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SIXTH SESSION

Official Records

SIXTH COMMITTEE, 266th MEETING

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CONTENTS

Chairman : Mr. Manfred LACHS (Poland).

Consideration of the Assembly's methods and procedures for dealing with legal and drafting questions (A/1897 and A/1929) (*concluded*)

[Item 63] *

1. The CHAIRMAN referred to the resolution adopted at the committee's 263rd meeting setting up a Committee to study the Assembly's methods and procedures for dealing with legal and drafting questions. He proposed that the committee should be composed of representatives of the following States : Belgium, Canada, Chile, Czechoslovakia, Egypt, El Salvador, France, Indonesia, Iran, Israel, Sweden, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela.

It was so decided.

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] *

2. Mrs. BASTID (France), resuming the statement she had begun at the previous meeting when she had dealt with the advisory opinion of the International Court of Justice,[1] went on to consider the more general question of reservations to multilateral conventions and the report of the International Law Commission (A/1858).[2] She summarized the Commission's main suggestions and emphasized that its essential purpose had been to achieve a practical solution. The report did not deal with all conventions but with those of which the Secretary-General was, or might in the future become, the depositary.

3. The United States representative (264th meeting) had made a very important declaration in which he had set aside the suggestions of the International Law Commission and had proposed that the completely novel system adopted by the Court with regard to its opinion on the Convention on Genocide should be applied. That system differed from the practice followed by the Organization of American States inasmuch as it admitted that reservations must be compatible with the object and purpose of the convention. The United States representative had indicated that this new rule could be applied to existing conventions, but neither his speech nor his draft resolution (A/C.6/L.188) indicated precisely how that could be accomplished. In putting forward his new idea, the United States representative had criticized the suggestions of the International Law Commission in several respects. His basic criticism had been that the adoption of those suggestions would mean the introduction of the veto into the relationships under multilateral conventions. That criticism seemed to be largely based on the assumption that the State making a reservation was acting wisely, whereas the objecting State was likely to be irresponsible. A further criticism had been that there was no reason to assume that the contracting parties necessarily wished to exclude reservations which

* Indicates the item number on the General Assembly agenda.

[1] *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.

were not unanimously accepted, in cases where the convention contained no specific clause on reservations. He had also argued that it was unwise to attach undue importance to the integrity of a text which might have been adopted by a very small majority and, finally, he had criticized the suggestions of the International Law Commission as being unrealistic in that it did not take account of the constitutional method of treaty-making in many States and of the difficulties involved.

4. In discussing the United States proposal, she emphasized first and foremost that the system suggested was quite unprecedented. It was true that the International Court of Justice in its advisory opinion had introduced the idea of the compatibility of a reservation with the object and purpose of the convention. Nevertheless, it had very strongly emphasized that that solution was related to the individual conditions of the convention and had refrained from making a generalization. Besides being applied in the future, it appeared that the United States system was also to be introduced for conventions which had already been adopted and ratified, although there was no indication how that was to be achieved. Thus, the United States proposed to modify radically a practice constantly followed by the United Nations with regard to reservations in a sense which could not have been contemplated by the negotiators of treaties drafted prior to the Court's advisory opinion. In her view, it would be extremely dangerous to introduce such a complete innovation into a field where progress was generally slow and changes usually came about very gradually.

5. In the second place, she was convinced that it would be impossible to put the United States system into practice. The United States representative had himself recognized that certain treaties, by their very nature, excluded the possibility of reservations, but there was no provision in the system he had proposed for determining which those treaties were. Moreover, the introduction of the criterion of compatibility with the aim and objective would involve endless difficulties. It was possible while a convention was being drafted to divide its articles into two categories : those to which reservations could be permitted and those to which they could not. But if it were left until afterwards there would naturally be endless disputes on which articles were essential to the object and purpose of the convention and which were not. It was a far harder matter to determine whether a State has a contractual obligation under a convention than it was to settle a mere dispute about interpretation between States which were unquestionably bound.

6. In addition, many conventions came into force only upon the receipt of a certain number of ratifications or accessions and correspondingly ceased to have effect when the number of parties fell below a certain figure. The Secretary-General had to register such conventions when they came into force, and to notify the States concerned of the date of entry into force. If the United States system were adopted it would be impossible to implement such provisions, for the Secretary-General would never be in a position to decide whether or not a treaty had come into force. In view of those considerations, she felt that General Assembly should not adopt the United States proposals.

7. Again, the United States delegation appeared to have based its proposals on somewhat contradictory ideas. For example, much emphasis had been laid on the word " veto " and reference had been made to the situation in the Security Council. The position there, however, was the reverse of that with respect to reservations to multilateral conventions. In the Security Council, a permanent member could veto a decision and prevent the Council from agreeing to take action, while in the case of multilateral conventions which were elaborated in the first place by agreement among States, the purpose of an objection to a reservation was to maintain the integrity of an agreed text which had been prepared in accordance with an internationally valid procedure. Thus an objection to a reservation did not frustrate agreement, but prevented an existing agreement from being impaired. It was therefore not a matter of preventing the exercise of an international right but of ensuring that provisions duly drawn up were maintained.

8. Furthermore, the United States delegation did not seem to be very consistent in its attitude towards the relations between the majority and the minority. In the first place, the United States representative had recalled that the conventions elaborated under the auspices of the United Nations were adopted by a majority vote and had argued that the admission of reservations was a safeguard for the rights of the minority. That was an attractive idea, for all States were at one time or another in the minority. Later, however, he had argued that the objection of a single State to a reservation should not prevent the reserving State from becoming a party to the convention, as to do so would frustrate the will of the majority of the parties who were willing to accept the reservation. There, apparently it was no longer the rights of the minority but those of the majority which should be safeguarded. Lastly, the United States representative had suggested that any dispute on the admissibility of a reservation might be settled by a majority vote, and there again he was obviously concerned with the rights of the majority rather than with those of the minority.

9. The United States representative had also argued that if negotiators felt that their governments must accept the treaties as signed without reservations they would become increasingly reluctant to sign. She was well aware of the complexities of parliamentary procedure, but she did not think it was wise to establish rules relating to international conventions on the basis of the difficulties of any particular constitutional system. Negotiators of treaties should of course remain constantly aware of the climate of opinion in their parliaments; but the United States went much further in wishing to make the international rule allow for parliamentary whims.

10. Finally, the adoption of the United States proposals would mean that the Secretary-General's functions as the depositary of international conventions would be curtailed and he would simply act as a post office. While she did not recommend that the Secretary-General should have unduly wide powers, she felt it would be unfortunate to take such a backward step.

11. Turning to her own delegation's position on the subject, she emphasized the extreme diversity of interests and legal systems among the States represented in the United Nations. In comparison, the Organization of American States was a closely-knit family. Consequently, conventions concluded under the auspices of the United Nations and those entered into among the American States were totally different in character. It was an extraordinary fact that the entire inter-American system had grown up without a single constitu-

tional instrument being brought into force, and therefore without any treaty basis. It would have been quite inconceivable to have attempted to establish the United Nations in a similar way with no basic treaty. Because of the diversity of its Members, the United Nations had to insist on the integrity of the texts of conventions drawn up under its auspices. Among States which did not have the same method of interpreting texts, it was essential that every point should be clear in advance. Consequently, the system used by the American States, although admirably suited to their purposes, was clearly not suited to those of the United Nations.

12. As for the practice of adopting conventions by a majority vote in the United Nations, it was not entirely new and had already been used for some time by the International Labour Organisation. In any event, once that practice had been adopted it was essential to accept the logical consequences. It should not be argued that, once a text had been adopted by majority vote, the minority could alter it to suit its own wishes by introducing reservations. If necessary, a different procedure could be used for elaborating conventions, such as a conference of plenipotentiaries where each article would have to be approved by every representative. Naturally, if the procedure of the majority vote was to be retained for the preparation of United Nations conventions, the majority must not exercise its power too much and must display some political wisdom.

13. In general, her delegation did not think there would be too many practical difficulties involved in the adoption of the suggestions made by the International Law Commission. To resort to any new procedure would be difficult, if only because it was always hard to change a practice which had been in use for many years. She pointed out that the American States which were Members of the League of Nations had accepted that procedure in connexion with the League conventions; indeed, there had been no disagreement with it until an issue had arisen the previous year with respect to the Genocide Convention. The system suggested by the International Law Commission did not necessarily mean that the reserving State would be excluded from participation in the convention. Moreover, if any State felt that another State was abusing its right under the Commission's rule to object to a reservation and thus exclude the reserving State from participating in the convention, the International Court of Justice could be asked to give an opinion on the matter. But under that rule difficulties would be the exception rather than being constantly present.

14. The great merit of the International Law Commission's suggestions was that if they were adopted the situation would be clear. It would be unwise to disregard them deliberately, as the International Law Commission was a body of experts and its report appeared to have been adopted by the great majority of its members even though they all came from different countries belonging to a variety of legal systems.

15. She emphasized that simple clear solutions were needed because, in many cases, conventions on technical subjects had to be applied not only by parliaments but also by national courts, and even by individuals. She reserved the right to comment later on points of detail. On the whole, her delegation felt that the conclusions reached by the International Law Commission should be the basis for any draft which the Committee might adopt.

Mr. Pérez Perozo (Venezuela), Vice-Chairman, took the chair.

16. Mr. ROBINSON (Israel) said that the Committee was faced with four problems. First : what attitude was it to adopt toward the advisory opinion of the Court ? In that opinion the Court had examined the question of the integrity of treaties in the light of the new practice of adopting treaty texts by a majority vote. Its conclusion concerning the admissibility of reservations to the Genocide Convention was a somewhat revolutionary one, which followed neither the principle of rigid integrity of multilateral treaties nor that of *liberum veto*, but set up a new principle, namely : that the only reservations admissible, in that particular case, were those compatible with the object and purpose of the Convention. Since the opinion did not go into the possible practical application of the compatibility test it prescribed, his delegation could not define its attitude toward the test in general until there were more examples of its application in practice. Its application would clearly involve difficulties. Although the test was not purely subjective, honest differences of opinion could exist regarding it. Its usefulness stood or fell, therefore, by the possibility of such differences of opinion being resolved by an impartial organ. In practice it might be difficult to find such an organ, and perhaps the dispute could be settled only through the regular diplomatic channels. The test suggested in the opinion was different from the one which his Government had recommended to the Court; nevertheless his delegation was prepared to accept the advisory opinion's conclusions in so far as they applied to the Genocide Convention.

17. Secondly, how far was the advisory opinion to act as a guide to the Secretary-General for other multilateral treaties ? Although the Court had insisted that its opinion was limited to the Genocide Convention, the opinion did appear to contain certain *dicta* of general application. One concerned the particular category of treaties to which the Genocide Convention belonged and to which, by implication, the same test might be applied, and another concerned the depositary functions of the Secretary-General.

18. The Court's compatibility test could obviously not be applied to multilateral conventions of a commercial nature. An analysis of the advisory opinion showed that the test could be applied to humanitarian multilateral treaties in favour of third persons which restated generally recognized principles of law, like the Genocide Convention. His delegation would prefer, however, that the compatibility test should, for the time being, be applied solely to the Genocide Convention, without excluding the possibility of its being extended later to other treaties. Such a new and revolutionary principle had to be tested for a period in practice in a particular case. A trial period would, moreover, enable publicists to make their contribution.

19. Thirdly, what would be the practical consequences of the opinion on the Secretary-General's functions as depositary ? Treaties did not always clearly indicate what his functions in that respect were. The purely technical ones raised no difficulties. But an element of appreciation was introduced when the Secretary-General was charged with notifications to or by *parties*, and in particular requests for revision of a treaty, a right confined exclusively to parties. Strictly speaking the Secretary-General would in such a case have to decide whether or not a certain State was a party to the con-

vention, which would involve, *inter alia*, deciding on the acceptability or non-acceptability of reservations. That difficulty had, however, been overcome by the Secretary-General's commendable practice of circulating all that type of information about all the treaties of which he was the depositary to all Member States and to non-member States who might be called upon to become parties to the treaties whether or not they were parties in the legal sense.

20. A decision by the Secretary-General was also involved in all steps directly connected with the coming into force of a treaty, and in connexion with the exercise of his *ex-officio* duty of registration of international treaties.

21. If the Committee accepted the doctrine of the Court, the task of the Secretary-General would be confined to receiving reservations and objections and notifying them. That might involve difficulties of appreciation, but they would be few in number, and when they arose he would be able to consult the General Assembly and the Court. The Court's doctrine had therefore no serious practical drawbacks.

22. Fourthly, what attitude should be adopted concerning the International Law Commission's report ? His delegation, taking the view that the report was one on development of international law rather than on codification, was not prepared to recommend its application to treaties which had entered into force before the report was adopted. It was unable, therefore, to accept point 2 and the second part of point 4 of the United Kingdom amendment (A/C.6/L.190) to the draft resolution of the United States (A/C.6/L.188). It expected and hoped, however, the Commission's excellent report would be made use of by those working on multilateral conventions in the future. And his delegation accepted the Commission's recommendation that multilateral treaties should have reservation clauses.

23. No useful purpose would be served by a debate on the report, particularly in view of the fact that it was part of a larger report on the law of treaties, which ought to be considered in its entirety. He suggested that the International Law Commission should be requested to include in its final report on the law of treaties a special chapter on the depositary functions.

24. The general spirit, but not the letter, of the United States draft resolution was acceptable to his delegation. He wished, however, to ask the United States representative for an explanation on certain points of detail. What was the meaning of the first paragraph of the operative part ? It did not specify the use to which the advisory opinion was to be put, whereas the second paragraph of the operative part did specify how organs of the United Nations would use it. Was the omission intentional or accidental ? In the second paragraph of the operative part, precisely which organs of the United Nations could in practice be guided in their work by the advisory opinion, and what exactly was meant by the expression " so far as it may be applicable " ? Did it mean applicable by the organs, or did it refer to applicability outside the Genocide Convention ? Further, was the third paragraph of the operative part intended to apply to all kinds of multilateral conventions, whether or not concluded under the auspices of the United Nations ? The word " drafters " in that paragraph did not seem very satisfactory. The fourth paragraph authorized the Secretary-General " to provide appropriate administrative services "; but it was surely a question of continuing those services within certain limits, since they were already being provided. In general, the resolution gave the Secretary-General no guidance in cases in which he had to appreciate the legal effect of certain notifications. Did that mean that other organs of the United Nations ought to give him no guidance in such cases ? Lastly, the draft resolution contained no reference to the International Law Commission's report and the action to be taken concerning it.

25. His delegation reserved the right to submit amendments to the United States draft resolution at a later date.

26. Mr. HSU (China) observed that in the opinion of his delegation the existing rule of international law was that a reservation to a multilateral convention could not be effective without the consent of all the parties, such consent being the basis of treaty obligations. The joint dissenting opinion of the Court [3] pointed out that such consent was the legal basis of even so-called " legislative " conventions.

27. If it were thought desirable to admit reservations of a certain kind, the common consent of the parties could be given before any reservations were made, by the inclusion of a clause in the convention itself to permit such reservations.

28. Regarding the Genocide Convention in particular, his delegation agreed with the joint dissenting opinion that there had been no agreement during the work of preparing the Convention to confer any right to make reservations which did not come under the normal practice of the United Nations. Although, as the Court held, a rule which would permit the participation of as many States as possible in a convention was desirable, his delegation believed that the criterion of compatibility of a reservation with the object and purpose of the convention, adopted by the Court, was not satisfactory. As the Commission said in its report, it was difficult to see how the compatibility test could be applied otherwise than subjectively.

29. His delegation would, however, vote for accepting the opinion of the Court. The General Assembly had requested the Court to give an advisory opinion in order to resolve a conflict of views. The opinion resolved that conflict and should therefore be accepted even if it were not regarded as completely satisfactory. If there were any possibility of the opinion being applied to a convention other than the Genocide Convention, it would be a different matter. And it was to be assumed that, in the case of the Genocide Convention, the contracting parties would be reasonable in their exercise of the right to make reservations and to object to them.

30. His delegation agreed with the views expressed by the International Law Commission on reservations to multilateral conventions in general.

31. He added that the States belonging to the Organization of American States had a right to their own system, but it was too early to decide whether or not it was a good one for general application.

32. Mr. MAKTOS (United States of America) wished to take up several points made by the French and Israel representatives.

33. The allegation of the French representative that his delegation's proposals were something new could not be justified because they were based on the Pan-American system, which itself was not new, and on the

[3] See *Reservations to the Convention on Genocide, Advisory Opinion I. C. J. Reports 1951*, page 31.

opinion of the International Court of Justice, which had already become a part of international jurisprudence. The answer to her statement that the consequences would be uncertain if the compatibility test were adopted was that there should be no difficulty, for the flexible compatibility test would leave governments free to settle their differences with regard to reservations through the usual methods of diplomatic negotiation or application to an international court. Consequently, he could not see how the French representative could, on such grounds, regard his delegation's proposals as fraught with danger.

34. The French representative had further questioned the possibility of applying the United States proposals and of defining the concept of compatibility. The opinion of the Court, however, did not prevent a State from taking position on a reservation for reasons other than that of its compatibility with the object and purpose of the particular convention.

35. The French representative had argued that there was an inconsistency in the United States proposals with regard to the question of majority and minority rule. The majority rule should apply when a treaty was negotiated, but that did not imply that reservations could not be made at a later stage. Again, that rule was preferable to the unanimity rule, if only for the purpose of achieving the objective of an effective instrument widely accepted, even with reservations, instead of a rigid instrument that few States could ratify. His proposals favoured the protection of the minority at a stage subsequent to that of drafting, by permitting minority States to accede subject to reservation or reservations, provided the latter were accepted by the other States parties to the convention. The allegation of inconsistency was, therefore, unfounded.

36. It was all very well for the French representative to urge that parliamentary opinion should be known at the time of drafting and signature, but that was not possible in the case of the United States and several other countries. Again, the French representative, when urging that the office of the Secretary-General should not be reduced to the status of a post office, had not given any reason why the Secretary-General should be entitled to inform a reserving State that it was not a party to a convention.

37. Answering the question of the representative of Israel concerning instructions to the Secretary-General when his functions involved an element of appreciation, he stated that the United States draft resolution provided that the Secretary-General should receive instruments of ratification, reservation, objection and the like. If the entry into force of a convention depended on whether a State whose reservation had been objected to was a party or not, the Secretary-General would have three courses open to him : first, under the unanimity rule, to inform the reserving State that it was not a party to the convention; secondly, on the basis of the Court's opinion, to inform such a State of the consequences of the incompatability of its reservation with the object and purpose of the convention; and thirdly, to state the position regarding acceptance by States of a reservation and leave each State to draw its own conclusions, according as it accepted the unanimity rule or the Pan-American system, as to whether the treaty was in force as far as it was concerned. It would be seen from the draft resolution that his delegation preferred the latter course. It was preferable that difficulties arising out of its adoption—and they would be few—should be solved in court rather than that an attempt should be made to legislate in advance for all possible cases.

38. The French representative had supported the International Law Commission's report on the grounds that the Pan-American system was suitable only for a group of States where there was little or no divergence of view, and that the recommendations of the Commission would not give rise to difficulties, except perhaps in the case of the American States, until they became accustomed to the other and better system. In his view, however, it was precisely where differences of view existed that the Pan-American system was most effective. Again, the French representative had not adduced arguments to disprove the United States contention that a widely accepted treaty with minor reservations was preferable to a rigid system. It had to be remembered that the objection of one State to another State's reservation should not affect the treaty relations of the objecting State with other States parties to the particular convention. Moreover, the French representative was herself inconsistent in describing the United States proposals as novel, while failing to recognize that reversion to the unanimity rule would be something new for the American States.

39. Taking up the questions raised by the representative of Israel, he said that the idea underlying the first operative clause of his draft resolution was that before objecting to a reservation, a State should have regard to the Court's opinion. The recommendation in paragraph 2 of the draft resolution was directed at the Secretariat and any other organ of the United Nations that in time might require to be so guided. The expression " drafters " in the second recommendation could perhaps be improved, and his delegation's intention with regard to that recommendation was probably better expressed by the Lebanese amendment (A/C.6/L.189). The phrase " To provide appropriate administrative services " in sub-paragraph (*a*) of paragraph 4 of the operative part could also be usefully revised to indicate the real intention of his delegation that the Secretary-General should continue to provide such services. As to the question of guidance to the Secretary-General, he submitted that by implication the draft resolution directed the Secretary-General to refrain from stating his view on the legal effect of an objection to a reservation and from applying the unanimity rule. Finally, it was true, and, in view of his delegation's position with regard to the unanimity rule, natural that the operative part of the draft resolution made no mention of the International Law Commission; but the latter was referred to in the preamble. It would be noted, of course, that the Commission's recommendation that drafters of multilateral conventions should consider the inclusion of a reservation clause, had been accepted.

Mr. Manfred Lachs (Poland) resumed the chair.

40. Mr. ROMERO HERNANDEZ (El Salvador) congratulated the United States representative on his defence of the Pan-American system which Latin-American countries supported. Although impressed by the French representative's speech, he could not support the substance of her remarks.

41. The Pan-American system was a highly practical arrangement that helped the American family of nations to overcome their difficulties. It was essentially democratic, being based on respect for the rights of minorities and the principles of equality.

42. It would be wrong to over-generalize on the basis

of the Court's opinion. The French representative had said that the system applicable to the Genocide Convention was not necessarily appropriate for other conventions. It would be noted that the American countries which had acceded to the Genocide Convention had endeavoured to give that Convention moral support. Any persecution of that nature in the Western hemisphere had been perpetrated by private individuals without the sanction of the authorities and had been punished in accordance with the law. Finally, he recognized the difference between the European and American legal systems and that the unanimity rule had been adopted following the experiences in Europe after the First World War.

43. He reserved his delegation's right to submit amendments both to the United States draft resolution and to any amendments that might be proposed to that draft resolution.

The meeting rose at 1 p.m.

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