by the eighth International American Conference,<sup>7</sup> which gave the parties the possibility of submitting their comments on reservations, had resulted in discouraging reservations without prejudicing the principle of universality. That system, therefore, was the one best adapted to the nature of multilateral conventions and was the one most in keeping with international reality. That was why the Argentine delegation, together with certain other delegations of Latin-American States, intended to submit an amendment to the United States resolution (A/C.6/L.188).

The meeting rose at 6.10 p.m.

<sup>6</sup> See *Official Records of the General Assembly, Third Session, Part I, Plenary Meetings*, 180th meeting.

<sup>7</sup> See *Final Act of the Eighth International Conference of American States*, resolution XXIX.