

# GENERAL ASSEMBLY

## FIFTH SESSION

Official Records



SIXTH COMMITTEE 220th

MEETING

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Lake Success, New York

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Chairman: Mr. V. OUTRATA (Czechoslovakia).

#### Reservations to multilateral conventions (A/1372) (*continued*)

[ITEM 56]\*

1. The CHAIRMAN reminded the Committee that the representative of Israel had asked at the 219th meeting for a complete list of the multilateral conventions deposited with the Secretary-General which had not yet entered into force.

2. Mr. KERNO (Assistant Secretary-General in charge of the Legal Department) read the following list:

(a) The Havana Charter for an International Trade Organization, signed at Havana on 24 March 1948;

(b) The Convention on the Inter-governmental Consultative Organization, signed at Geneva on 6 March 1948;

(c) The Convention on Road Traffic, signed at Geneva on 19 September 1949;

(d) The Protocol on Road Signs and Signals, signed at Geneva on 19 September 1949;

(e) The Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, with Protocol of Signature opened for signature at Lake Success on 15 July 1949;

(f) The Convention on the Declaration of Death of Missing Persons, Lake Success, New York, 6 April 1950;

(g) The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, opened for signature at Lake Success, New York, on 21 March 1950.

3. The Convention on Genocide had, of course, to be added to these various agreements, since the question of reservations in that connexion was most urgent.

4. Mr. LACHS (Poland) stated that certain representatives and the Secretary-General, whose views were expressed in document A/1372, had not touched upon the substance of the problem, because they had taken as a basic hypothesis a premise which should have been their conclusion, namely, that the unanimous consent of

all the governments concerned should be reached before such governments could be bound by a reservation.

5. He wished to have an explanation of the motives and facts which had led to such a conclusion and would try to explain why he had reached a different conclusion.

6. He briefly outlined the history of the question of treaties. It went back to ancient times and its development throughout the centuries had dominated international law. Of course, bilateral treaties went back even further, and were more numerous than multilateral treaties.

7. The essential part of the conclusion of a treaty was the phase of negotiations, during which general agreement was reached, after discussions, concessions and compromises by the Parties concerned. With regard to bilateral treaties, if the negotiations did not result in unanimous agreement, no treaty could be concluded; in the case of multilateral treaties, however, the question was complicated by the fact that it was difficult for a large number of States to reach unanimous agreement.

8. It had been recognized in the nineteenth century and at the beginning of the twentieth, that no treaty could exist without the unanimous consent of all the Parties. As long as that principle remained in force, the treaties concluded expressed the wishes of all the signatories and the question of reservations did not arise. He instanced a number of international conferences at which a unanimous vote had been required, and referred in particular to article 14 of the rules of procedure of the Berne Conference of 1874. Subsequent conferences had introduced changes, but the principle that the final act should be adopted unanimously and that only questions of interpretation should be left open to a majority decision, had been maintained. He then referred to the Convention Relating to the Regulation of Aerial Navigation of 1919, and recalled that at that time the representative of the United Kingdom had argued that alterations or amendments to the Convention should be approved by all the contracting States before they were incorporated in the Convention.

9. He continued his historical summary by pointing out that during the period between the two World Wars, the majority principle had gradually prevailed

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

over that of unanimity and had replaced it in international conferences. That constituted a fundamental change, since the question arose as to whether the opinion of the majority should be binding upon the minority. That was an especially important question in international treaties, which were not mere recommendations, but legislative treaties which imposed obligations upon the contracting States. It was thus that the question of reservations had arisen, as he would go on to prove.

10. In a conference based on the principle of unanimity, a solution acceptable by all had to be found in the course of negotiations, in view of the fact that the majority solution could not be imposed upon the minority. The scope of agreement would thus be reduced, but the final text would incorporate the views of the largest possible number of States. If, on the contrary, the conference were to apply the majority rule, the decision reached would not have been negotiated, in the proper sense of that word. In fact, there could be no real negotiation, since the majority often tended to neglect the interests of certain States which were in the minority. Thus, the minority had to be given the right to formulate reservations, in order to re-establish equality between the contracting Parties.

11. He referred to several concrete cases, to prove that reservations had become an accepted institution in international practice. In respect of the forty-four international treaties concluded up to 1931 under the auspices of the League of Nations, 259 reservations had been formulated; 112 reservations had already been made to the twenty-four new conventions signed under the auspices of the United Nations.

12. He then dwelt on the question whether the consent of all the Governments concerned was necessary before a reservation could be accepted. He stressed the fact that, according to the argument of the Secretary-General and some of his colleagues, it was possible for one State to prevent another from acceding to a convention by refusing to accept the reservation of that State. He maintained that such a view could not be justified by any theoretical or practical considerations. He gave several examples to prove that, in the initial stages, when reservations were made, the consent of the other signatory States was not requested.

13. He considered that the principle of the unanimous acceptance of reservations constituted a serious violation of the rights of Governments which were in the minority; nevertheless, he did not acknowledge that the act of casting a negative vote on a specific article of a treaty during the negotiations established, as certain persons had alleged, the right to formulate a reservation tacitly accepted by the other Parties. Explanations of such negative votes and reference to them in the records of the meetings merely represented unilateral statements of opinion and did not imply the tacit agreement of the other Parties, which moreover was not required. The right to formulate reservations remained intact, as a logical consequence of the conclusion of multilateral conventions by means of decisions adopted by a majority vote.

14. Those who considered that a reservation should be accepted by all the Parties were following the practice established by the League of Nations on the basis

of the opinion given in 1927 by the Committee of Experts for the Progressive Codification of International Law in the following terms:

"In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations."<sup>1</sup>

15. Moreover, no detailed doctrinal study of the problem of the unanimous acceptance of reservations had yet been made. Sir William Malkin had written in 1926<sup>2</sup> that the problem had hardly been studied by the authors. That statement was still true: nevertheless, the following sentence could be found in the Harvard University publication *Research in International Law*:

"... since a choice must be made, reason and the necessity of preserving multipartite treaties as useful and effective instruments of international co-operation indicate that the preference should be given to the States which find the treaty satisfactory as it stands, and that the inconvenience, if any, of non-participation in the treaty should fall upon the State which seeks to restrict its effectiveness by reservations".<sup>3</sup>

16. He pointed out that this was not the statement of a legal principle, but merely a practical piece of advice. He also recalled a statement by the American author, Miller, to the effect that any reservation formulated at the time of signature might be accepted by another State at the time of ratification.<sup>4</sup> This was a definition of the principle of reciprocity.

17. From the point of view of practical values, as opposed to doctrine, it was obvious that the principle of the unanimous acceptance of reservations was highly questionable. He gave an example of an inadmissible result of the application of that principle. If twenty States were to sign a multilateral convention and two of those States were to formulate reservations, and seventeen of the remaining eighteen States were to accept the reservations and one State were to reject them, the opinion of one State would nullify the wishes of the nineteen other States and would prevent two States from becoming parties to the convention.

18. Having given the historical reasons and the practical and theoretical considerations in support of his thesis, he went on to quote the example of the Organization of American States. He recalled article 6 of the Convention on Treaties adopted at Havana<sup>5</sup> under which a State making a reservation could become a Party to a treaty, even if one or more States refused to accept the reservation. That method offered considerable advantages. Its basic principle was the equality of States. That was the only system which safeguarded the rights of minorities.

<sup>1</sup> *League of Nations Official Journal*, 1927, page 881.

<sup>2</sup> "Reservations to Multilateral Conventions", *The British Yearbook of International Law*, 1926, page 141.

<sup>3</sup> "Law of Treaties", in the *American Journal of International Law* (Supplement), 1935, vol. 29, p. 871.

<sup>4</sup> Cf. A/1372, annex II, para. 10.

<sup>5</sup> Convention on Treaties adopted by the sixth International Conference of American States, Havana, 20 February 1928. Cf. A/CN.4/23, annex B.

19. He strongly supported the view expressed by the Netherlands representative at the 219th meeting that if that system held good for a regional organization, it must hold even more for a world organization, where the ties between the States were looser. He was surprised by the Brazilian representative's support for the contrary opinion; he could remember previous occasions on which Brazil had suggested the application to other States of the American system. Since that system was based on sound legal principles, it could be applied to the whole world just as well as to the American continent.

20. He concluded by emphasizing the danger which could arise from the majority rule if the principle of the unanimous acceptance of reservations were added to it. The result would be to force States which were in the minority either to accept provisions against which they had voted, or to be excluded from the treaty, and to transform the United Nations into a *de facto* monopoly for States in the majority; but a vote on the text of a treaty was not a vote on procedure; treaties signed under those circumstances would not be universally binding and would not represent the principal legal systems of the world as recommended in the Statute of the International Court of Justice. The principle of the sovereignty and equality of States could not be modified by a decision taken by a majority vote.

21. He asked the Committee to protect the rights of minorities by rejecting the principle of the unanimous acceptance of reservations.

22. Mr. ORTIZ TIRADO (Mexico) congratulated the Secretary-General on his report (A/1372). The reasons for the origin and development of a legal problem such as that of reservations to multilateral conventions should be sought. It was equally necessary to apply the principle of universality to those conventions, and the interesting historical survey made by the Polish representative, who had enunciated views based on a desire for universality and had mentioned the system followed by the Organization of American States, deserved study. The recent change in the technique for concluding multilateral conventions had been due chiefly to two factors, a desire to increase the number of contracting Parties by means of the practices of deferred accession and signature and the tendency to do away with the procedure of signature followed by ratification, as had been done in the case of the international labour conventions. It has been maintained that delay in ratification, or non-ratification by a State for constitutional reasons, might halt the progress of international law. That was why remedies had been found for those deficiencies.

23. The legal system of reservations was dominated by three conceptions: the time when such reservations might be submitted, the legal nature of the act to which they applied, and their own validity. In the final analysis, a reservation was a fresh negotiation in which any State was free to participate. According to Podestá Costa, if reservations affected only the legal ties between the States submitting them and the signatories, and not the relations between the signatories, the rule of the indivisibility of treaties would have to be modified.

24. The representatives of the United States, the United Kingdom, Uruguay, France and Brazil had

pointed out how difficult it would be for the Committee to reconcile the proposed solutions of the problem before it. Apparently the Sixth Committee, despite its membership and its functions, would not provide an appropriate climate in which to study the question thoroughly and it had therefore been suggested that it should be submitted to some other competent body and that until the opinion of that body had been received a provisional line of conduct should be adopted.

25. The Brazilian representative had expressed disagreement with the Secretary-General's report because it confined the right to reject reservations to States which had ratified a convention or acceded to it, and had advocated the system of the Harvard Draft Convention on the Law of Treaties which allowed that right to all signatories.

26. The French representative had suggested that the International Court of Justice should be asked to give an opinion.

27. Mr. Ortiz Tirado supported the Uruguayan representative's proposal, though reserving the right to submit modifications of detail. In his opinion, reservations, in order to be valid, should be explicitly or implicitly accepted by the contracting Parties. The acceptance of a reservation was implied if no statement of rejection was made. If a reservation was rejected, the State making it and the State opposed to it were not bound by any of the provisions of the convention, in the absence of a clause to the contrary. If a reservation were accepted, the State making it and the State accepting it were bound by it and the deposit of the ratification of the State making the reservation should be accepted, even if another party opposed the reservation then or later. The Secretary-General's report recognized that the Pan-American system made it possible for the largest possible number of States to become parties to a convention and to render final the deposit of the instruments of ratification. The Uruguayan memorandum (A/C.6/L.117) set forth the advantages of the Pan-American system, which encouraged the development of international law.

28. With regard to the question whether the matter should be submitted to the International Court of Justice or to the International Law Commission, he thought that it was not desirable, as certain representatives had done, to take into account only purely practical considerations, such as, in particular, the fact that the International Court of Justice would be able to give an opinion more rapidly than the International Law Commission. The nature of the problem should be considered, as well as the structure, the membership and functions of the body to be consulted.

29. He would prefer the matter to be submitted to the International Law Commission. The International Court of Justice was primarily a court, responsible, as such, for dealing with concrete cases and not for suggesting general solutions which could be applied in a large number of questions. Without under-estimating the creative function of the Court, he thought that the International Law Commission, being responsible for codifying international law and not for laying it down as was the International Court of Justice, was particularly qualified to study the question.

30. In support of his argument, he analysed what would happen if, as had been suggested, a specific question was put to the Court asking whether a particular system, for example that proposed by the Secretary-General, was or was not legal. A reply in the affirmative would not help to solve the problem. The General Assembly must be provided with more than legal arguments before it could issue directives to the Secretary-General. A question to the Court would only be useful if there was one single legal solution and not many as in the case in point. An advisory opinion from the International Court of Justice would thus be insufficient to solve the problem.

31. The Sixth Committee had before it a number of legal solutions competing on the grounds of expediency and effectiveness, reasons which were not in themselves juridical and which were material for a legislator rather than a judge. Moreover, such a complex problem could not be settled by a single solution such as the Court would be in a position to give. It was, of course, connected with the question of the classification of treaties. Treaties having the force of law required a system of reservations quite different from that applicable to mere compromise arrangements. A special system might be adopted for conventions on technical matters. The Convention of 1923 for the Simplification of Customs Formalities provided for consultation with technical bodies in cases of admission or rejection of reservations. Article 19 of the Convention on the Declaration of Death of Missing Persons adopted the Pan-American system, which seemed to be the most convenient, although the United Nations tended to follow League of Nations practice.

32. There was a formal reason why recourse should be had to the International Law Commission, i.e., the fact that that Commission was already dealing with the treaty system and would have to study the question of reservations, which was part of it. The General Assembly was in danger of placing itself in an exceedingly difficult position if the solutions proposed by the International Court of Justice and by the International Law Commission were contradictory.

33. For all those reasons, he would support the Uruguayan proposal that the matter should be submitted for study to the International Law Commission and that provisionally the three rules set forth on that proposal should be adopted.

34. Mr. SCHAULSOHN (Chile) recalled that the Secretary-General had asked what procedure he should follow with regard to the conventions of which he was the depositary if certain States ratified or acceded to them subject to reservations. His report had suggested the procedure to be recommended, which was to continue the League of Nations practice of permitting reservations only if the signatory States and the States which had acceded to or ratified the convention unanimously agreed to accept them.

35. Contrary views had been advanced, particularly by the representatives of American States, who felt that the Pan-American procedure should be followed. Under that system a reservation, to be valid, did not require unanimous acceptance but merely acceptance by those States which agreed to be bound by it. The discussion had demonstrated the complicated nature

of the problem, for which it was almost impossible for the Sixth Committee to provide a juridical solution. The trend of the discussion had therefore been towards determining which body could work out a final solution and in the meantime decide upon a simple procedure for the Secretary-General to follow.

36. He agreed with that procedure and, as between the International Court of Justice and the International Law Commission, he favoured the latter. If the question were strictly one of law, the Court would be competent, as it was empowered to give an opinion on the question; but the Court was a tribunal which had the duty of interpreting the law. It was not sufficient, however, to interpret the law; a procedure had to be found and the law created. Those were functions which without any doubt belonged to the International Law Commission. He felt that practical considerations also weighed in favour of consulting the latter body: out of respect for the International Court of Justice, no request could be made to it for an advisory opinion which might not be accepted by the General Assembly.

37. A temporary solution had to be found for the urgent problem with which the Secretary-General was faced with respect to the Convention on Genocide, and, in that connexion, he felt that the revised draft resolution submitted by the United States (A/C.6/L.114/Rev.1) was acceptable. Should the Committee wish to adopt a more far-reaching solution, he would vote for the Uruguayan proposal (A/C.6/L.116), which he would propose to amend as he felt that the solution it contained should not apply if the text of the Convention were approved by the General Assembly (see A/C.6/L.120).

38. In the General Assembly, majority decisions were binding upon the minority and the latter could not make its views prevail by means of reservations. The Polish representative had put forward a material objection when he claimed that any restriction of the right to make reservations would be to infringe the contractual liberty of States. He had made a distinction between voting upon ordinary resolutions of the General Assembly and voting upon resolutions approving treaties. He himself felt that the argument was incorrect, since the United Nations Charter made no distinction as to the kind of resolution adopted. No State was compelled to ratify the conventions adopted by resolution of the General Assembly: each State was free to do what it wished, but if it accepted a treaty it had to accept the text adopted by the General Assembly. The States which had become Members of the United Nations had by that very act abandoned the principle of autarchy and were obliged to submit to restriction. The principle of sovereignty could no longer be as absolute as in the past.

39. Mr. PALACIO (Colombia) pointed out that in placing the problem of reservations to multilateral conventions before the Committee, the Secretary-General had no doubt thought that the proceedings would be confined to a choice between the procedure which had been followed by the League of Nations and the procedure adopted by the Pan-American Union. However, the points of view which had so far been put forward by representatives in the Committee had revealed some sixty different systems, each delegation

adhering more or less to its own system. The Colombian delegation could not therefore join any bloc.

40. There appeared to be general recognition that the Committee would be unable to reach a final decision and that that would have to be done by another body. Different views, however, had been expressed on the question whether that body should be the International Court of Justice or the International Law Commission. If the rules of procedure permitted, the Chairman could perhaps open a general discussion on that question. Opinion was also divided as to whether, pending the decision of the body consulted, it would be desirable to introduce a provisional procedure and, if so, what that procedure should be.

41. His delegation felt some doubt as to the propriety of consulting the International Court of Justice on a technical matter, a question of procedure which more properly lay within the competence of the International Law Commission.

42. The Colombian delegation therefore agreed with those who thought that the question under discussion should be submitted to the International Law Commission.

43. Secondly, his delegation thought that there would be a certain danger in introducing a provisional procedure since if the procedure finally adopted were contrary to the provisional procedure, many very difficult problems would be created.

44. In the light of those considerations he felt that it would be desirable to adjourn the discussion. If, however, the Sixth Committee had to choose a particular system, his delegation would support that of the Pan-American Union.

45. Mr. CORTINA (Cuba) observed that in his report, the Secretary-General had raised two specific questions: he had asked the General Assembly for its views as to the legal effect of reservations—which was a question of substance—and as to the procedure which the depositary should follow in order to obtain the required consent. He himself felt that the solution of the first question would automatically solve the second.

46. It had therefore to be decided whether, to be valid, a reservation had to obtain unanimous consent and, if not, how that affected the relations of the various States among themselves. He recalled that under the procedure followed by the Organization of American States, a reservation remained fully binding as between the State formulating it and the States accepting it, without being binding upon those States which refused to accept it. That was a system which respected the principle of the national sovereignty of each State; it was based on the principle that, with the exception of certain international instruments such as the charters and constitutions of international organizations, to which no reservations were possible, any international convention could form the subject of a reservation by an interested State. It should moreover be noted that that system had been very carefully studied before being adopted and that, despite a seemingly complicated structure, it had hitherto given satisfactory results.

47. He did not share the view expressed in the Secretary-General's report that such a system, while

undoubtedly of value, could be applied in practice only to the States included in the Organization of American States in view of the peculiar political, economic and geographical organizations of those States. Nor could he support the argument contained in the Secretary-General's report whereby the fact that no State could make a reservation with respect to basic provisions militated in favour of the adoption of the system which required unanimous consent. Under that system, any reservation which did not receive unanimous consent, irrespective of whether it related to a fundamental provision or a minor provision of a convention, had the effect of rendering that convention inoperative. The danger of such a procedure was immediately apparent.

48. He proceeded to examine the United States draft resolution (A/C.6/L.114/Rev.1) and the various amendments to it. The draft resolution, though somewhat confused, advocated a system partly analogous to that of the Pan-American Union. The United Kingdom amendment (A/C.6/L.115) erred by admitting at the outset that the United States draft resolution supported the League of Nations system. The French amendment (A/C.6/L.118) was of interest because it formulated the question to be submitted to the competent body and assumed a willingness to accept the advisory opinion in advance. Lastly, the Uruguayan amendment (A/C.6/L.116) reverted to the Pan-American Union system, but gave it a certain flexibility by contemplating the possibility of incorporating in conventions express provisions concerning reservations.

49. That being so, the Cuban delegation considered that pending receipt of the opinion of the body consulted—and the matter seemed to be rather within the competence of the International Law Commission—the Secretary-General could be asked temporarily to follow the same procedure as the Pan-American Union. If, however, the members of the Sixth Committee thought such a suggestion would prejudice the General Assembly decision, he could be recommended provisionally to adopt the system proposed in the United States draft resolution.

50. The Cuban delegation, in voting, would therefore give its first preference to the Uruguayan amendment and, if necessary, its second preference to the United States resolution. In that connexion, he observed that it would perhaps be better to limit the proposal to conventions which had not yet entered into force.

51. Mr. LILAR (Belgium) associated himself with the congratulations addressed to the Secretary-General for the excellent document he had circulated to the members of the Committee.

52. At the present stage of discussion, a recapitulation of the various questions touched upon during the meetings was justified; the Secretary-General's report had provided the members of the Committee with so much material that as a result, it had discussed several quite different questions, and the complexity of the subject had led it to consider questions both of substance and of procedure.

53. He did not intend to re-examine the substance of the problem; it was of such importance, on account of its repercussions on international law with regard to conventions, that it could only be settled by a legal ruling, the validity of which could not be challenged. It

ought therefore to be referred to the competent body. For the reasons stated by the representatives of the United Kingdom and of Greece, he considered that the International Court of Justice should be consulted, and that it should be consulted on the general question of law in connexion with reservations to multilateral conventions which themselves contained no provision concerning reservations. For the time being, therefore, he would confine himself to stating the Belgian delegation's position regarding the various draft resolutions.

54. The United States draft resolution, in its revised form (A/C.6/L.114/Rev.1), dealt only with the question of procedure, not with the question of law. That being so, the Belgian delegation had no objection to provisional adoption of the procedure suggested in the draft resolution, without prejudice to the final solution to be proposed by the competent body. However, the United States draft resolution required elucidation: the third paragraph stated that the procedure to be observed by the Secretary-General was only contemplated in the absence of other agreement between States directly concerned. Where such other agreements existed, it should be made clear in what circumstances the Secretary-General would be entitled to consider a ratification with reservations as being in order.

55. The United Kingdom amendment (A/C.6/L.115) presupposed a premature decision on the part of the General Assembly; the Court being consulted only according to a system similar to that followed by the Secretariat. The Belgian delegation would therefore prefer the

question to be placed before the International Court of Justice to be worded in more general terms, similar to those proposed by the French delegation. It should not be forgotten that, in the last resort, it would be for the General Assembly to choose between the various systems, not being guided in its choice by legal considerations alone. It would, however, have to do so in the light of indications from the International Court of Justice as to the legal merits of the various possible systems.

56. Nevertheless, the Belgian delegation did not think that the third paragraph of the French amendment could be retained if it were agreed that the Court was not to be consulted on a matter of temporary procedure, but on one of substance, namely, the conditions governing the validity of the reservations and the legal effects of any objections made to such reservations. Moreover, it would not be wise to apply an advisory opinion given on the substance immediately it was formulated, because the General Assembly could not give the Secretary-General instructions to comply with an opinion which might amount to approving the validity of several systems, concerning which it had not yet taken a decision.

57. In conclusion, he said that his delegation's opinion was that, those main points having been made clear, it would probably be wise to adopt the Canadian representative's suggestion and appoint a drafting committee to draft the text of the questions to be submitted to the advisory body.

The meeting rose at 5.45 p.m.