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CONTENTS

Page

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) 97
- (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) 97

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), speaking on a point of order, said he wished to make an important correction in the provisional summary record of his statement at the 267th meeting. Far from endorsing the views presented by the Polish representative at the fifth session of the General Assembly, he had actually argued against them. Accordingly he had been most inaccurately reported.

2. He also wished to protest against the manner in which his statement had been deliberately over-summarized, which even suggested partiality. He had spoken at length and had expressed regret at the length of his speech. Yet only two pages of the summary record had been devoted to it, whereas the speeches of other representatives had been given in full. The secretariat had not, he felt, given him the service which the Brazilian delegation was entitled to expect. He would send in corrigenda to the responsible department and protested against the latter's marked discourtesy towards him.

3. Mr. STAVROPOULOS (Secretary of the Committee) expressed regret at the incident of which the Brazilian representative had been a victim. There had been no intention on the part of any official of the Secretariat to minimize or distort Mr. Amado's words. His protest would be recorded in the minutes.

4. The CHAIRMAN was confident that the Committee's secretariat and the *précis* writers had in no way intended to hurt the feelings of the Brazilian representative. He was sure that they had no fixed views on the question of reservations to multilateral conventions.

5. Mr. ITURRALDE (Bolivia) said that the discussion had brought out the main differences of opinion on the question of reservations. Some agreed with the International Court of Justice¹ that a reserving State could be regarded as a party to a convention if its reservation was compatible with the object and purpose of the convention. Every State should be consulted on the question of compatibility.

6. Other delegations favoured the solution proposed in the International Law Commission's report on the work of its third session (A/1858),² where the problem was dealt with in all its aspects and the conclusion reached that a reservation was admissible, but only if none of the previous signatories objected to it. That was virtually a restatement of the League of Nations practice, under which the admission of reservations depended on the consent of all the parties. That was the practice followed and strongly defended by the Secretary-General.

7. A third theory, which had been in practice during the past half-century, was the Pan-American system. Reservations were notified to the parties. If not accepted by them, the reservations could be upheld by the reserving State but they were not binding on States that objected to them.

* Indicates the item number on the General Assembly agenda.

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

² See *Official Records of the General Assembly, Sixth Session, Supplement No. 9*, chapter II.

8. Two of those systems were similar in that they enabled a reserving State to accede freely to a convention even though its reservation met with objections. By contrast, under the International Law Commission's system, the reserving State could not accede to a convention unless its reservation had been approved by the other States. But in modern positive international law the unanimity rule was obsolete, having been superseded by the majority rule, with but one exception: the "veto" in the Security Council. The unanimity rule was criticized in some quarters as paralyzing the action of the United Nations. It would be undesirable to re-introduce it into the law of treaties, for that would be tantamount to introducing a survival from an old into a new regime, would cause delay and revive the serious consequences of the rule that had previously been followed. It would mean that every State would have the right of veto, yet the veto was inadmissible where the majority rule was called for. A State's right to make reservations was a right inherent in its sovereignty.

9. It was incorrect to say, as the United States representative had done, that the reservation of a single State was sufficient to enable that State to impose its will on the majority. The premise on which the International Law Commission had based its reasoning in its report (paragraph 29) was false. Reservations had seldom the character of a new agreement. They were usually concerned with domestic constitutional provisions or the territorial application of a convention. Under the Pan-American system, moreover, they applied only as between the reserving State and States not objecting to them. Reservations were not incorporated in the text of the agreement, because they did not actually modify the substance of the instrument.

10. Reservations were never, in fact, formally accepted. As the Brazilian representative had pointed out, the Pan-American system had been in operation for more than twenty-five years, during which only one case of formal acceptance of reservations had occurred. That was evidence of its soundness.

11. When objecting to the USSR reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Guatemala had stated that its objection only affected its relations with the reserving State.³ The Montevideo treaties of 1889 and the Bustamante Code were examples of conventions where reservations had not been the subject of acceptance. Reservations to those conventions had been but the consequences of differences in provisions of municipal law concerning capacity. Similarly, in the case of extradition treaties, countries which did not admit the surrender of their nationals invariably inserted quasi-formal clauses which amounted to reservations which did not call for acceptance or rejection by the other States.

12. Since the legislatures of the various American States were not consulted when Pan-American conventions were signed, the natural stage for those States to make reservations was the ratification stage. It was only under dictatorial régimes that the legislature could not contradict the executive.

13. He regretted that such flexible practices had not been accepted by the International Law Commission and the Secretary-General.

14. The Genocide Convention was a law-making convention forming the basis of a system of public law which was beginning to take shape and to go beyond national law. The Convention had been submitted for consideration to the International Court of Justice, and it would be reasonable to apply the Court's opinion to all law-making conventions. It was impossible to admit of reservations to such conventions, which had to be accepted as a whole or not at all. That was the case with the Charter of the United Nations, as was apparent from its Article 4.

15. The example of the Genocide Convention showed that the Secretary-General had not invariably followed the practice referred to in document A/1372, since prior to the entry into force of that Convention some States had already made reservations that would have prevented it from coming into force if the unanimity rule had been applied.

16. Under the Pan-American system instruments of ratification could be deposited definitively, and that had many advantages. In cases where a treaty did not make express provision, it was certainly more practical to apply the Pan-American system, which made ratification easier. The ideal would be for the negotiators to include in a treaty specific clauses defining what reservations would be compatible and which would be incompatible. As the examples given by the United Kingdom representative (267th meeting) clearly showed, the adoption of a rigid rule would make it impossible to achieve international harmony. It was to avoid inequalities and in an effort to obtain the most satisfactory solution that Bolivia, along with other countries, had proposed an amendment (A/C.6/L.191) to the United States draft resolution (A/C.6/L.188). The duties of the Secretary-General as a depositary were laid down in those amendments, the object of which was to liberalize the rules applicable to him.

17. Mr. P. D. MOROZOV (Union of Soviet Socialist Republics) said the background of the question was familiar. In 1950, the Secretary-General had announced that he would not accept instruments ratifying the Convention on the Prevention and Punishment of the Crime of Genocide if they were qualified by reservations which met with objections from other contracting States, or even from a single contracting State. Naturally, that position, which was inconsistent with the principles of international law and with the practice usually observed by governments in dealing with multilateral conventions, led to protests from a number of Member States including the USSR. It would also be recalled that at the fifth session of the General Assembly, many delegations sitting on the Sixth Committee had not approved of the Secretary-General's attitude. In other words, the question had come before the Committee once again not because it had not been given adequate study or because it presented great difficulties, but rather because a number of delegations were resisting the attempt to impose upon the United Nations the administrative procedure of the League of Nations instead of the generally accepted system which was broadly reflected in the system of the American States.

18. The USSR delegation had stated at the fifth session (305th plenary meeting) that the text of the Convention for the Prevention and Punishment of the Crime of Genocide was unequivocal and without gaps and hence should not require construing. Under the terms of article XVII, the Secretary-General was merely to notify all States of the ratifications received in pursuance

³ See *Official Records of the General Assembly, Fifth Session, Annexes*, agenda item 56, document A/1372, annex I, para. 12.

of article XI, whether subject to reservations or not. By attempting to set up a special system governing reservations, the Secretary-General was exceeding the limits of his powers.

19. The USSR delegation had also stressed at the time that the Convention itself placed no restriction upon any reservations which might be made; it respected the inalienable right of every State to make reservations to any convention. The USSR delegation had made clear the practical consequences of the system which entitled States to make reservations: the convention was in force between the State making the reservations and the other contracting States, except for the provisions affected by the reservations. It had shown that its interpretation was supported by numerous precedents and promoted international co-operation by enabling more States to accede to the convention.

20. Yet, despite the clear terms of the Convention itself which required no interpretation or decision, the Assembly (resolution 478 (V)) had asked the International Court of Justice and the International Law Commission to give rulings on the question. The replies of those two bodies did not influence the USSR delegation to alter its views, which the Court's opinion to some extent upheld.

21. He would not dwell on the contradictions and errors in the International Law Commission's report, which other speakers had pointed out. The report contained nothing new; it merely repeated the view of the Secretary-General, of which all the members of the Sixth Committee were fully aware and which most of them did not share.

22. The International Law Commission considered in its report (paragraph 34, sub-paragraph (5) (b)), that a State which tendered a ratification or acceptance with a reservation might become a party to the convention only in the absence of objection by any other State which, at the time the tender was made, had signed, or ratified or otherwise accepted the convention. In his report (A/CN.4/23) to the International Law Commission at its second session, Professor Brierly had recognized that the International Law Commission had been unable to corroborate that argument from legal doctrine.

23. The International Law Commission had therefore sought to substantiate its argument from practice, a perfectly proper procedure inasmuch as the reply to the problem before the Committee could be found in the practice of governments. Unfortunately, the Commission's analysis of past practice was totally devoid of objectivity. With no reflection on the sincerity of the members of the Commission, he felt bound to state that the cases referred to—in which the practice of the League of Nations had been followed—had been carefully selected, while no mention had been made of the much more numerous cases of conventions to which that system had not been applied. The reason for that attitude was clear: in the heat of argument, one tried to prove what could not be proved at all.

24. The International Law Commission spoke of conventions concluded under the auspices of the League of Nations in which the practice of the League had been followed. The practice had originated in the resolution of 17 June 1927, to which the International Law Commission referred in paragraph 18 of its report. To rebut that example, one had only to read the opinion of the International Court of Justice (pages 24 and 25) that that concept, based on the principle of the absolute integrity of conventions, could not prevail because the concept of absolute integrity had not apparently become a rule of

international law. The Court added that there had been too few examples in practice to warrant the formulation of such a rule. Thus, as the Bolivian representative had said, such a rule could not be said to exist in law, nor could one be formulated on the basis of the 1927 report of the Council of the League of Nations.⁴ If that report was dismissed—as the Court had done in holding that the recommendation contained in the report was at most the point of departure for administrative practice—the very basis of the International Law Commission's report disappeared and with it the system which it advocated.

25. The International Law Commission also referred to International Labour Organisation conventions, most of which—as everyone knew—had never been ratified by anyone. Yet it failed to mention some very important conventions to which the League of Nations system had not been applied. Thus sixty reservations had been made to the Hague Convention of 1907 and the Netherlands Government, as depositary, had accepted all the ratifications qualified by reservations. The United States had made a reservation to that Convention although eight States had already ratified it, and the Netherlands Government had accepted that reservation without so much as consulting the contracting States. He mentioned several more conventions to which the League of Nations system had not been applied, such as the 1912 International Radiotelegraph Convention, the 1925 Convention on the use of poison gas in warfare, the 1929 Convention on the Suppression of Counterfeiting Currency, the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs and especially the four great Geneva Conventions of 1949 on the protection of war victims. There had been a series of reservations to the latter, but the Swiss Government, the depositary, had not applied the League of Nations system to any of them. The International Law Commission had refrained from mentioning all those conventions which supported a practice which it preferred to ignore.

26. Moreover, the League of Nations practice and that of the American States could not be said to be mutually exclusive. The countries of Latin America had not invented the practice of the American States; they had merely adopted, with some adaptations, a practice which had existed before the 1928 Havana Convention on private international law. That system, which supported the inalienable right of every sovereign State to make reservations to a multilateral convention, was the only admissible one. The practice proposed by the Secretary-General was merely an attempt to distort or confuse a practice which had become a rule of positive law.

27. On that point, the terms of article 6 of the Havana Convention of 1928 were perfectly clear. They showed that the system of the American States was in fact a synthesis of existing rules, that reservations were manifestations of national sovereignty and that, in the exercise of that sovereignty, a State did not violate any rule of international law.

28. The International Law Commission had therefore not proved by its analysis of theory and practice that the Pan-American system was inconsistent with international law. It had used a purely geographical argument when it said that the Pan-American Union's practice had proved satisfactory only in so far as it had applied to the States of the American continent and could not be applied to a wider community of States. According to Mr. Yepes, a

⁴ League of Nations Document, C.357.M.130.1927.V.

member of the International Law Commission,⁵ that argument was false, because if the Pan-American method could be successfully applied to a group of States which were closely linked, it would be applicable *a fortiori* to a much wider organization, more loosely bound together, such as the United Nations, the universal nature of which made it less demanding in that respect than a purely regional organization like the Organization of American States.

29. By a decision of its Governing Board of 4 May 1932, the Pan-American Union had unfortunately departed from the principles of international law underlying article 6 of the Havana Convention. According to that decision, a multilateral treaty was not deemed to be in force between a State ratifying subject to a reservation and other States which, having previously ratified without reservation, objected to the reservation. The USSR delegation could not accept that view, which was inconsistent with international law.

30. The attempt of the International Law Commission to reject the Pan-American system was doomed to failure. Moreover, Professor Briery, in his report to the second session of the Commission (A/CN.4/23), had had to recognize that the principle of the integrity and uniform application of the convention might, if carried to extremes, lead to barring reservations altogether, which was going too far. The Commission therefore contradicted itself, because according to the system it proposed there was virtually no other course open to States but to accept the convention without alteration or to refrain from acceding to it, which amounted in effect to barring reservations absolutely.

31. He proceeded to analyse the opinion of the International Court of Justice; he approved the arguments relied on by the Court when it stated that the greatest possible number of States should become parties to the Convention on the Prevention and Punishment of the Crime of Genocide and that the contracting parties had the right to formulate reservations, even though the Convention contained no express provisions concerning reservations. Unfortunately, the attitude adopted by the Court was in some respects inconsistent with that view. That was perhaps due to the desire of the majority to find common ground with the minority which agreed with the International Law Commission. The Court asserted, for example, that no reservation could be imposed on a State without that State's consent, and concluded that the Convention could not enter into force between a State which made a reservation and a State which did not accept it. It recognized that the decision taken by a competent legal body could result in the exclusion of a State whose reservation was regarded as incompatible with the object and purpose of the Convention; but it offered no objective test by which to judge whether reservations were compatible with that object and purpose. In that connexion he examined some of the statements of other speakers about the nature of reservations which could properly be made.

32. The contradictions in the Court's opinion were due to the fact that the Court had applied to multilateral conventions principles valid for bilateral conventions.

Multilateral conventions were not the sum of bilateral conventions; they were different in essence. The procedure followed in preparing the text of a multilateral convention was different from that followed in the case of a bilateral convention. In the case of a bilateral treaty, if the parties were not agreed there was no treaty. The text of a multilateral convention, however, was frequently not accepted in its entirety by all the parties, and it was natural that a State which, at the time when the text of a provision was voted on, was one of the minority overruled, should defend its sovereign right to commit itself as it wished, by formulating a reservation.

33. The representative of France, Mrs. Bastid, had said (366th meeting) that the Members of the United Nations had accepted the rule that the Assembly's decisions were taken by majority vote and that those who were unwilling to adopt the method suggested by the International Law Commission were rejecting a system they had accepted. But there was no logical connexion between the two stages of her argument. In signing the Charter no State had pledged itself to agree to the contractual obligations subsequently to be imposed by the majority. The Assembly had only recommending powers; when it adopted a draft convention it recommended States to adopt it, and it did not follow that a State was bound by the Charter to ratify such a convention.

34. He had listened with great interest to the statement of the Brazilian representative (367th meeting), but had not found in it any convincing argument to cause him to alter his views.

35. To sum up, his delegation felt that adoption of the system proposed by the International Law Commission would mean dictating to a State the extent of the obligations it was to assume; that was a serious interference in affairs which were exclusively within the jurisdiction of each State. A State must be able to formulate reservations. The reservation had the legal effect that the other States were not obliged to respect, in their relations with the reserving State, the provisions to which the reservation applied. Consequently the principle of reciprocity was not impaired and there was no disturbance of the equilibrium between the parties.

36. In conclusion, he said that any attempt to limit the inalienable right of a State to formulate reservations was contrary to law and hampered international co-operation.

37. His delegation was prepared, therefore, to accept sub-paragraph 4 (a) of the operative part of the United States draft resolution (A/C.6/L.188). It also accepted the first phrase of sub-paragraph 4 (b) of the operative part, which authorized the Secretary-General to communicate documents relating to ratifications, accessions and reservations to all States concerned. But it could not accept the remainder of sub-paragraph 4 (b), or paragraph 3 of the operative part of the draft resolution, which would complicate the drafting of the texts of conventions.

38. He reserved the right to make a further statement during the discussion.

The meeting rose at 1.5 p.m.

⁵ See *Official Records of the General Assembly, Sixth Session, Supplement No. 9*, page 5, note 15.