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Chairman: Mr. Alberto HERRARTE (Guatemala).

AGENDA ITEM 65

Reservations to multilateral conventions: the Convention on the Inter-Governmental Maritime Consultative Organization (A/4188, A/4235, A/C.6/L.449 and Add.1 and 2, A/C.6/L.450 and Add.1) (continued)

CONSIDERATION OF DRAFT RESOLUTIONS (A/C.6/L.449 AND ADD.1 AND 2, A/C.6/L.450 AND ADD.1) (continued)

1. Mr. CACHO ZABALZA (Spain) said that he had been unable to be present during the voting on the joint draft resolution (A/C.6/L.448 and Add.1) but hoped that he could be listed among those who had supported that proposal.

2. In that particular case, India had come to recognize that the question should be decided by IMCO. But in order to avoid any repetition of such a situation, it was necessary, as he had already stressed, to define clearly the scope of paragraph 3 (b) of resolution 598 (VI) by deciding, if that was the general wish, that it should apply to all conventions deposited with the Secretary-General.

3. Contrary to what the representative of the USSR had implied at the previous meeting, the two draft resolutions before the Committee followed parallel courses and were not contradictory. If the sponsors of the ten-Power draft resolution (A/C.6/L.450 and Add.1) had really wished to create obstacles, they would have submitted amendments to the seven-Power draft resolution (A/C.6/L.449 and Add.1 and 2) and not a wholly different text. Some of them were even willing to vote in favour of the seven-Power draft resolution, provided that it was understood that only a provisional decision was involved. The only difference between the two texts was that the seven-Power draft resolution established the procedure to be followed by one particular depositary, namely, the Secretary-General, whereas the ten-Power draft resolution viewed the problem as a whole.

4. His delegation felt that the sponsors of the two draft resolutions should endeavour to devise a single text with the assistance of the representative of Italy, who had announced his intention of submitting a third draft.

5. If that course were not adopted, his delegation would vote in favour of both texts.

6. Mr. LACHS (Poland) said that he had no intention of reopening the whole question of reservations, for his delegation had already presented its views on that subject nine years before in the Sixth Committee (220th meeting). However, great changes had taken place since that time and the question should currently be considered in the light of the effects of theory upon practice and vice versa, as well as of facts which indicated a certain historical trend. Care should be taken, however, to avoid confusing past experiments or even subsisting phenomena with the progressive development of international law or with the law itself. That explained the need for adjustments based both on practice, which influenced theory, and on theory, which guided practice. That approach was as necessary in dealing with treaties as with reservations. He wished to consider three aspects of reservations: their scope, their operation and their effects.

7. So far as their scope was concerned, reservations came between two extremes: simple declarations of policy, which had no practical effects on the concrete provisions of treaties, and reservations which had far-reaching effects on the instrument itself. In that connexion, a distinction should be made between two types of treaties. On the one hand, there were those which confirmed or gave more precision to generally recognized principles of law, in which case the entering of a reservation amounted to challenging some law which had its source outside the treaty itself. So far as those treaties were concerned, reservations could not be admitted, for as Charles de Visscher had pointed out, they would reopen controversy on rules which should be considered as established and would thus cause regression in international law. Obviously any such reservation would give the reserving State the possibility of evading duties and responsibilities which it could not otherwise escape. On the other hand, there were also treaties traditionally classified as law-making treaties and contractual treaties which lent themselves to reservations. In their case, some States might feel that some of the provisions went too far, others that they did not go far enough. That did not mean that all reservations were admissible, however, for their scope always had to be compatible with the subject and purpose of the treaty. The limits of reservations should be clear and easy to ascertain. Reservations must not conflict with the purpose of the treaty but rather facilitate agreement on essential issues.

8. The question, then, was who should rule on the admissibility of a reservation or on its compatibility with the purposes of the treaty. The theories on that question varied considerably. It had been suggested, inter alia, that that function should be entrusted to the International Court of Justice or to the Sixth Committee. He himself felt that the decision should be left to the States parties to the treaty, for they were

the best judges of their interests and knew best what had been their intentions in concluding the treaty. That, furthermore, had been the view of the International Court of Justice in its advisory opinion on the subject of reservations to the Convention on Genocide.1/

9. With reference to the legal effects of reservations, he repeated that his considerations were based on general principles of international law, built on practice and developed by theory. There again, a clear division had to be made between two types of treaties: first, there were those which contained specific provisions on the subject of reservations, provisions amounting to rules binding on the contracting parties. They could either exclude reservations altogether, as in the case of the Supplementary Convention on the Abolition of Slavery (1956), or provide for reservations which were either specifically enumerated or related to certain articles only, as in the Convention relating to the Status of Refugees (1951); or they could also stipulate that reservations would be admitted if they were accepted by a certain number of contracting parties. Those conventions, which themselves established the rules to be followed, did not create any problems; there was no need, therefore, to discuss them. The Committee should concern itself rather with treaties of the second type, which were silent on the subject of reservations. In that connexion, the Committee should consider what were the possibilities open to the States concerned and what were then the functions of the depositary.

10. The United Kingdom representative had indicated (623rd meeting) five systems which might apply to reservations to such conventions. From the point of view of general international law, there were in fact only three. Two of them were diametrically opposed solutions: on the one hand the system of unanimity and on the other the system of "unilateralism", the latter recognizing the right of States unilaterally to make all the reservations they wished. Both of those solutions had to be rejected, because neither served the purposes of multilateral treaties.

11. The unanimity principle had been rejected by a considerable number of States, as evidenced by their practice both before and after 1952, and by the General Assembly at the time of the adoption of resolution 598 (VI). The best proof of that fact was the considerable number of multilateral conventions which had come into force and remained in effect despite the fact that more than one party had expressed the objections to the reservations made in connexion therewith. The theory of unilateralism must also be rejected, because, like the theory of unanimity, it sought to impose the will of one State on all the other parties to a convention. In the one case the State seeking to impose its will was the reserving State, and in the other the objecting State.

12. What solution should therefore be adopted? In his report on the law of treaties, Professor Lauterpacht had stated that the majority principle provided a possible solution; the United Kingdom, for its part, had suggested (623rd meeting) the application of that principle to the covenants on human rights. The majority rule, however, had to be expressly stipulated in the convention and could not, therefore, be regarded as a system forming part of general international law. In view of the diversified theories and practice in the matter, it might be said that, whenever a reservation was made to a convention which was silent on the matter of reservations, the States parties to the convention could either accept it, and consider that the convention was binding upon the reserving State, or reject it; in the latter case, depending on the decision of the parties, the refusal had one of two consequences: either the convention was binding as regards all its provisions except those which were affected by the reservation, or else the reserving State was not regarded by those States which had rejected the reservation as being a party to the convention. On that point, the practice of the Organization of American States and the advisory opinion of the International Court of Justice regarding the Genocide Convention were of great interest.

13. The reservations system had been operating along those lines for some considerable time past, and since the adoption of resolution 598 (VI) had given rise to no difficulties. The Secretary-General had acted quite properly in letting each State judge the legal effects of communications containing reservations attached to instruments of ratification or acceptance. It had been said that such a practice might create doubts on the question whether the reserving State should be considered as a party to the convention even before the other parties had been able to appreciate the admissibility of the reservation. The Polish delegation, for its part, felt that there was no danger in allowing a State to become party to a convention, since the other States would only have to regard it as such in so far as they accepted its reservation. The fact that the reserving State's accession to the convention might bring about the convention's entry into force was a further factor which the other States would obviously take into consideration in determining their attitude with respect to the reservation. Under present practice, when the Secretary-General received from a State an instrument of ratification or acceptance accompanied by a reservation, he considered that, for the purposes of the convention's entry into force, that State had duly become a party. There was no reason for modifying that practice. If any complications should arise, the inherent flexibility of the reservations system would make it possible to solve them without difficulty.

14. To avoid the recurrence of a situation similar to that in which India had found itself, it would be highly advisable to extend the application of resolution 598 (VI) to conventions concluded before 1952. No fundamental objection had been raised to such a solution, and, as had been rightly pointed out, if a solution of that kind had been duly applied to the Genocide Convention, nothing prevented its application to other instruments concluded before 1952. The question of introducing an element of discrimination did not really arise, since all conventions concluded prior to 1952 had already entered into force and some of them had already been the subject of reservations to which no objections had been raised.

15. As to the multilateral conventions of which the League of Nations had been depositary, the question was one of determining whether the provisions instructing the United Nations Secretariat to exercise the functions previously carried out by the League of Nations Secretariat envisaged matters of substance or only of form. General Assembly resolution 24 (I)

1/Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, p. 15.

and the League of Nations resolution of 18 April 1946[2/] were, in his view, closely linked and could not be considered independently. The Secretary-General's functions were specifically defined in part I, section A, of resolution 24 (I). Those functions were of an administrative kind and did not affect either the application of instruments or the substance of the question of the rights and obligations of the parties. The League of Nations resolution having been adopted after the General Assembly resolution and having specifically mentioned the latter, it was clear that the League of Nations had been precluded from transferring to the United Nations any functions other than those which the United Nations had been prepared to accept. The United Nations was not bound to follow League of Nations practice based on the unanimity rule, particularly as that practice had not been imposed on the League by any international agreement, but had been initiated by the League itself as a result of a study carried out by an expert group. The unanimity rule could only be applied in the case of conventions which expressly provided for it, whether registered with the League of Nations or with the United Nations.

16. Some delegations considered that there was need for a more thorough study of the question of reservations to multilateral conventions, with particular reference to the functions of the Secretary-General as depositary. While the Polish delegation agreed that studies were always desirable, it wished to draw attention to the danger of undertaking such a study outside the context of the law of treaties in general and of the question of consent and of the validity of treaties in particular, as reservations were an essential part of those subjects. In his view, it would be preferable to look for guidance to the conduct of States, to gain more experience as regards the operation of the system of reservations, and to avoid seeking to apply strict rules in an area where flexibility was particularly necessary. The Committee should avoid laying down principles applicable to conventions for which the Secretary-General was depositary before receipt of the full text of the International Law Commission's draft on the law of treaties.

17. If States were concluding an ever-increasing number of treaties, the reason was not that they had a particular inclination to do so, but rather that they had to take into account the needs of everyday life and defend their vital interests. The same was true of the reservations which States made to multilateral conventions and of the objections which they raised against such reservations. Slowly but surely, a balance would be found between the different factors and interests at play. The day would come when, after thorough study of all the aspects of the law of treaties, precise and detailed rules on reservations could be prepared in the light of experience.

18. Mr. HERAVI (Iran) said that the seven-Power draft resolution (A/C.6/L.449 and Add.1 and 2), which sought to apply to all conventions, whatever the date of their conclusion, the provisions of resolution 598 (VI), was in keeping with the views his delegation had already expressed and would therefore receive its support.

19. His delegation also considered the ten-Power draft resolution (A/C.6/L.450 and Add.1) to be acceptable. In his view, its sponsors were not seeking to re-establish the outdated unanimity rule, but simply considered that so complex a question required more thorough study.

20. He therefore expressed the hope that the Committee, in its characteristic spirit of conciliation, would find a compromise solution and merge the two complementary, and in no way contradictory, draft resolutions into a single text.

21. Mr. AMADO (Brazil) said that he had listened most attentively to the statements of the members of the Committee, especially the masterly exposition of the representative of Poland. He would confine his own remarks to some observations of a practical nature.

22. In the first place, although many speakers had cited, in connexion with the depositary functions of the Secretary-General, paragraph 3 of resolution 598 (VI), they had not attached sufficient importance to paragraph 1, in which the Assembly recommended to States that they consider the insertion in conventions of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them. That recommendation was, in fact, highly important.

23. At the sixth session of the Assembly, Sir Gerald Fitzmaurice had acknowledged in the Sixth Committee that "no single rule could be found which would satisfy all requirements" (264th meeting, para. 11); that statement coincided with the opinion expressed by the Polish representative on the need for adopting, with respect to reservations, a sufficiently flexible system.

24. During the fifth and sixth sessions, Brazil had favoured the principle of the integrity of conventions, but its present position was being influenced by the growing tendency of the majority of States to accept reservations which did not affect the rule-making provisions of treaties. In modern times, the interests of international co-operation demanded that multilateral conventions concluded under United Nations auspices be universal in character. States were consequently faced with a complicated task: the task of ensuring a balance between the efficacy and the universality of conventions. For that purpose, treaty provisions had to be classified in two categories—those that permitted of reservations and those that did not—since no rigid rule, whether it was the rule of unanimity or that of complete freedom, would ever be satisfactory.

25. What was required therefore, as the representative of Greece in the Sixth Committee had already shown at the sixth session (272nd meeting, para. 10), was that the States themselves, which were the principal parties concerned, should eliminate every possibility of doubt, by introducing into the conventions they concluded clauses stating whether reservations were admissible and, if so, specifying the kind of reservations which were permitted and their legal effect. That was the only practical and sure way to resolve the problem, in accordance with the recommendation set forth in resolution 598 (VI), paragraph 1.

26. Should a treaty be silent on that matter, the Secretary-General ought to perform his functions in accordance with the law in force, namely, paragraph 3 of resolution 598 (VI). The duties entrusted to him under that resolution were purely administrative, but

2/League of Nations, Official Journal, Special Supplement No. 194 (1946), p. 278.

that did not make them any less important. The parties themselves had to determine the consequences of reservations, and the deposit of reservations with the Secretary-General created only a simple presumption which, although most often correct, could be rebutted, if necessary, by the other signatory States.

27. In that connexion, he failed to see what risk might be involved in the proposal contained in the seven-Power draft resolution.

28. Differences of opinion which might arise between the contracting parties regarding the consequences of reservations should be settled according to the usual methods of peaceful settlement of international disputes, namely, by arbitration or by a decision of the International Court of Justice.

29. In conclusion, he protested against the haste with which a theoretical solution was being sought at all costs to the problem of reservations, a problem which was dependent on the practice of States. Accordingly, he could not support the ten-Power draft resolution, which, if adopted, would impose on the already overburdened International Law Commission a task which it could not accomplish before the sixteenth session.

30. Mr. DOUC RASY (Cambodia) said that his delegation had decided to join in the debate not because it wished to take a stand on certain principles or situations, but in the hope of removing some obstacles to their consideration and thus making the Sixth Committee's task easier. That task was an unrewarding one, for if the analysis undertaken exposed the defects of a system too clearly, the supporters of that system could say that bias was involved.

31. His delegation would maintain a strictly reserved attitude, particularly regarding the competence of international organizations, for those organizations were assemblies of sovereign States. A conflict of competence among assemblies of sovereign States could not be settled by one universally recognized rule. Even the most ardent advocates of the competence of the United Nations General Assembly had acknowledged that one field at least, the technical field, came under the exclusive competence of the specialized agencies. If, in order to settle a question in that field, a technical organization was competent to take a vote in which all its members without exception were free to participate, then necessarily it had to be the sole master of its membership, at least in the choice of its members, and no other authority should seek to dictate a different membership. Otherwise that technical organization would not be able to exercise its exclusive competence. There was no point in citing article 11 of the IMCO Convention,[3/] which provided that no State or territory might become or remain a member of the organization contrary to a resolution of the General Assembly of the United Nations, for the article did not mean that a State or territory might become a member in pursuance of a resolution of the General Assembly. All those considerations showed that extreme caution should be exercised in dealing with questions relating to the competence of international organizations.

32. With regard to the question of reservations, the main point was to take decisions which would preclude future difficulties. The first question was to decide what the Secretary-General should do when he received an instrument of acceptance with reservations. No text gave him detailed instructions thereon. The first step was to ascertain whether the stipulation was in fact a reservation and to decide whether, in that process, a substantive or a formal criterion should be adopted. Assuming that a reservation was in fact involved, should the Secretary-General register the acceptance or postpone registration and apply to another authority? If the latter, to what authority? Another essential question was whether registration had the effect of conferring membership on the State which had deposited the instrument of acceptance with reservations.

33. Those questions remained unanswered. Resolution 598 (VI) stipulated that the Secretary-General should avoid expressing an opinion on the legal effect of instruments of acceptance. But did the resolution, as the Italian representative had said at the preceding meeting, prohibit the Secretary-General from announcing that a State which had deposited an instrument of acceptance had become a party to the convention? Did suspending judgement on an instrument and applying to another authority for an opinion amount to passing on the legal effect of an instrument?

34. Such questions would not be resolved by amending resolution 598 (VI), as was proposed by the sponsors of the seven-Power draft resolution. Resolution 598 (VI) had been adopted after lengthy preparatory work, and an equally searching preparatory study was needed before amending it. That had been the feeling of the sponsors of the ten-Power draft resolution, which sought only to enlighten the General Assembly on a matter which it must decide. For that reason, his delegation had joined in sponsoring the draft resolution.

The meeting rose at 12.35 p.m.

3/United Nations Maritime Conference, Final Act and Related Documents (United Nations publication, Sales No.: 1948.VIII.2), p. 29.

Litho in U.N. 77601—February 1960—1,975