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RESERVATIONS TO MULTILATERAL CONVENTIONS

Report of the Secretary-General

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RESERVATIONS TO MULTILATERAL CONVENTIONS

Report of the Secretary-General

I. INTRODUCTION

1. The Secretary-General, whilst exercising his functions as the depositary of the conventions which have been adopted or approved by the General Assembly and of the many other multilateral instruments which have been concluded under the auspices of the United Nations, has been from time to time concerned with the procedure to be followed with respect to reservations as to the terms of such conventions which may be made by States as a condition to their accession.

2. While it is universally recognized that the consent of the other Governments concerned must be sought before they can be bound by the terms of a reservation, there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State objecting to a reservation.

3. The question has acquired a current importance in connexion with the Convention on the Prevention and Punishment of the Crime of Genocide. A number of States have to date made reservations as to specific articles of that Convention at the time of signature, and certain other States have incorporated reservations in their instruments of ratification or accession. Other States having recorded their dissent from some of the terms of these reservations, but without its appearing that all the interested parties necessarily foresee the same legal consequences deriving from these dissents, the Secretary-General has felt it his duty to place clearly before the General Assembly, for its approval and advice, the principles which he has considered necessary to follow in the interests both of an efficient performance of depositary functions and of the maximum usefulness of multilateral conventions in the development of international law.

II. PRACTICE OF THE SECRETARY-GENERAL

4. Normally the multilateral conventions thus far concluded under the auspices of the United Nations contain no stipulations regarding the making of reservations. Only the Revised General Act for the Pacific Settlement of International Disputes, as adopted by the General Assembly at its third session (resolution 268 (III)),

/expressly

expressly permits, as did the original Act, the making of specified reservations. In pre-existing treaties, however, from the time of the League of Nations, similar clauses have regulated the making of reservations, while other clauses have expressly excluded reservations of any type.

5. In the absence of stipulations in a particular convention regarding the procedure to be followed in the making and accepting of reservations, the Secretary-General, in his capacity as depositary, has held to the broad principle that a reservation may be definitively accepted only after it has been ascertained that there is no objection on the part of any of the other States directly concerned. If the convention is already in force, the consent, express or implied, is thus required of all States which have become parties up to the date on which the reservation is offered. Should the convention not yet have entered into force, an instrument of ratification or accession offered with a reservation can be accepted in definitive deposit only with the consent of all States which have ratified or acceded by the date of entry into force.

6. Thus, the Secretary-General, on receipt of a signature or instrument of ratification or accession, subject to a reservation, to a convention not yet in force, has formally notified the reservation to all States which may become parties to the convention. In so doing, he has also asked those States which have ratified or acceded to the convention to inform him of their attitude towards the reservation, at the same time advising them that, unless they notify him of objections thereto prior to a certain date - normally the date of entry into force of the convention - it would be his understanding that they had accepted the reservation. States ratifying or acceding without express objection, subsequent to notice of a reservation, are advised of the Secretary-General's assumption that they have agreed to the reservation. If the convention were already in force when the reservation was received, the procedure would not differ substantially, except that a reasonable time for the receipt of objections would be allowed before tacit consent could properly be assumed.

III. PRACTICE OF THE LEAGUE OF NATIONS

7. In following the practice referred to above, the Secretary-General has of course done no more than follow the practice already established by the League of Nations. Its Committee of Experts for the Progressive Codification of International Law, for example, reported to the Council of the League that:

/"In order that

"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. If not, the reservation, like the signature to which it is attached, is null and void". 1/

8. Judge Hudson in his International Legislation confirms that this was the League policy:

"The Secretariat of the League of Nations has scrupulously observed this principle; when the United States offered for deposit its adhesion to the Slavery Convention of 25 September 1926, subject to a reservation, the instrument was received only subject to the acceptance of the reservation by other States parties to the Convention". 2/

9. Concurring on this same point, the Harvard Research in International Law says of the League Secretariat "...that it apparently does not regard an accession which is subject to reservations as definitively deposited until those reservations have been communicated to and accepted by the States signatories of or parties to the treaty concerned". 3/

10. Some other examples of this requirement of unanimous consent have been given by Judge Hudson, 4/ who describes the clause expressly incorporating the rule in the Convention for the Prevention and Punishment of Terrorism (1937) as an invention of the Legal Section of the League Secretariat. Article 23, paragraph 2, of that Convention provided:

"In the event of any objection being received, the Secretary-General of the League of Nations shall inform the Government which desired to make the reservation and request it to inform him whether it is prepared to ratify or accede without the reservation or whether it prefers to abstain from ratification or accession".

1/ League of Nations Official Journal, 1927, page 881. For a similar expression by the Assembly of the League, see its resolution on the Cuban reservation to the Statute of the Permanent Court of International Justice, Official Journal, Records of the twelfth Assembly, plenary meetings, page 139 (1931).

2/ Ibid., page 1, note 3.

3/ Harvard Research in International Law, "Law of Treaties", 29 American Journal of International Law, (Supplement), page 910. See also page 904 for a League precedent. Cf. the League example given in Hackworth, Digest of International Law, volume V, page 139.

4/ "Reservations to Multipartite International Instruments", 32 A.J.I.L., (1938) at page 334.

/This clause,

This clause, he notes, "establishes that when reservations other than those agreed to at the time of signature are proposed, the alternatives are absence of objection from any State consulted, on the one hand, and abstention from proceeding to the deposit of a ratification or accession, on the other hand. It serves as a needed guide not only to international administrative officials, but also to Governments themselves. Many difficulties may be avoided if this or some provision along similar lines should become a standard article for multipartite conventions."[1]

IV. PREVIOUS INSTANCES OF THE PRACTICE OF THE SECRETARY-GENERAL

11. Although the Secretary-General of the United Nations has not himself heretofore been faced with the necessity of determining the legal consequences of a refusal by one State to accept the reservation proposed by another, there are already precedents in the practice of the Secretariat confirming the principle as enunciated.

12. Thus, on 30 June 1948, the Secretary-General informed the States parties to the Constitution of the World Health Organization that he was not in a position to determine whether the United States of America had become a party to that Constitution by depositing an instrument containing a reservation, but he noted the authority of the World Health Assembly to interpret the Constitution under its article 75. Only after a unanimous acceptance by the Assembly of the ratification as not inconsistent with the Constitution did the Secretary-General proceed with his notification that the United States had become a party.

13. Prior to the entry into force of the Constitution of the International Refugee Organization, the Secretary-General circulated the text of reservations made by several States in accepting that Constitution. Finally, when the last instrument of acceptance necessary to permit the entry into force had been deposited, the Secretary-General so notified the interested States, requesting their observations before a specified date. Only after that date had passed did he declare that the Constitution had entered into force.

14. On 16 February 1949, the Union of South Africa desired to sign the Protocol modifying certain Provisions of the General Agreement on Tariffs and Trade with a

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1/ "Reservations to Multipartite International Instruments", 32 A.J.I.L., (1938) at page 335.

/reservation

reservation excepting the application of one of its articles.[1] A procès-verbal of signature was therefore drawn up to permit the representative of the Union of South Africa to sign the Protocol, "it being understood that such signature would not have any legal effect until the Secretary-General of the United Nations had informed each of the contracting parties of it and of the reservation made thereto and until each contracting party had notified the Secretary-General of its acceptance". A Declaration accepting the reservation was subsequently transmitted to the Secretary-General notifying him "that the reservation of South Africa has been examined at a meeting on 9 May 1949, at which all the contracting parties were represented, and that no contracting party raised any objection to the said reservation".

15. Similarly, the notification by the Government of Southern Rhodesia of its acceptance of the Protocol modifying part I and article XXIX of the General Agreement on Tariffs and Trade was accompanied by a statement reserving the position of that Government with regard to one article of the General Agreement. All contracting parties were accordingly advised:

> "In view of this statement, the Secretary-General, acting as depositary of the Protocol, will not be able to accept the above notification as definitively constituting the instrument of acceptance unless all of the contracting parties consent to the reservation. The Secretary-General has informed the Government of Southern Rhodesia to this effect".

16. Subsequently, at their third session, the contracting parties adopted a Declaration concerning the acceptance by Southern Rhodesia of this Protocol, in which they unanimously declared that the acceptance was valid and effective and instructed that a copy of their Declaration be forwarded to the Secretary-General with reference to his communication quoted above. The Secretary-General thereupon gave notice that the notification by Southern Rhodesia was "considered as a duly deposited instrument of acceptance".

1/ The reservation was subsequently withdrawn.

V. VIEWS OF INTERNATIONAL JURISTS AND OF GOVERNMENTS

17. The practice of the Secretary-General has the general support of international jurists; and certainly a similar attitude can be detected in the actions of many Governments acting as depositaries, even though express objections to reservations have not been of sufficiently frequent occurrence for Governments or inter-governmental conferences to have developed clear rules of procedure on the handling of reservations.

18. The draft Convention on the Law of Treaties developed by the Harvard Research in International Law provides (reading sections 14 (c) and 15 (c) together) as follows:

> "If a treaty is open for signature at any time in the future, a State may make a reservation when signing (or ratifying), if it signs (or ratifies) before the treaty has been brought into force, only with the consent of all the States which become signatories before the treaty is brought into force; if it signs (or ratifies) after the treaty has been brought into force, only with the consent of all other States which have become signatories or parties to the treaty prior to the signature (or ratification) by that State."

19. The International Law Commission, after examination of a preliminary report on the Law of Treaties[1/] [2/] by its special rapporteur, Professor Brierly, has brought support to these principles in a comment contained in the report on its second session:

> "There was a large measure of agreement on the general principles on this topic [reservations] formulated in the report [of the special rapporteur] and particularly on the point that a reservation requires the consent at least of all parties to become effective. But the application of these principles in detail to the great variety of situations which may arise in the making of multilateral treaties was felt to require further consideration."[3/]

20. A recent Soviet textbook, part of a collective study published by the Institute of Law of the Academy of Sciences of the USSR, also favours unanimous consent:

> "Reservations at the time of signature of a treaty that the parties to the treaty become familiar with them prior to signature and agree to them (if only by remaining silent). As a general rule reservations must be accepted and countersigned by all parties to the treaty (for example, by an exchange of notes, in the protocol of signature, or otherwise."[4/]

1/ A/CN.4/23.
2/ Regarding the discussion on the matter, see A/CN.4/SR.53.
3/ A/1316. (See Official Records of the fifth session of the General Assembly, Supplement No. 12, paragraph 164).
4/ Institut Prava Akademii Nauk SSSR, Mezhdunarodnoe Pravo (Moscow, 1947) page 388.

/Other

Other expressions of the same Academy also give support to this view.[1]

21. A number of Government precedents may also be of interest. The Netherlands Government, when in 1899 the United Kingdom Government wished to sign one of The Hague Conventions subject to a reservation, refused to accept the signature. As Headquarters Government it "could not accept the reservation without referring it to the other signatories, but they were willing to do so and recommend its acceptance. This was done, and all the other signatories agreed; the convention was accordingly signed subject to this reservation..."[2]

22. In 1905, the British Ambassador at Paris was instructed to deposit with the French Government the British ratification of the International Sanitary Convention, with a declaration of reservations. According to Sir William Malkin:

> "The French Minister for Foreign Affairs stated that he was unable to receive the ratification if it were accompanied by reservations of any kind; he could only communicate the reservations to all the signatory Powers and, if they were accepted unanimously by the latter, make special mention of them in the procès-verbal of the deposit of all the ratifications, which must eventually be drawn up.... The procès-verbal, therefore, established the consent of the other signatories to the reservations in question. It is interesting, however, to note that the French Government (as the Headquarters Government) insisted on these reservations being communicated to the signatory Powers and agreed to by them before a ratification containing the reservations in question could be accepted."[3]

23. When Germany proposed to sign the Convention of 4 May 1910 for the Suppression of White Slave Traffic subject to a reservation which embodied practically the same provision as an amendment pressed by Germany during the conference but voted down, objection was made on the ground that a State should

1/ "Reservations at the time of ratification cannot be unilateral: they must receive the agreement of all States who are parties to the international agreement." See Defense of Dissertation in the Institute of Law of the Academy of Sciences of the USSR, "The Ratification of International Treaties". Izvestiya Akademii Nauk S.S.S.R., Otdelenie Ekonomiki i Prava, No. 4, Iyul - August (1948) page 285.

2/ Malkin, Reservations to Multilateral Conventions, 7 British Year Book of International Law, pages 141, 156.

3/ Malkin, op cit. pages 148, 149. For a similar recognition that the French Government had first to determine whether the other Governments concerned authorized it to accept a United States ratification, with the reservations included, of the Convention for the International Regulation of Air Navigation, see Hackworth, Digest of International Law, volume V, pages 109-110.

/not be

not be permitted to write in by reservation a clause specifically rejected by vote of the conference. Ultimately, therefore, Germany was obliged to abandon that particular reservation.[1/]

24. In 1930, when the United States transmitted to Paris for deposit with the French Ministry for Foreign Affairs its instrument of ratification to the Convention for the Revision of the General Act of Berlin and the General Act and Declaration of Brussels, subject to a reservation regarding arbitration of disputes, the "French Government evidently took the view that it could not permit the deposit of a ratification which was subject to reservations unless those reservations were first agreed to by the other signatories of the Convention."[2/] Not until 1934 was the deposit treated as completed, because of delays by the other Powers in consenting to the reservations made by the United States.

25. A notably different system, however, has been followed on some occasions in the past by the Pan-American Union, which is now the central organ and General Secretariat of the Organization of American States. By these procedures[3/] the text of a proposed reservation is submitted in advance of the actual ratification to the Union as depositary, in order that it may seek the views of the signatories. But the reserving Government is permitted, having taken into account any observations that may thus be made, to deposit its instrument definitively if it still desires, regardless of the nature of the views expressed by the other signatories. For, under this system, a State may

1/ See Malkin, op. cit. page 151; Harvard Research in International Law, "Law of Treaties", 29 A.J.I.L. (Supplement), page 875.

2/ Harvard Research in International Law, "Law of Treaties", 29 A.J.I.L. (Supplement), page 899.

3/ For an analysis of Pan-American Union procedures and theory, see Sanders, "Reservations to Multilateral Treaties", 33 A.J.I.L. page 488. See also Bustamento y Sirven 3 Droit International Public, pages 430-434 (1936). The Brazilian jurist, Hildebrand Accioly, remarks that this represents a minority school of thought. Traité de Droit International Public, volume 2, (Paris, 1942) page 451.

/become

become a Party to a convention notwithstanding the refusal of one or more States to agree to the reservations proposed.

26. The only juridical consequence of the rejection of a reservation is that the Convention fails to enter into force between the parties immediately concerned, namely, between the reserving and the rejecting Powers. This legal effect was defined by the Governing Board of the Pan-American Union (as formerly constituted) in a resolution adopted on 4 May 1932:

> "With respect to the juridical status of treaties ratified with reservations, which have not been accepted, the Governing Board of the Pan-American Union understands that:
>
> "1. The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations, in the terms in which it was originally drafted and signed.
>
> "2. It shall be in force as between the Governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be modified by said reservations.
>
> "3. It shall not be in force between a Government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations." 1/

27. Finally, one other important variation in the theory of depositary procedures deserves attention. As indicated above, it has been the policy of the Secretary-General of the United Nations - just as it was the policy of the League of Nations - to treat only the objection of a State which has ratified or acceded to a convention as being of such legal force as to exclude the participation of a reserving State. By contrast, some authorities would permit any State merely signatory to a convention to exclude the participation of another State proffering its ratification subject to a reservation to which the signatory objects. 2/ Some authorities, indeed, would seem to incline toward allowing not only signatories to object but all States which took part in the negotiation of the convention - at least until the date of its entry into force.

28. These two major variations in depositary procedures - first, as to whether unanimous consent is necessary to permit accession with a reservation, and

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1/ Quoted in Sanders, op. cit., page 490.

2/ See Harvard draft Convention on the Law of Treaties, as quoted above (paragraph 18).

/second,

second, as to which States must in that event consent - are of sufficient importance, in the opinion of the Secretary-General, to warrant his placing before the General Assembly the considerations which have governed the growth of United Nations procedures.

VI. THE REQUIREMENT OF UNANIMOUS CONSENT TO RESERVATIONS

29. As noted in the introduction, there is no question of a State becoming bound to a treaty text as modified by reservations without its having had an opportunity to object. The present problem concerns only the effect of an objection to a reservation.

30. The method attributed to the Pan-American Union has the advantage of permitting a maximum number of States to become parties to a convention, even though some of them undertake to apply only a portion of the text and exchange that undertaking with only a portion of the parties. It has the additional advantage of permitting an instrument of ratification, once it has been cleared for deposit, to be deposited definitively. There is thus less uncertainty as to the status of the reserving party.

31. It may be assumed that this procedure is well adapted to the needs of a regional agency and to the close relations existing between States within a defined geographic area. It may likewise be ideally suited to the conclusion of those multilateral agreements, the essential nature of which is to facilitate the exchange of merely contractual undertakings within a group of States. Such conventions, although multilateral in form, are in operation simply a complex of bilateral agreements. Where performance by one party accrues to the advantage of any one other party at a given moment, it is perfectly logical that the convention should be enabled to come into force between States A and B and B and C, but not between A and C if C rejects the reservation which A proposed and B accepted.

32. On the other hand, it is submitted that this theory is not well fitted to the purposes of multilateral conventions drawn up under the auspices of the United Nations, and for accession by all its Members. Such conventions by their very nature normally have a world-wide character by which States in very diverse circumstances agree to be bound, and presumably agree to be

/bound

bound in exchange for the similar consent of all other parties. They have a law-making character, not the character of a contract; and they are multilateral not only in form and in manner of adherence but in their purpose and essential juridical effect.[1/] To use the example at hand, it does not seem entirely plausible to treat a convention for the suppression of the crime of genocide as a bargain adaptable for entry into force between one pair among the parties thereto but not between another pair. Rather, the Genocide Convention would seem to represent the true type of legislative convention having the object of creating rules of law for identical operation in the different States adopting them - establishing, in fact, "a public law transcending in kind and not merely in degree ordinary agreements between States."[2/]

33. Not all conventions of which the Secretary-General may act as depositary will necessarily be of so broad a character. But such law-making treaties are so much a part of the function of the United Nations in furthering the progressive development of international law as to justify, in the absence of articles in the text to the contrary, general rules concerning the entry into force of all treaties of which the Secretary-General is made the depositary.[3/]

34. Since a choice must be made between requiring, on the one hand, that all the States concerned approve a reservation or, on the other hand, treating the convention as a hub through which sets of bilateral agreements may be concluded or not - according to whether or not the parties reach an accord on given reservations - it seems logical to select the former where the depositary is chiefly concerned with conventions which establish general principles of international law or which, however technical, are broadly regulatory of international conduct. In contractual compacts States may agree or not agree to exchange the quid pro quo. In conventions with a legislative intent a

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1/ Judge McNair has pressed for a careful distinction, in the application of rules concerning the formation and discharge of treaties, between those treaties which are in the nature of contractual bargains and those which are of a legislative or constitutional character. See "The Functions and differing Legal Character of Treaties", II British Year Book of International Law, page 100.

2/ Ibid; page 113. On the essential indivisibility of a multilateral treaty (la règle de l'intégrité du traité) see also, Rousseau, Principes Generaux du Droit International Public, volume 1, (1944), pages 298-299.

3/ President Basdevant has shown how the traité collectif, in the process of adoption of conventions by the Assembly of the League, has outgrown the procedures established for the traité-contrat bilatéral. Des Transformations Recentes Subies par la Technique de la Conclusion des Traités. Recueil des Cours, (1926), pages 598-600.

/State willing

State willing to become a party must be assumed to wish to enforce at least the core of the agreement. If another State considers, however, that the reservation proposed is so crucial as to remove its real meaning from the text as drafted, then the objection raised against the reservation constitutes not a rere bilateral refusal to deal but rather a declaration that the legislative intent of the convention will not be furthered by an adherence subject to a nullifying reservation. For, of course, the reason for requiring unanimous consent is not that one State should exclude another from participation in a multilateral agreement simply on the grounds of its own theoretical disapproval of the reservation, but only on the serious ground of its deeming that the reservation strikes so directly at the essence of the convention as to impugn its basic purposes.

35. The reasoning supporting the requirement of unanimity is forcefully presented by the Harvard Research in International Law in its General Comment on the Reservations sections of its draft Convention on the Law of Treaties. A State seeking to make a reservation, it urges,

> "proposes, in effect, to insert in the treaty a provision which will operate to exempt it from certain of the consequences which would otherwise devolve upon it from the treaty, while leaving the other States which are or which become parties to the treaty fully subject to those consequences in their relations inter se and possibly even in their relations vis-a-vis the State making the reservation. It seems clear that a State should be permitted to do this only with the consent of all other States which are parties, ... and this because, as has been said, States are willing in general to assume obligations under a multipartite treaty only 'on the understanding that the other participating Powers are prepared to act in the same way and that general benefit will thus result'. A multipartite treaty is 'an agreement in which each party finds a compensation for the obligations contracted in the engagements entered into by the others'. (League of Nations document A.10.1930.V., page 2). Consequently, were a State permitted to write a reservation into a multipartite treaty over the objection of any State already a party to the treaty ... the latter State might regard the consideration which prompted it to become a party as so far impaired by the reservation that it would denounce the treaty and withdraw therefrom".

In any case, it continues,

> "since a choice must be made, reason and the necessity for preserving multipartite treaties as useful and effective

/instruments

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."1/

36. In this same connexion it may be mentioned in passing that there is of course an even stronger case for requiring unanimous approval of a reservation where the convention in question is in the nature of a charter or constitution of an international organization formed under the auspices of the United Nations. It would clearly be neither equitable nor workable to permit States members of a functioning body to vary the terms of their admission (for instance, regarding the financial conditions of membership, as would often be the case) over the objection of one or more members already meeting more onerous terms. It does not appear even theoretically possible to have a State sitting and voting as a member of an international council and bound to certain other States members of that council (because they have accepted its reservation) but not bound under the same constitution to certain other member States which have rejected its reservation.

37. Finally, there is a practical advantage in the uniformity of legal relationships resulting from the unanimity rule. The technical complexity of determining and keeping account of the manifold bilateral relationships which might exist under a variety of conventions, possibly involving a large proportion of the Governments of the world, would be very great. Wherever there were objections to reservations, it would be necessary to establish between which of the parties a convention was in force.2/ For as large a depositary of major law-making conventions as the Secretariat of the United Nations may be expected to become, the resulting administrative burden would be considerable, while the difficulties for Governments - and, in the event of dispute, for the courts - could hardly be less.

1/ Harvard Research in International Law, 29 A.J.I.L. (Supplement), page 871.

2/ Under the Pan-American Union's procedure there is also the difficulty of the date of entry into force of each of the multiple bilateral undertakings. For each pair of States it is apparently the date of acceptance by any one State of the reservation proposed by another. Cf. Sanders, op. cit. page 490, and Article 6 of the Convention on Treaties of the Havana Conference (1928).

VII. OBJECTIONS BY GOVERNMENTS PARTIES OR BY ALL SIGNATORIES

38. Once it is proposed that the States concerned must unanimously approve a reservation on which an adherence is conditioned, it becomes a matter of prime importance to determine on which States should be conferred this significant power to exclude the participation of the reserving State. The answer necessarily depends on a reasonable weighing of the relative degree of interest of the State affected.

39. The Harvard Research in International Law, desiring to favour the State which approves the generally agreed text of a convention over the State which prefers to introduce a special provision of its own, extends the right to object to all States which are likely to become parties, and deems it reasonable to base that likelihood on the interest and intent which is attested by the act of signature. It offers the following explanation:

> "It may be presumed that normally the greater number of States eligible to sign a treaty, and certainly those having the greater interest in it, will sign it promptly and before the date when it is brought into force. Such States should certainly have a voice in determining whether or not reservations are to be introduced into the treaty. And, on the other hand, since it may be necessary, in the case of a treaty left open for signature at any time in the future, to deprive some signatories of a voice in that matter, it seems that in the case here envisaged it may properly be those which for one reason or another delay signing the treaty, not only until after the date when the State making the reservation is prepared to sign, but also until after the treaty has actually come into force."1/

40. This procedure naturally has the distinct advantage of not foreclosing the rights of a State having a tangible interest to protect in the future operation of the convention. Where only two ratifications are required to bring a treaty into force, it prevents two reserving States (or at least two like-minded Governments) from writing their reservations into the treaty before those with slower constitutional procedures for ratification can qualify to object.

41. On the other hand, under present-day methods of treaty formation, it may no longer be so logical to place so much weight on the protection of the

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1/ Harvard Research in International Law, "Law of Treaties", 29 A.J.I.L. (Supplement), pages 886-887.

/signatory,

signatory, for reasons set out below. Moreover, the counterpart of the signatory's interest is the serious disadvantage of empowering a State which may not ratify its signature for some years to come - or in consequence of altered circumstances may not ratify at all - to exclude the participation of a State which, subject to certain conditions, is ready to accept responsibilities under the convention at once.

42. A broader category of States whose interest in a convention might reasonably be protected would embrace not only signatories but all those which took part in the negotiation of the text. This approach seems the least adapted to United Nations procedures. It is the logical outgrowth of the diplomatic conference, where the mere fact of States sending emissaries to participate in the elaboration of a draft was itself an expression of relatively direct interest in the application of the treaty. For such treaties, indeed, the conference was likely to terminate with a ceremony of signature and often with a Protocol of Signature, the right to sign frequently being restricted to a single date or period. The signatories, having a relatively close community of interest, might meet again for the deposit of ratifications, and draw up a procès-verbal of deposit. The technique of leaving a treaty open unconditionally for signature by Powers which had no part in its drafting appears to be a relatively modern development.[1/]

43. By contrast, the majority of conventions of which the Secretary-General acts as depositary are drawn up within the framework of the United Nations or of a specialized agency or related body. The broader and more significant conventions, before being opened for signature, are adopted by the General Assembly, and their texts may have been prepared in a commission or ad hoc committee elected from among the Members of the United Nations. The degree of interest in, and of probable adherence to, the future convention neither follows necessarily from membership in the General Assembly nor is necessarily restricted to the narrow membership of the drafting commission. In any case,

1/ For the gradual increase in the scope of the right to sign, see the Report of the Committee for the Progressive Codification of International Law (League of Nations document C.357.M.130.1927.V., page 2) as quoted by Harvard Research in International Law, "Law of Treaties", 29 A.J.I.L. (Supplement) pages 879-880.

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it is hardly sufficient to empower - as the application of this rule to the United Nations would empower - any Member having voted in the General Assembly at the time of adoption to exclude a reserving State, should the Member be so inclined, on the grounds of objection as a matter of principle to the content of the reservation. Moreover, signatures then commonly follow adoption by the General Assembly and are not infrequently affixed in the spirit of that event. Not only is it generally conceded that there is no obligation to ratify a signature and so become a party, but United Nations experience already demonstrates that some signatory States ultimately decide against ratifying.[1/]

44. The policy of the Secretary-General, therefore, as also practised by the League Secretariat, has been to ascertain the attitude towards any reservation of all States which have ratified or acceded to a convention, whether or not it is in force. The text of a reservation, however, is circulated to all interested States. Thus, the final authority to exclude the participation of a reserving State is in effect confined to those States which have (or before entry into force will have) established their immediate concern by themselves becoming parties. At the same time, the right of a signatory to make its objection heard would by no means, be absolutely excluded. Any objection by a signatory would of course be circulated so that its reasoning could be taken into account not only by the reserving State, which might then decide to withdraw its reservation, but also by the parties, which might then be persuaded to enter an objection on their own behalf.

45. This system would seem to represent a fair compromise of the various interests of parties, signatories and reserving States in a manner realistically related to the United Nations machinery for the promulgation of conventional international law. The rule as here described is of course intended to refer to conventions of which the Secretary-General is the

1/ On the diminution in the force of signatures, and in the probability of their ratification, under the League of Nations, see Basdevant La Conclusion et la Rédaction des Traités, Recueil des Cours, (1926) pages 589-590, 596. Cf. Scelle, Précis de Droit des Gens (1934) page 511.

/depositary,

depositary, and need not govern the procedures of diplomatic conferences outside the framework of the United Nations.

VIII. CONCLUSION

46. The rule adhered to by the Secretary-General as depositary may accordingly be stated in the following manner:

A State may make a reservation when signing, ratifying or acceding to a convention, prior to its entry into force, only with the consent of all States which have ratified or acceded thereto up to the date of entry into force; and may do so after the date of entry into force only with the consent of all States which have theretofore ratified or acceded.

47. To summarize the discussion above, this rule is based on the following considerations:

(a) It conforms with majority practice to require the assent of all the States most directly concerned to any proposal to alter, by individual reservation, the terms of the agreed text of a convention. Moreover, it is more in harmony with the nature and purposes of conventions adopted under the auspices of the United Nations, which commonly have a law-making character,[1] to treat them as establishing integral principles of international law agreed to by all the parties, rather then as nodules of many purely bilateral engagements.

(b) Since the attention of a very large number of States is normally directed at one stage or another to conventions of which the Secretary-General is made depositary, it is in the interests of efficiency to keep to a minimum the number of States required to give unanimous consent to a reservation. This can best be accomplished by confining the power to reject a reservation to the States most directly affected - namely, to actual parties to the convention in question.

1/ Professor Scelle has suggested that the League practice served to protect the competence of the international legislative body. Precis de Droit des Gens, Volume II, (1934) page 480.

/(c) It is

(c) It is inevitable that any rule followed by the Secretary-General, in the absence of express provisions in the convention, will not suit the circumstances of every convention or every relationship proposed between given parties. This difficulty can be met by the conscious use, in the drafting of such a convention, of final articles best adapted to any special situation. If, for example, it is desired to forestall certain objections in order to make a convention acceptable to a maximum number of States, it is always possible to include an article expressly approving specified reservations.[1] If it is desired in special cases to permit signatories, and not only parties, to reject proposed reservations, the League of Nations formula mentioned above, used in the Convention for the Prevention and Punishment of Terrorism, might be applicable.[2]

48. Finally, should it be desired to permit a maximum number of States to exchange undertakings through the medium of a multilateral convention, and thus to permit reserving States to become parties even though individual States

1/ Article 39, paragraph 1 of the Revised General Act for the Pacific Settlement of International Disputes reads as follows: "In addition to the power given in the preceding article, a party, in acceding to the present General Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph. These reservations must be indicated at the time of accession".

2/ In addition to requiring in any case that the consent of all the parties be obtained by appropriate inquiry, article 23 of this Convention provides:
"1. ..... Should the reservation be formulated within three years from the entry into force of the Convention, the same inquiry shall be addressed to members of the League and non-member States whose signature of the convention has not yet been followed by ratification. If, within six months from the date of the Secretary-General's communication, no objection to the reservation has been made, it shall be treated as accepted by the high contracting parties.
"2. In the event of any objection being received, the Secretary-General of the League of Nations shall inform the Government which desired to make the reservation, and request it to inform him whether it is prepared to ratify or accede without the reservation or whether it prefers to abstain from ratification or accession."

/already

already parties object to the reservations, the unanimity requirement also can be expressly waived.[1/]

49. All these considerations, it is submitted, support the practice followed by the Secretary-General as to the conventions of which he serves as the depositary.

1/ Article 19 of the Convention on Declaration of Death of Missing Persons, opened for accession at Lake Success on 6 April 1950, reads as follows:

"Any State may subject its accession to the present Convention to reservations which may be formulated only at the time of accession.

"If a Contracting State does not accept the reservations which another State may have thus attached to its accession, the former may, provided it does so within ninety days from the date on which the Secretary-General will have transmitted the reservations to it, notify the Secretary-General that it considers such accession as not having entered into force between the State making the reservation and the State not accepting it. In such case, the Convention shall be considered as not being in force between such two States."

This of course embodies the Pan-American Union procedure. The clause was considered an exceptional measure in view of the special nature of the convention, especially since it dealt with matters of private international law. See document A/Conf.1/SR.10, pages 8, 9, 10.

ANNEX I

STATUS OF SIGNATURES, RATIFICATIONS, ACCESSIONS AND RESERVATIONS WITH REGARD TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

1. In illustration of the practice of the Secretary-General as described in the foregoing report, the proposed reservations as to articles of the Convention for the Prevention and Punishment of the Crime of Genocide are here set out in full for the information of the General Assembly, together with an indication of the actions taken by the Secretary-General as depositary, and the dissent expressed by certain States regarding these proposed reservations.

I. Status of signatures, ratifications and accessions

2. The Convention was signed by the following 43 States:

Australia
Belgium
Bolivia
Brazil
Burma
Byelorussian Soviet Socialist Republic
Canada
Chile
China
Colombia
Cuba
Czechoslovakia
Denmark
Dominican Republic
Ecuador
Egypt
El Salvador
Ethiopia
France
Greece
Guatemala
Haiti
Honduras
Iceland
India
Iran
Israel
Lebanon
Liberia
Mexico
New Zealand
Norway
Pakistan
Panama
Paraguay
Peru
Philippines
Sweden
Ukrainian Soviet Socialist Republic
Union of Soviet Socialist Republics
United States of America
Uruguay
Yugoslavia

The following States have ratified the Convention:

Australia
Ecuador
Ethiopia
Guatemala
Iceland
Israel
Liberia
Norway
Panama
Philippines (subject to reservations)
Yugoslavia

/and the following

and the following have acceded to it:

Bulgaria (subject to reservations)	Saudi Arabia
Jordan	Turkey
Monaco	Viet-Nam

II. Reservations made by the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic and Czechoslovakia

3. The Union of Soviet Socialist Republics, the Byelorussian SSR, the Ukrainian SSR and Czechoslovakia signed the Convention "with the reservations regarding articles IX and XII stated in the special procès-verbal drawn up on signature of the present Convention".

4. By way of example[1/], the text of the special procès-verbal drawn up at the signature of the Convention by the delegation of the USSR is reproduced below:

"His Excellency Mr. A. S. Panyushkin, Ambassador of the Union of Soviet Socialist Republics to the United States, prior to signing the Convention on the Prevention and Punishment of the Crime of Genocide, in the office of the Assistant Secretary-General in charge of the legal Department, at the Interim Headquarters of the United Nations, on Friday, 16 December 1949, made the following statement:

'At the time of signing the present Convention the delegation of the Union of Soviet Socialist Republics deems it essential to state the following:

'As regards article IX: The Soviet Union does not consider as binding upon itself the provisions of article IX which provides that disputes between the contracting parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the Soviet Union will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

'As regards article XII: The Union of Soviet Socialist Republics declares that it is not in agreement with article XII of the Convention and considers that all the provisions of the Convention should extend to Non-Self-Governing Territories, including Trust Territories.'

1/ The procès-verbaux of the Byelorussian SSR, the Ukrainian SSR and Czechoslovakia are in the same terms and contain the same reservations.

/"In witness

"In witness whereof the present Procès-verbal was drawn up.

Done at Lake Success, New York, this 16th day of December 1949.

(Signed) Dr. I. KERNO
Assistant Secretary-General
in charge of the Legal Department"

Translation by the Secretariat:

Ambassador Extraordinary and Plenipotentiary
of the USSR to the United States of America

(Signed) A. PANYUSHKIN
16-12-49"

5. The Secretary-General sent notifications of the above reservations, attaching a certified copy of each procès-verbal, to each Member of the United Nations and to each of the non-member States to which an invitation to sign the Convention had been addressed. In addition the Secretary-General informed the five Member States which had ratified the Convention at that time, namely Australia, Ecuador, Ethiopia, Iceland and Norway, that he would like to be informed at the earliest possible opportunity of their attitude with regard to the reservations. He further advised them that it would be his understanding that all States which had ratified or acceded to the Convention would have accepted these reservations, unless they had notified him of objections prior to the day on which the first twenty instruments of ratification or accession, necessary to bring the Convention into force, had been deposited.

III. Position taken by Ecuador

6. In reply to this notification, the Minister for External Relation of Ecuador addressed a letter to the Secretary-General, under date of 10 February 1950, to inform him that:

"The Government of Ecuador, in accordance with the position previously maintained regarding reservations, has no objection to make regarding the submission of such reservations but expresses its disagreement with their content."

7. Acknowledging this communication, the Secretary-General, on 21 March 1950, replied:

"Your letter states that the Government of Ecuador has no objection to make concerning the submission of the reservations by the aforesaid States as contained in the procès-verbaux, copies of which were annexed to my previous letters, and at the same time, expresses disagreement with the content of these reservations.

"As the statement does not seem to indicate clearly the intention of your Government, it will be appreciated if Your Excellency would be good

/enough to inform

enough to inform me whether it may be taken as accepting the aforementioned reservations."

8. The Minister for External Relations accordingly responded on 31 March 1950 as follows:

"The Government of Ecuador is not in agreement with these reservations and therefore they do not apply to Ecuador, which accepted without any modification the complete text of the Convention in question".

9. This position was communicated by the Secretary-General on 5 May 1950 to all the Governments concerned.

IV. Position taken by Guatemala

10. To the notification referred to in paragraph 5 above, the Under-Secretary for External Relations of Guatemala replied on 16 June 1950 as follows:

"I must inform you that the Government of Guatemala is not in agreement with the reservations made by the Governments of the Union of Soviet Socialist Republics, the Ukrainian Soviet Socialist Republic and Czechoslovakia to the Convention on Prevention and Punishment of the Crime of Genocide; and that, consequently, it should not be inferred that this Government accepts them merely because it did not make any reference to them in depositing its instrument of ratification, since they have no relation to the full acceptance of the Convention by this Republic".

11. It appeared that the notification of the Secretary-General had in fact not been received by the Government of Guatemala in sufficient time to have affected its ratification. The Secretary-General therefore inquired "whether the statements that the 'Government of Guatemala is not in agreement with these reservations, and that it should not be inferred that the Government of Guatemala accepts them merely because it did not make any reference to them in depositing its instrument of ratification', are intended to convey the meaning that the Government of Guatemala, having had due notice of these reservations, specifically objects to them". The Secretary-General felt it his duty to advise the Government of Guatemala that the consequence in law of any objection to the reservations would be to make him unable "to accept for deposit instruments of ratification by the Governments of the Union of Soviet Socialist Republics, the Ukrainian Soviet Socialist Republic and Czechoslovakia, subject to the aforesaid reservations".

12. The Government of Guatemala accordingly clarified the legal assumptions, on which its expression of disagreement was based, in the following manner:

"In reply I have pleasure in repeating the view expressed in my communication No. 7865 of 16 June 1950, in which this Ministry stated that

/the Government

the Government of Guatemala was not in agreement with these reservations and that they had no relation to ratification and full acceptance of the text of the Convention by my Government. I wish to add, in reply to your question, that the Government of Guatemala has always maintained the view that reservations made upon signing or ratifying international conventions are acts inherent in the sovereignty of States and are not open to discussion, acceptance or rejection by other States. In collective conventions reservations made by a State affect only the application of the clause concerned in the relations of other States with the State making the reservation".

13. These interchanges were also circulated by the Secretary-General to all the Governments concerned.

V. Attitude expressed by the United Kingdom

14. To the notification by the Secretary-General of the reservations made by the USSR, the Byelorussian SSR, the Ukrainian SSR and Czechoslovakia, the United Kingdom replied:

"His Majesty's Government regret that they are unable to accept the above-mentioned reservations because in their view the effect of these reservations would be to alter in important respects the Convention as drafted and as adopted at the third session of the General Assembly. His Majesty's Government cannot therefore regard as valid any ratification of the Convention maintaining such reservations".

15. The views of the United Kingdom Government as to the legal considerations governing this matter were submitted in a memorandum which is attached as Annex II.

VI. Subsequent reservations by the Philippines and Bulgaria

16. Since the exchange of communications described above, the Governments of the Philippines and of the People's Republic of Bulgaria have proffered instruments subject to reservations.

17. On 7 July 1950, the Philippines submitted an instrument of ratification containing the following reservations:

"1. With reference to article IV of the Convention, the Philippine Government cannot sanction any situation which would subject its Head of State, who is not a ruler, to conditions less favourable than those accorded other Heads of State, whether constitutionally responsible rulers or not. The Philippine Government does not consider said article, therefore, as overriding the existing immunities from judicial processes guaranteed certain public officials by the Constitution of the Phillippines.

"2. With reference to article VII of the Convention, the Philippine Government does not undertake to give effect to said article until the Congress of the Philippines has enacted the necessary legislation defining and punishing the crime of genocide, which legislation, under the

/Constitution

Constitution of the Philippines, cannot have any retroactive effect.

"3. With reference to articles VI and IX of the Convention, the Philippine Government takes the position that nothing contained in said articles shall be construed as depriving Philippine courts of jurisdiction over all cases of genocide committed within Philippine territory, save only in those cases where the Philippine Government consents to have the decision of the Philippine courts reviewed by either of the international tribunals referred to in said articles. With further reference to article IX of the Convention, the Philippine Government does not consider said article to extend the concept of State responsibility beyond that recognized by the generally accepted principles of international law."

18. On 21 July 1950, the People's Republic of Bulgaria submitted an instrument of accession embodying reservations in the same terms as those proposed by the USSR, the Byelorussian SSR, the Ukrainian SSR and Czechoslovakia.

19. Notifications of these reservations were likewise sent to each Member of the United Nations and to each of the non-member States to which an invitation to sign the Convention had been addressed. In addition, as in the prior instance, the Secretary-General asked to be informed of the attitude of those States which had ratified or acceded to the Convention.

ANNEX II

RESERVATIONS TO MULTILATERAL CONVENTIONS

Memorandum presented by the United Kingdom

I. Necessity for obtaining consent to reservations

1. A State which, while wishing to become a party to a convention, considers that it can only do so if it can exclude the application to itself of one or more of the particular provisions of the Convention, may seek to achieve this object in one of the following ways:

(i) By obtaining the insertion into the convention of express words excluding the application of that provision to itself (e.g. article 287 of the Treaty of Versailles); or a clause expressly permitting reservations to one or more articles to be made;

(ii) By a reservation attached to the signature of a convention by its representatives and duly recorded in a procès-verbal or protocol of signature;

(iii) By a reservation attached to the ratification and duly recorded;

(iv) In the case of a convention left open for accession by other States, by a reservation attached to its signature and duly recorded.1/

2. It is generally, though not universally, held that, since a State wishing to make a reservation is, in effect, seeking to write into the convention certain terms which will limit its effect, it is essential, in the last three cases mentioned in the preceding paragraph, that all the other parties to the convention should assent to the making of the reservation, and that if they do not, the signature or ratification or accession which the reservation purports to qualify is a nullity. In other words, the non-acceptance of the reservation by a single signatory or party excludes the State formulating the reservation from any participation in the convention.2/ According to this view,

"A State which wishes to make reservation to a treaty may do so only if all other States which are parties to the treaty, or which as signatories are likely to become parties consent to its so doing; lacking such consent, the State desirous of making the reservation must either abandon that desire and accept the treaty without the

1/ McNair, Law of Treaties, pages 105-106.

2/ McNair, op.cit., page 106; 29 American Journal of International Law, (Supplement), page 871; O. Schachter, British Year Book of International Law (1948), page 124; 33 American Journal of International Law, page 488.

/reservation

reservation or else remain outside the treaty altogether."[1]

A number of precedents were examined by Sir William Malkin in an article in the British Year Book of International Law.[2] He concluded his review of them by saying:

> "It will be seen that of all the cases examined above, where an actual reservation was made to any provision of a Convention, there is hardly one as to which it cannot be shown that the consent of the other Contracting Powers was given either expressly or by implication. There is no case among those examined which could be quoted as a precedent in favour of the theory that a State is entitled to make any reservations it likes to a Convention without the assent of the other contracting parties."[3]

1/ Comment of Harvard Research in International Law on article 14 of draft Convention on the Law of Treaties - 29 American Journal of International Law, (Supplement), page 870. The same view has been expressed, though in a somewhat different way, by Fauchille (Droit International Public, Volume I.3., paragraph 823, pages 312-313):

> "Comment admettre, au surplus, qu'une même convention n'entraîne pas les mêmes obligations sans distinction vis-à-vis de ceux qui y participent? Entre un contractant qui signe la convention en bloc, purement et simplement, et un autre qui la signe partiellement, avec des réserves, la situation n'est vraiment pas égale... Pour nous, des réserves à la signature ne sont acceptables que si toutes les puissances contractantes consentent à y donner, expressément ou tacitement, leur adhésion: il y aura alors finalement un traite nouveau, entièrement distinct de celui qu'on avait primitivement négocié. Si les signataires purs et simples ne consentent pas, ils seront en droit d'obliger leurs contractants qui ont fait des réserves à y renoncer ou à souffrir que la convention ne s'applique pas dans les rapports des puissances intéressées".

2/ "Reservations to Multilateral Conventions", 7 British Year Book of International Law, page 141.

3/ Malkin, op.cit., page 159.

/3. There is,

3. There is, however, another view which has not gained general acceptance, but which was expressed in a resolution adopted by the Governing Body of the Pan-American Union on 4 May 1932. This is that non-acceptance of a reservation merely affects the party which refuses to accept the reservation and that the State making the reservation is free to participate in the convention with the parties that accept the reservation either expressly or by implication.1/ This view was given formal expression in the following draft clause which Venezuela proposed, at the Pan American Conference in December 1948, should be added to the Convention on Treaties of the Havana Conference:

> "A treaty that is ratified with reservations shall enter into effect only between the parties that accept the reservation".2/

II. Method of obtaining consent

4. Whichever view is accepted, it is necessary to consider how the assent of the other parties to the making of a reservation to a multilateral convention can be obtained. Such assent may be obtained in the following ways:

(i) Where the reservation has been previously announced at a sitting of the conference and has been repeated at the time of signature without any objection being taken, assent is implied.

(ii) Where the reserving State has before signature, or after signature and before ratification, expressly enquired of all other parties if they will permit the reservation.

(iii) Where the parties to a multipartite treaty, on being made aware that a signature, ratification or accession qualified by a reservation has been tendered, neither assent nor dissent expressly.3/

In case (iii) it is probable that after the lapse of a reasonable time assent would be inferred, and the signature, ratification or accession would therefore become effective. In the opinion of the United States authority, Professor Hyde, the question whether such implied acceptance can be understood depends on whether the reservation made lessens or enlarges the obligations which the State signing is prepared reciprocally to accept.

1/ 32 American Journal of International Law, page 490.

2/ Ibid., page 490.

3/ McNair, op.cit., page 106; Malkin, 7 British Year Book of International Law, page 159.

/"If a State

"If a State be permitted to sign or deposit its ratifications of a treaty under a reservation that lessens rather than enlarges obligations which such State is prepared reciprocally to accept, and at a time before the arrangement has become binding upon any of the other signatories or prospective parties, it is reasonable to conclude that if the latter with knowledge of the fact proceed, without more ado, to make the instrument binding upon themselves, as by deposit of ratifications, their conduct amounts to acceptance of the reservation".1/

If, however, the reservation purports to enlarge rather than diminish reciprocal burdens sought to be imposed by the convention, inaction by the other parties in relation to such a reservation would (says Hyde) "probably not be deemed to constitute acceptance of it".

III. Reservations made on or appended to signature

5. The position which arises in regard to reservations which are made when a multilateral convention is open to signature for a certain period (e.g. for six months) was examined by Sir William Malkin, who considered it to be most desirable that some procedure should be devised for dealing with reservations made by States which were either not represented at the conference leading up to the convention, or, if represented, did not sign on the date on which the convention was opened for signature.2/ Sir William Malkin considered that it might be argued, on the one hand, that such States "cannot expect any facilities as regards reservations", but that it could also be argued on the other hand, that the State concerned

"may have had perfectly good reasons either for not attending or for not signing on the appointed day, and it is undesirable that it should be debarred from becoming a party to the convention on account of a reservation which might well have been accepted if made in time."3/

"The position can sometimes be regularized on the deposit of ratifications, but otherwise there is no occasion on which representatives of all the Contracting Powers can meet and can deal with reservations which have been proposed since the Conference separated; but... it is essential that the consent of the other signatories should in some manner be obtained in such cases before a reservation can be implied".4/

1/ Hyde, International Law, Volume II, pages 1440-1441.

2/ 7 British Year Book of International Law, pages 160-161.

3/ 7 British Year Book of International Law, pages 160-161.

4/ Ibid., page 160.

6. Suggestions as to the procedure to be adopted in such a case are included in the comment on article 14(b) of the draft Convention on the Law of Treaties prepared by the Harvard Research Institute, which reads as follows:

> "If a treaty is open for signature until a certain date, a State may make a reservation when signing only with the consent of all other States which sign before the date fixed".1/

The comment on article 14(b) includes consideration of the manner in which such consent should be obtained, particularly in the case in which a certain State is not among the original signatories, but instead desires to sign the convention with reservations after other States have already signed it.2/

(a) There is, on the one hand, the case in which such a State merely seeks to append to its signature a reservation which (without objection being made thereto) it has previously stated and recorded in the proceedings of a conference in which the prior signatories were likewise participants. Here the consent of the prior signatories may be implied.3/ An interesting example of this situation occurred in connexion with the "Red Cross" Convention of 1906, which (under article 32 thereof) was open for signature for several months. The British representatives signed the Convention subject to a reservation to certain articles containing provisions which could not be enforced without legislation in this country. There is no record of any assent to these reservations by the other signatory Powers, but the attitude of the British delegation had been made clear in the Fourth Committee of the Conference, and it seems to have been tacitly assumed that all the other signatories assented to the reservations in question.4/

(b) On the other hand, there is the case in which a State seeks to subject its signature to a reservation which has not been previously agreed to. Here (to quote the comment on article 14(b) of the Harvard Research Institute's draft Convention)

> "it seems desirable that the consent of the prior signatories should be given expressly. It is possible that under certain circumstances their consent might be implied from a failure to object after notification of

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1/ 29 American Journal of International Law, (Supplement), page 879.

2/ Ibid., pages 879-886.

3/ Ibid., pages 885-886.

4/ Malkin, 7 British Year Book of International Law, page 150.

//[the] proposed

/the/ proposed reservation, but ordinarily such consent should and can be expressly given. This might be done, for example, by an exchange of notes between /the reserving State/ and the prior signatories either directly or through a Headquarters Government... Or it might be done by drawing up and signing a protocol or procès-verbal expressly recording /the/ reservation and consent thereto".1/

As regards subsequent signatories, the Harvard Research Commentary considers that if the reserving State has duly obtained the consent of all prior signatories, and then affixes its signature to the convention in question and appends its reservation thereto, the consent of subsequent signatories will be regarded as given by implication if, without protest, they sign the convention (or the convention and a protocol recording the reservation).2/

IV. Reservations made on ratification.

7. There is also the question of a State which wishes to make a reservation to a multilateral convention on ratification thereof. Paragraphs (b) and (c) of article 15 of the draft Convention on the Law of Treaties apply to this situation and are as follows:

"(b) If a treaty is open for signature until a certain date, a State may make a reservation when ratifying only with the consent of all other States which become signatories before the date fixed and of all the States which have acceded to the treaty prior to the ratification by that State".

"(c) If a treaty is open for signature at any time in the future, a State may make a reservation when ratifying, if it ratifies before the treaty has been brought into force, only with the consent of all other States which become signatories before the treaty is brought into force; if it ratifies after the treaty has been brought into force only with the consent of all other States which have become signatories or have acceded to the treaty prior to ratification by that State".3/

In commenting on this article, the Harvard Research Institute point out that

"each of the paragraphs...is designed to prevent the writing of a reservation into a treaty without the consent of all other States which are likely to be affected by it and which might find the value of the treaty for them destroyed or seriously impaired were the reservations to become a part of the treaty. Those other States are the States which have already become parties to the treaty or which, as signatories, are likely to become parties".4/

1/ 29 American Journal of International Law, (Supplement), page 885.

2/ 29 American Journal of International Law, (Supplement), pages 885-886.

3/ Op.cit., pages 901-905.

4/ Op.cit., page 890.

/If article 15

If article 15 of the Harvard Research Institute's draft Convention is considered to be a correct statement of existing international law on this matter, the position is that a reservation to a multilateral convention made on ratification thereof must be consented to, not only by such States as have already become parties to the convention by ratifying it, but also by States which are merely signatories and which may not proceed to ratify. This situation would appear to be open to the objection that it makes it possible for a State which may not ultimately become a party to the convention to exclude from participation a State which is prepared to accept the convention subject to a reservation on ratification, even though all the States which actually become bound by the convention, by ratifying it, have consented or are prepared to consent to the reservation. However, there seems very little reason to doubt that paragraphs (b) and (c) of the Harvard Research Institute's draft Convention states the correct legal position. Hackworth, for instance, says:

> "If reservations are not made at the time of signing a multilateral treaty, ratifications with reservations, in order to be binding, must be brought to the knowledge of the other Contracting Powers and receive their approval, unless otherwise specified in the treaty, since they constitute a modification of the agreement".1/

It seems probable that Hackworth is using the term "Contracting Powers" in this passage as equivalent to "signatories". Hudson appears to hold the same view, although he is a little more cautious in expressing it when he says:

> "Any fresh reservation made at the time of ratification or in any separate instrument, must be agreed to by all States which have previously ratified, and it would seem by all signatory States".2/

8. A recognition of the right of signatories to a convention, as well as those who have ratified it, or acceded to it, to object to reservations made by other States on ratification or accession, is to be found in article 23 of the Convention of 16 November 1937 for the Prevention and Punishment of Terrorism. Whilst recognizing this right, however, the article provides that the period within which States "whose signature of the Convention has not yet been followed by ratification" can object to reservations shall be limited to three years from the entry into force of the Convention. In commenting on this Hudson says:

> "It recognises the possible interest of signatories which have not proceeded to ratification in the reservations offered by other signatories, and thus clarifies a point on which there has been doubt. It also

1/ Hackworth, Digest, Volume V., paragraph 482, page 130.

2/ Hudson, International Legislation, Volume I., Introduction, page 1.

/establishes

establishes that when reservations other than those agreed to at the time of signature are proposed, the alternatives are absence of objection from any State consulted, on the one hand, and abstention from proceeding to deposit of a ratification or accession on the other hand". 1/

The provisions of article 23 of the Convention of 16 November 1937 also appear to show the fallacy of an argument which has been advanced, but which seems unsupported by any authority, to the effect that if a multilateral convention, in respect of which ratifications containing reservations have been deposited, has entered into force without any objections being raised to such reservations, it is not open to any States which subsequently ratify or accede to the convention to object to any reservations which have already been made. A most serious objection to this argument is that it might enable a limited number of States (in some cases - e.g. the Geneva Conventions of 1949, which enter into force when two ratifications have been deposited - as few as two) to force the other signatories whose ratifications are deposited after the entry into force of the convention to accept a convention containing provisions quite other than those to which they had agreed when signing the convention, and without their having had an adequate opportunity to object to reservations only made simultaneously with the very ratifications that brought the convention into force. The procedure set forth in article 23 of the Convention of 16 November 1937 appears to be a reasonable one, since it allows States which are signatories of the convention, but which have not yet ratified it, a period of three years in which to object to any reservations made on ratification by other States and, at the same time, prevents the possibility that a ratification subject to a reservation may indefinitely be held to be ineffective because it is objected to by a signatory State which has not yet made up its mind to ratify the convention and possibly may never do so.

V. Reservations made on accession.

9. The position with regard to reservations made at the time of accession to a multilateral convention appears to be very similar to that regarding reservations on ratification. Article 16 of the Harvard draft Convention provides that:

> "A State may make a reservation when acceding to a treaty only with the consent of all the signatories to the treaty and of the States which have previously acceded to the treaty". 2/

1/ Hudson, 32 American Journal of International Law, (1938), page 335.

2/ 29 American Journal of International Law, (Supplement), page 905.

This corresponds with the view held by Hudson, who says:

"Similarly, an adhesion subject to reservation cannot be received in deposit without the consent of all States which have previously ratified or adhered, and possibly without the consent of all signatory States".1/

VI. Should reservations preferably be made on signature, or on ratification or accession?

10. The balance of opinion is in favour of making reservations on signature rather than on ratification. The United States authority, Professor Hyde, puts the case for making reservations on signature as follows:

"The Department of State has found occasion to declare that reservations to a multipartite treaty should be made and recorded at the time of signature in order that all parties to the treaty may, previous to and in considering ratification, understand to what extent each signatory is bound by the terms of the agreement."2/

Article 14(d) of the Harvard draft Convention on the Law of Treaties is as follows:

"If a State has made a reservation when signing a treaty, its later ratification will give effect to the reservation in the relations of that State with other States which have become or may become parties to the treaty".3/

The Harvard comment on the provisions is as follows:

"Reservations made upon signature are of necessity formally accepted by every Power which subsequently ratifies the treaty. Every Power has had formal knowledge thereof to the same extent as of the text of the treaty itself."4/

VII. Position of Headquarters Government or depositary authority regarding attempted reservations.

11. Hudson emphasizes the duty which rests upon the depositary of ratifications to a multilateral treaty, and says:

"An authority designated as the depositary of ratifications would not be justified in allowing a definitive deposit of a ratification which

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1/ Hudson, International Legislation, Volume I, Introduction, page 1.

2/ Hyde, International Law, Volume II, page 1442.

3/ 29 American Journal of International Law, (Supplement), page 888.

4/ 29 American Journal of International Law, (Supplement), page 889, quoting Miller, Reservations to Treaties (1919) page 94.

/is subject

is subject to a reservation unless the consent of other signatory States were obtained, though the consent may, in some cases, be inferred from a failure to object after adequate opportunity."1/

Hudson also points out that agreement to a fresh reservation made at the time of ratification

"is usually expressed in a procès-verbal of the exchange or deposit of ratifications or by an exchange of notes.2/

In saying this he appears, although he does not expressly say so, to mean that this way of expressing agreement to a reservation is that which should be adopted by other States who have already deposited ratification, depositing them at the same time as the State which is ratifying subject to a reservation. The consent of signatories who have not yet ratified can, it seems, be sometimes inferred from failure to object.

12. An interesting example of a case in which no ratifications had been deposited before the deposit of the first ratifications containing reservations is afforded by The Hague Conventions of 1907. The first ratifications to these Conventions were deposited on 27 November 1909, and included several ratifications which contained reservations. The representatives of the States depositing such ratifications verbally called them to the attention of the other Powers depositing ratifications and signing the procès-verbaux. Copies of all instruments of ratification deposited were then sent to all the Powers who had attended The Hague Peace Conference, and States subsequently ratifying The Hague Conventions of 1907 therefore had notice of the reservations contained in the ratifications already deposited, and the failure of any such States to object appears to have been considered as indicating consent to the reservations.3/

13. Another problem regarding consent to the deposit of ratifications subject to reservations has been raised by the fact that, at the present day, the depositary of a multilateral convention will often be, not the Government of a State, but the Secretary-General of the United Nations. A similar problem arose

1/ Hudson, International Legislation, Volume I., page 1

2/ Ibid.

3/ 29 American Journal of International Law, (Supplement), pages 902-903.

/during the

during the existence of the League of Nations, and an attempt to solve it was made by the insertion in multilateral conventions of which the Secretary-General of the League was the depositary of specific provisions relating to the method of obtaining consent to reservations to the conventions (see, for example, article 23 of the Convention of 16 November 1937 for the Prevention and Punishment of Terrorism, which has already been referred to above.)1/ An interesting example of the procedure adopted by the Secretary-General of the United Nations in regard to the communication to other parties of a reservation to a multilateral convention arose in connexion with the Constitution of the World Health Organization, in respect of which the United States, in depositing its instrument of accession with the Secretary-General of the United Nations, reserved its right to withdraw from the organization on giving one year's notice.2/ In this particular instance, the normal procedure of the depositary communicating the reservation to all the parties and enquiring whether they objected to it, would not have been entirely satisfactory, since, as pointed out by Schachter,

> "it was .... evident that the consent of all the Members could not be obtained within the short time available and that the requirement of unanimity might result in the rejection of the acceptance if the States were to act separately without opportunity for consultation. .... Moreover, the effect would be that a decision of great importance to an established international organisation would be made not through the competent organs but by the States acting individually and separately, with each entitled to veto the ratification".3/

The Secretary-General's method of dealing with the problem avoided this result. He informed the States parties to the Constitution that he was "not in a position to determine whether the United States has become a party to the Constitution" and that he therefore proposed to refer the matter to the World Health Assembly which, under article 75 of the Constitution, was the competent body to settle questions concerning the interpretation or application of the Constitution. The matter was accordingly discussed by the World Health Assembly, and at the conclusion of the

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1/ Hudson, 32 American Journal of International Law, pages 334-335.

2/ O. Schachter, 15 British Year Book of International Law, pages 122-127.

3/ O. Schachter, 15 British Year Book of International Law, page 124.

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discussion it was announced by the President that, since there were no objections, "the United States ratification of the Constitution is unanimously accepted by this Assembly." Thus, in effect, the decision on the question of the reservation has been transferred to the organization; and it would scarcely be possible to find a clearer application of the principle that, to such reservations, general consent is necessary, and that they cannot be made unilaterally.1/

VIII. Method by which depositary obtains consent.

14. Different views have been expressed as to how consent to reservations made on ratification should be obtained by the Headquarters Government or depositary authority. The comment on article 15(b) of the Harvard draft Convention on the Law of Treaties suggests that, depending on the circumstances of the case, a State which is the depositary of ratifications may either:

(i) Communicate the proposed reservations, both to the other signatories who have not yet ratified and to those signatories which have deposited ratifications, in a note implying that in the absence of express objections their consent to the proposed reservation will be presumed.

or (ii) Request from the other States concerned, whether they are signatories who have not yet ratified or signatories who have deposited ratifications, an express indication of consent by vote.2/

Hackworth, on the other hand, considers that there is a difference in such circumstances, between signatories whose ratifications have been deposited and signatories who have not yet ratified. The former should signify the acceptance of the proposed reservations by some positive act, but in the case of the latter it is probable that acceptance of the reservations would be implied from failure to object.3/

IX. General conclusion

15. The most generally accepted opinion clearly is that a State which wishes to make a reservation to a multilateral convention may do so only if, at the least, all the other States which are signatories to the Convention consent; and, in the case of conventions which are still open for signature, it is arguable that the consent of all those who have a right to sign must be obtained. It is preferable

1/ Ibid, pages 125-127.

2/ 29 American Journal of International Law, (Supplement), pages 901-902.

3/ Hackworth, op.cit., page 130.

/that consent

that consent should be given explicitly, but in some cases it can be assumed from silence. If, however, one of the other States possessing a right to object explicitly refuses to accept a reservation, the reservation must either be abandoned or the State making the reservation must remain outside the convention altogether. This would be so even though only one article of the convention were to be affected, for, as Sir William Malkin put it, "If.. any party is entitled, without the consent of the other signatories, to pick out of the convention any provisions to which it objects and exclude them by means of a reservation from the obligations which it accepts, it is obvious .... that the object of the convention might be largely defeated".[1] Equally, given the fact that the consideration for the acceptance of the contract by any one party is its acceptance by the others, it is also clear that such consideration would be impaired or even destroyed. The argument sometimes advanced that, as no State is obliged to sign any convention unless it wishes to do so, any State is entitled to accept as much or as little of a convention as it may think fit, and is therefore in a position to make any reservations which it considers desirable, irrespective of the views of the other actual or potential parties, is untenable. An international convention is an integral whole and must be accepted or not accepted as a whole. It cannot be accepted in part. Derogations may, exceptionally, be permitted to meet the special circumstances of particular countries, provided they receive the consent of the other interested parties, but no State can claim a right to make such reservations unilaterally, or accept those parts of a convention which suit it while excluding those parts it disagrees with or does not feel it can carry out. The Harvard research commentators endorse this view,[2] and quote a memorandum addressed to the Secretary-General of the League of Nations by the British Government for circulation to the members of the Council of the League of Nations regarding the Austrian signature with reservations of the Opium Convention of 19 February 1925:

> "If individual States are to be entitled, without consultation with other signatories, to accept an agreement as a whole while declining to adopt those of its provisions which may be unwelcome to them, there is a danger that such a practice would tend to defeat the purposes for which multilateral agreements are entered into".[3]

1/ 7 British Year Book of International Law, page 142.

2/ 29 American Journal of International Law, (Supplement), page 870.

3/ League of Nations Official Journal, 1926, pages 612-613.