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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. OGRODZINSKI (Poland) noted with regret that the apprehensions expressed by the Polish delegation in the Sixth Committee at the fifth session (224th meeting) had been borne out by events: the opinion of the International Court of Justice¹ and the conclusions of the International Law Commission in its report (A/1858)² differed. At the current session the discussion had dealt mainly with two ideas, that of the absolute will of the majority and that of the sovereignty of each State. The idea of sovereignty was in keeping with the law in force. Since the nineteenth century, when no treaty could be concluded without the unanimous consent of all the parties, the system of concluding treaties had changed. The modern practice was frequently to conclude treaties by simple majority. To compensate for that, the minority could secure acceptance of its views by means of reservations. The Court's opinion (page 22) noted that reservations were the corollary of the application of the majority principle in the conclusion of multilateral conventions. If that had not been so, the minority would not only be deprived of any possibility of influencing

the treaty, but would also be unable to accede thereto on acceptable conditions. Objections to reservations infringed the rights of each State and were incompatible with the fundamental principles of international law.

2. The admissibility of reservations should be generally recognized. The League of Nations had admitted them and there was no reason why the United Nations should not do likewise. If reservations were not allowed, the minority would be unable to decide whether, or indeed to what extent, to become party to a treaty.

3. He disagreed with those who supported the so-called League of Nations practice. Their arguments fell into three categories.

4. First, it was argued that that practice was the traditional method; but that was a mistaken notion. A report of League of Nations experts in 1927³ had concluded that the submission of reservations in the course of negotiations corresponded to the acceptance and adoption of reservations. Yet the practice of the League of Nations contained examples of reservations which had been made without the express consent of the other parties, as in the case of the accession of the United States to the International Slavery Convention of 1926. The requirement of consent to reservations was not a rule of international law, as the Court's advisory opinion (page 24) confirmed.

5. He also took issue with the contention that contracting parties would not enjoy equal rights under an international agreement. The representative of France (266th meeting) had claimed that the majority rule would guarantee the rights of a reserving State and take away rights from the States objecting to such reservations. But Mr. Ogrodzinski took the contrary view that States making reservations were exercising a sovereign right and that a State objecting thereto was inter-

* 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.

³ See *League of Nations Official Journal*, July 1927, pages 880-882.

fering in matters within the competence of another State. In cases where certain States accepted the reservations, that practice would even amount to interference in the legal relations between other States. The States of the majority would thus have greater rights than those of all the States in the minority together. The argument was absurd, because a single State of the majority could exclude a whole group of States by objecting to reservations.

6. Thirdly, those in favour of some limitation on reservations, like the representatives of the United Kingdom and Canada, claimed that reservations might well have the effect of radically altering the substance of treaties. Yet, if reservations distorted conventions in that way, no country would agree to them. If a convention was of no interest to a State, the State in question would not accede. Conversely, if a State took an active part in negotiations, the reason was that it proposed to accede to the convention; its goodwill and wish to co-operate should not be impugned. The effect of reservations was to modify the treaty on the basis of reciprocity. The principle had been frequently applied in English law. That was also the principle on which the League of Nations had relied in 1930 in defining a multilateral treaty as an agreement in which each contracting party could regard the commitments entered into by the other parties as the counterpart of its own commitments.

7. Contrary to the theory of the integrity of multilateral obligations, a convention was a document constituting the common denominator of reciprocal relations between the contracting parties. It replaced a number of bilateral treaties, but also contained special agreements between the various signatories.

8. To refuse reservations would end in complicating the procedure for the conclusion of treaties and would make international co-operation difficult. By 1931 259 reservations had been made to treaties concluded by the League of Nations, which was clear enough evidence that the system of reservations had already become a recognized custom.

9. Turning to Pan-American practice, he refuted the arguments put forward against it, in particular by the Brazilian representative (267th meeting), who had claimed that the bonds between the Latin-American countries were so weak that the principle of reservations was no proof of closeness of connexion between them in the field of law. Others had affirmed that the system would be applicable to a regional organization but not to a wider one. He thought that the divergence of views was proof of the weakness of the arguments. The Pan-American system guaranteed the same rights to each of the contracting parties, which amounted to defending the interests of the minority.

10. Opponents of the Pan-American system claimed that to allow reservations would enable a State to render a treaty valueless. But treaties were based on the principle of reciprocity. Rights had their corresponding obligations. States made reservations only if their vital interests obliged them to do so and when the majority had failed to take their interests into consideration.

11. The International Law Commission in its report had endeavoured to impose a single system, which might have the effect of binding States against their will. The International Court of Justice had defined the law in that connexion on the occasion of the promulgation of the Convention on the Prevention and Punishment of the Crime of Genocide, but a wider conclusion should be drawn from its opinion.

12. It was only possible to refuse to allow reservations in the case of conventions in which the decision of the contracting parties must be absolutely unanimous. If the majority were allowed to take a binding decision on the making of reservations, that would amount to eliminating the safeguards for the minority. The Polish delegation was therefore favourable to the principle which the International Court of Justice had expressed.

13. Mr. FITZMAURICE (United Kingdom) pointed out that the examples of reservations quoted by the Bolivian representative at the 269th meeting did not constitute real reservations, but merely general statements explaining the attitude of a State on a certain point. A reservation was a declaration by which a State announced its intention not to assume certain obligations in a treaty.

14. He was more and more convinced that the Sixth Committee would be unable to reach a decision concerning reservations at present. Further study of the problem was required. Every speaker seemed to be struck by a different aspect of the problem. Some were impressed by the right of veto which a reservation constituted, others by the fear of impairing the integrity of conventions, some by the necessity of allowing reservations, others by the danger contained in reservations which related to the substance of conventions. It was therefore essential to find a compromise solution.

15. Some aspects of the problem had not been sufficiently stressed. The Committee at present was concerned only with a certain kind of convention — those included under the auspices of the United Nations, which involved rules of law and were of a social and humanitarian nature. That kind of convention did not entail any advantages for the contracting parties, but merely obligations, which were sometimes fairly heavy. In cases where advantages were entailed, reservations were limited. That was far from being the case with the conventions in question.

16. He had never received a satisfactory answer to the question of how to ensure that States would not make important reservations relating to the substance of conventions. In the Pan-American system acceptance of reservations by only one or two parties sufficed to make the reserving States themselves parties to the convention, even in the case of reservations of substance. In present circumstances, when countries were divided into quite divergent groups, it was impossible to obtain unanimous objections to a reservation.

17. He regretted that there had been so many objections to the example he had given at the 267th meeting, of the hypothetical case concerning the attitude Hitler might have adopted if the Convention on Genocide had been in force in 1936. There were more plausible examples of the application of the Pan-American system. If the future Covenant on Human Rights were to contain a clause under which each party undertook to guarantee to its people political and civil rights, and if a State made a reservation to that clause because part of its people were very backward, there would be differences of opinion among the other States as to whether that was a reservation of substance or not. Similarly, if, in the Convention relating to the Status of Refugees, there was a clause to the effect that refugees must be admitted to the receiving country for at least five years, what would happen if a State claimed that it must be allowed to reserve its right to expel refugees at the end of two

years solely because they constituted a charge upon the State?

18. The Convention on Genocide provided an instance of the danger inherent in the Pan-American system, and that was why the question was now before the Sixth Committee. Under that system parties rejecting a reservation could not prevent the State presenting it from becoming a party to the convention. He preferred that States wishing to present a reservation of substance should not be admitted as parties to the convention, but rather, should conclude a separate agreement with those willing to accept their reservations. A passage from the dissenting opinion of four members of the International Court of Justice (pages 46-47 of the advisory opinion) indicated that each party must be given the right to judge the acceptability of a reservation in order to preserve the principle of the acceptance of common obligations. It was incorrect to claim that it was better for a convention to have many signatories than none. If the United Nations conventions involved advantages for the parties, the Pan-American system might perhaps be acceptable, but that was not the case.

19. Some representatives had pointed out that the right to make reservations derived from the sovereignty of States. That was a mistaken conception of sovereignty. Parties should not be entitled to select certain obligations in a convention and reject others because they did not suit them. That would lead to anarchy.

20. The Polish and Belgian representatives (272nd meeting) had objected that it was the same majority which drafted the convention and rejected the reservation. It could not be otherwise. What point was there in inserting a clause that could be rejected afterwards? Conventions were based on equality between the parties. There was a great difference between the position of States making reservations and that of those rejecting them. A State making a reservation was asking for a privilege, the right to which it must justify. There was hardly any fear of the rejection of a reservation being unreasonable, but the same was not true of the presentation of a reservation.

21. The Pan-American system did not guarantee that reservations would be limited to matters of minor importance, or that they would not concern the substance of conventions. For those reasons he thought it would be wise to study the question more closely.

22. The Chilean representative (270th meeting) had shown that the right to make reservations had not encouraged the conclusion of conventions by the Latin-American countries, as more than half the conventions signed by those countries had not been ratified. Some of the conventions had contained clauses stipulating that no reservations could be made to them. Reservations to the substance of the conventions had destroyed their effect. He inferred from that that the Pan-American system was perhaps convenient, but very dangerous.

23. The draft resolution submitted by Denmark, India, Iran, Israel, Mexico, Netherlands, Peru and Sweden (A/C.6/L.198) constituted a reasonable compromise. It provided that pending the completion of the study by the International Law Commission on the law of treaties, the Secretary-General should be invited to follow his prior practice. Mr. Fitzmaurice hoped that the draft resolution would be adopted.

24. Mr. BARTOS (Yugoslavia) recalled that the question before the Committee had originally been connected with the Convention on Genocide, the Secretary-General

having asked for instructions to guide him in carrying out the duties of depositary. However, as might have been expected, the question had immediately become general, in view of the fact that there were many conventions concluded under the auspices of the League of Nations or of the United Nations which had not entered into force, or as regards which a similar problem might have arisen at the time of ratification or accession if they had entered into force.

25. Before studying the general aspect of the question, he wished to make it clear that his delegation had objected in the Sixth Committee (221st meeting) at the General Assembly's fifth session to reservations being made to multilateral conventions when the conventions did not contain a clause providing for such reservations, and it therefore objected to the reservations made to the Convention on Genocide.

26. As that Convention had now entered into force, some delegations suggested that a temporary solution should be sought, implying that the original problem had lost its significance and, to a certain extent, had solved itself. He did not think that that was so. The objective, which was to settle the question of the regularity and the legal effects of *ex post facto* reservations, had not been attained. The best proof of that was that ratifications accompanied by reservations had not been regarded as ratifications permitting the Convention to come into force.

27. The Yugoslav delegation considered that the reservations made so far to the Convention on Genocide, as well as those which might be made later to the same effect, changed the very substance of the Convention, since they tended to render void the clause which provided, as the sole legal penalty, that disputes concerning the interpretation, application and execution of the Convention should be submitted to the International Court of Justice. To authorize such a reservation would be tantamount to saying that violation of the Convention by a State which had made such a reservation could not be brought before the Court, and that the obligation to punish and prevent the crime of genocide was reduced for that State to a natural obligation, whereas it was a strict legal obligation for States which had not made such reservations. In other words, the Convention would merely be a collection of rules of good conduct, the effect of which would depend on the goodwill of States, which would decide how far they wished to commit themselves, some of them assuming the right to make eloquent speeches on international co-operation and on respect for international law while excusing themselves from making any effective contribution in those spheres.

28. It was the Committee's task, in view of the Court's advisory opinion and the International Law Commission's report, first to solve the question of reservations to the Convention on Genocide; secondly, to give instructions to the Secretary-General as depositary of that and other conventions; and lastly, to take a decision of principle, in accordance with the rules of international law, to ensure the stability of legal relations and the development of international co-operation.

29. He wished to make some general remarks on that question before beginning the study of the Court's advisory opinion and the International Law Commission's report. In support of the Court's advisory opinion and of the system adopted by the Organization of American States, the principle of universality of conventions had been put forward: that is, the possibility for a

large number of States to participate in multilateral instruments by accepting obligations in part when they could not accept them as a whole. The Yugoslav delegation also accepted the principle of universality, but it could not conceive that on that basis there should be any inequality between the various contracting States. The obligations imposed by a convention were not juxtaposed, as the Mexican representative (270th meeting) had implied. They were part of an indivisible whole which the contracting States could not accept in part. International co-operation, which it had been alleged would be improved by the system favoured by the Organization of American States, depended precisely on respect for all the obligations imposed by the convention by all the contracting parties and not merely by some of them. It might be asked how the international community would benefit by conventions signed by a large number of States, most of which refused to apply the rules of international law on the ground of their sovereignty. In that connexion the Chilean representative's analysis had destroyed the corollary argument of the principle of universality: that the system of the Organization of American States would encourage ratifications. It was clear, moreover, that the ratification of a convention by a State by no means depended on the fears which it might have as to the acceptance or rejection of its reservations. He did not think, therefore, that the adoption of such a system would be a step towards universality and the Yugoslav delegation could not support it.

30. That did not mean that Yugoslavia rejected the possibility of reservations. Reservations might be made and accepted as long as they did not affect the substance of the Convention or give it a wrong interpretation. It was therefore not a question of objecting to reservations in general, but to the abuse of reservations as a means of avoiding obligations and of inserting in the texts of conventions provisions which had been rejected in the course of negotiations because they had been considered inconsistent with the aim in view. In the opinion of the Yugoslav delegation, *ex post facto* reservations were inadmissible unless the text of the treaty stated otherwise. States should make their views known at the negotiation stage, that is, when a compromise solution was usually being sought.

31. The question which had arisen was not so much a question of the right of States to make reservations as of the legal effect of such reservations. The International Court of Justice had been invited to state whether a State which had made a reservation could be considered as a party to a convention so long as it maintained that reservation, if one or more parties objected to the reservation and other parties did not. A negative reply should have been given to that question, the basis of obligations assumed under conventions being the very consensus of the contracting parties. Without that consensus there would be no treaty and no rules of international law, since treaties were the source of international law. A treaty, once concluded, could not be amended without the consent of all the contracting parties. If that principle was not accepted, the multilateral treaty would be transformed into a sum of bilateral treaties, which would cause confusion and impose unequal obligations on the parties to the original treaty.

32. It was known, in that connexion, that the Yugoslav delegation had always objected to the "colonial" clause which, in reality, was a privilege granted to colonial States as regards the application or non-application

of a convention to colonial territories. The clause was out of place in multilateral treaties and should be deleted from the Convention on Genocide. It seemed, however, that for the time being it would be impossible to make a reservation to that clause, as the obligations included in the Convention could not be amended by the will of one party alone after the text of the Convention had been drawn up. Some parties to the Convention might accept it in view of the fact that the clause in question would grant them a certain latitude, and, for the State whose point of view had not been accepted at the time of the negotiations or which had not taken part in the negotiations, a reservation in that connexion might compel the parties to adopt an attitude which they had not wished to adopt originally.

33. On the other hand, it was plain that a reservation to the clause in the Convention on Genocide which provided that any disputes in regard to the interpretation, application and execution of the Convention should be submitted to the International Court of Justice would result in destroying the legal element of the Convention represented by sanctions, the application of which would no longer be possible. The Court would no longer have any competence in the matter, and the Convention would no longer be in force between the State that had made the reservation and the States that had not accepted it, not only as regards the clause under consideration but also, in general, because of the disappearance of the legal element of the Convention.

34. With regard to the principle of sovereignty and the argument that the majority system would involve the undeniable right of the minority to protect itself and not to permit the majority to impose its will on it to an unlimited extent, the Yugoslav delegation had always been opposed to the imposition of the will of one State upon another by force. It considered, nevertheless, that the sovereign rights of the minority were sufficiently protected by the fact that a State was not obliged to accept the text adopted by the vote of the majority. The fact of depriving a State of the right to express its views on a reservation made by another State amounted precisely to the imposition of the will of the minority on the majority. It had been said that a single State could not exercise the right of excluding a State making a reservation from the Convention, but it was equally unlawful to give the State whose reservation had been accepted by only one of the contracting parties the right to become a party to the Convention in defiance of the explicit will of the majority. Thus, the principle of sovereignty as applied in the Organization of American States was tantamount, on the pretext of protecting the minority, to subjecting the majority to the will of the minority, or in other words, to applying an anti-democratic system. The fact remained that, after the treaty had been drawn up, States had the right to accept not only reservations but also the possible revision of that treaty. For that reason, it would, in his opinion, be more fitting to accept the United Kingdom representative's suggestion (267th meeting) as to the possibility, in the case of conventions which did not contain any provision as regards reservations, to adopt the positive elements of the two systems that had been pursued up to the present, and thereby reach a constructive solution.

35. Influenced by the atmosphere of mistrust prevailing in the General Assembly, those who supported the absolute right of a State to make reservations were proceeding from the false principle that a State which was opposed

to a reservation was guilty of bad faith. If the State which formulated a reservation considered that it was acting in good faith, it would be quite natural for that State to admit that States which had to express their views on such a reservation might also be acting in good faith. For that, however, the present atmosphere would have to be changed. The majority should study the reservations made by the minority in a spirit of goodwill and the minority should show themselves less stubborn.

36. The international community could not, out of respect for the sovereignty of each State, impose obligations on States which were not prepared to accept them. A State should not, however, in the name of its own sovereignty, make all kinds of reservations without asking itself whether the other parties would be prepared to accept them, because it would then be encroaching upon the sovereignty of the latter. The sovereignty of a State should in no case mean denial of the sovereignty of another State. Every State was a member of the international community and should take into consideration the existence of other States with which it maintained relations. Conditions of equality should prevail between all the States concerned as regards the obligations assumed by them and the rights accorded to them. That was a historical truth which was also acknowledged by Soviet Union jurists, among others. Rules of international law existed in spite of the fact that they were denied in certain quarters. The Yugoslav delegation considered that when obligations had been accepted in the international community, a State could not change them by invoking its sovereign right just because it was pleased to do so. Such procedures would shake the very foundations of international law.

37. Some members of the Committee had attempted to draw analogies between international law and private law in order to justify the right of a State to make reservations. If there were such an analogy, however, it would not provide support for the argument that a sovereign State would enjoy an unrestricted right in that particular, because of the principle of autonomy of will, and that it would not have to endeavour to obtain the consent of the other parties, which would, as it were, be acquired *a priori*. That represented a dangerous concept in international law. In private law, public law and order did in fact protect and restrict the will of the individual. In international law, on the other hand, such public order was specifically represented by the joint will of the States forming the international community. An international treaty constituted a law created by the sovereign will of States and not by the will of States restricted by considerations of public order; every State should respect the expression of that will.

38. In the light of those general ideas, the Yugoslav delegation agreed with some of the views expressed in the advisory opinion handed down by the International Court of Justice, but could not accept the Court's conclusions. Certain passages of the opinion had been quoted to prove that the practice followed by the League of Nations and by the Secretary-General did not represent existing international law. Mr. Bartos took the view, however, that the opinion of the Court showed many proofs of the existence of principles on which that practice was founded. The Court stated, for example (page 21), that it was a well-established fact that in its treaty relations a State could not be bound without its consent and that, consequently, it could not be reproached for any reservation as long as it had not signified its assent. As every multilateral convention

was the outcome of an agreement which had been freely entered into in regard to all its clauses, it could not rest with any of the contracting parties to nullify or compromise, by means of unilateral decisions or by special agreements, what was after all the very purpose and meaning of the Convention: consequently, reservations must be unanimously accepted. The Court then acknowledged that the large number of participants in conventions concluded under the auspices of a body of a universal character such as the United Nations had already resulted in greater flexibility in international practice, and it recognized that there was need for increased flexibility in the operation of multilateral agreements.

39. Pursuing that line of reasoning, the Court then arrived at a conclusion which, in the view of the Yugoslav delegation, was as incorrect as it was unexpected. It might be presumed, said the Court, that the parties to the Convention on Genocide had intended to authorize reservations. That assumption was categorically refuted in the dissenting opinions of the four members of the Court and of Mr. Alvarez, who found that the first draft convention had contained an article dealing with reservations and that a sub-committee, composed of the representatives of Poland, the USSR and the United States, had decided that there was no reason to make provision for reservations, a decision which had been unanimously accepted by the *Ad Hoc* Committee on Genocide. The General Assembly had therefore followed the classical principle that reservations were admissible only if the parties previously took a decision to that effect and made specific mention of it. The majority of the judges of the Court had lost sight of that fact and had sought a politically acceptable solution, on the assumption that it had been the intention of the General Assembly and of the contracting States to rally the largest possible number of States in support of the Convention. It had concluded that the trend towards universality should be the criterion for every State in deciding individually, and on its own behalf, whether a reservation was justified. The Yugoslav delegation accepted that conclusion, but thought that the fact should be taken into account that the General Assembly, in approving the draft convention, had been seeking strict law and not a rule of conduct.

40. It was interesting to note that from the fact that objections to reservations were rare, the Court had drawn the conclusion that the principle of the integrity of conventions had not become a rule of international law. That fact would rather seem to prove that reservations were an exception and a prerogative conferred on States by courtesy and that, in addition, States authorized to make objections had not abused that right. That did not mean, however, that those States had called into question the principles on which the practice of the League of Nations had been based. The finding did not, therefore, justify the Court in considering that the special character of the Convention on Genocide called for a special solution.

41. The Court had then introduced the criterion of compatibility. It had not specified, however, who should apply the criterion, but had left it to each State to do so. What would happen in instances where reservations were made against the provisions of the Convention stipulating that the Court was competent to settle disputes relative to the interpretation and application of the Convention? The case would be insoluble. That concept thus introduced a new arbitrary element, and, as the Court had declared that a State making a reser-

vation could be party to the Convention if the reservation were compatible with the purpose and object of the Convention but could not be a party if that were not the case, it would never be known whether a State was a party to the Convention or not. Assessment of the compatibility of a reservation was very often a political question. If competence in the matter were to rest with the Court, the latter might perhaps *ipso facto* find that it had become transformed into a political organ. If the contracting States had decided not to admit reservations, as in the case of the Convention on Genocide, the Court should first disregard that expression of the will of the parties so that it could apply the criterion of compatibility.

42. The Yugoslav delegation therefore did not accept the opinion of the Court because it did not settle the question, but proposed a solution which could only complicate still further a problem which was complicated enough already. Mr. Bartos agreed with the Brazilian representative that the criterion proposed by the Court was entirely novel and not based on existing international law. Taking into consideration, as the Court had done, the special character of the Convention on Genocide, he had arrived at a contrary solution, namely, that the practice of the League of Nations and the Secre-

tary-General should be followed as being in accordance with the classical theory of law maintained by many authors. The Yugoslav delegation considered that that system should be applied to other conventions which were often of lesser importance and therefore were not liable to cause many difficulties.

43. With regard to the report of the International Law Commission on the work of its third session, the Yugoslav delegation accepted its conclusions, and particularly supported those contained in paragraph 33, recommending the insertion in multilateral conventions of provisions relating to the admissibility or non-admissibility of reservations and the effect to be attributed to them. He cited the case of the Convention on the Status of Refugees, which contained a specific provision on the subject of reservations.

44. In conclusion, he stated that he might vote for the joint draft resolution (A/C.6/L.198), so as to reserve the opportunity of again studying so important a question, which was both political and legal in nature. In that connexion, he felt, like the United Kingdom representative, that the Committee should be afforded the opportunity of giving the matter further consideration.

The meeting rose at 1.15 p.m.