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Report on Reservations to Multilateral Conventions by Mr. J.L. Brierly, Special

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Reservations to multilateral conventions

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RESERVATIONS TO MULTILATERAL CONVENTIONS

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Report by Mr. J. L. Brierly, Special Rapporteur

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Report on reservations to multilateral conventions

1. Paragraph 2 of the resolution of the General Assembly, dated 16 November 1950, reads as follows:

“Invites the International Law Commission—

“(a) In the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions, both from the point of view of codification and from that of the progressive development of international law; to give priority to this study and to report thereon, especially as regards multilateral conventions of which the Secretary-General is the depositary, this report to be considered by the General Assembly at its sixth session;

“(b) In connexion with this study, to take account of all the views expressed during the fifth session of the General Assembly and particularly in the Sixth Committee.”

2. The question referred by the General Assembly is that of reservations to *multilateral* conventions only. Bilateral treaties are not involved and, indeed, no special difficulty arises in that connexion, for unless all the provisions in a bilateral treaty are acceptable to both States there is no mutual agreement and hence no treaty. It is specifically in relation to multilateral conventions

that reservations raise special problems. These problems, it may also be remarked, occur in practice after the text of a treaty has been definitively settled in conference. A reservation made by a State represented at the conference, and during the conference, is *ipso facto* brought to the notice of all other States present who either agree to it or do not, and in the latter event the States making the reservation will be obliged either to withdraw it or to refrain from signing the convention. This report will, therefore, deal with reservations made at the time of signature, deposit of ratifications, or accession, taking particularly into account as requested in paragraph 2 (b) of the above quoted resolution, the views expressed in the Sixth Committee. These views are summarized in Annex A to this Report.

3. Before proceeding to the consideration of the subject of reservations it is desirable to point out that this Report is necessarily of a tentative character, for until the International Court has rendered its opinion on the questions referred to it by the Assembly's resolution of 16 November 1950, any study of the subject by the Commission, whether from the standpoint of codification or the progressive development of international law, can hardly be definitive.

4. Where a convention is signed by all States represented at a conference reservations made, whether at the time of signature or during the conference itself, are

* Incorporating document A/CN.4/41/Corr.1.

presumed to be accepted by the mere fact that the reserving State is allowed to sign with the rest. The main difficulty connected with reservations arises where, after the conference at which a convention is drafted is dissolved, a State (whether represented at that conference or not) attempts to become a party subject to reservations. The difficulty is the following one. The text of the convention has been established after discussion and exchange of views and is in the nature of a bargain or compromise arrived at after taking such views into account. But a reservation made after the text is established cannot, conveniently, be the subject of bargain or compromise; the conference is dissolved and the reservation must either be accepted or rejected. The difficulty is sharpened when a State not represented at the conference attempts to become a party. Formerly it was not usual to allow such States to become parties to multilateral conventions, but towards the end of the nineteenth century, the "open-accession clause" became common and under the auspices of the League of Nations and of the United Nations a clause to this effect became a *clause de style*. In 1925 the question arose of the precise legal position when a State purported to become a party to a convention in such circumstances. The Second Opium Convention which was signed in that year contained a provision that it should remain open to signature by any Member of the League of Nations until 30 September 1925. The Austrian Government, which had not been represented at the conference, signed the Convention subject to a reservation. The Government of the United Kingdom addressed a letter to the Secretary-General suggesting that reservations made in such circumstances raised a question of principle which deserved study by the Council of the League. In the result the matter was referred to the Committee of Experts for the Progressive Codification of International Law whose report was adopted in June 1927 by the Council of the League.¹

5. This report makes the distinction, already referred to above, between States represented at a multilateral conference and those not so represented. As regards the former the report observes:

"A signature is the sign affixed by negotiators at the foot of the provisions on which they have agreed. It pre-supposes that each signatory is fully in agreement with the other signatories; it establishes the assent of each of the negotiators to the final result of the negotiations and the reciprocity of these assents."

Thus, where a reservation is made during the conference by a State represented there, and it is accepted by the other participants, the fact of signature alone by those States and the reserving State establishes their common agreement and the reservation will usually be recorded in the protocol of signature.²

¹ League of Nations Document C.357 M.130 1927 V. 16 (reproduced in McNair, *The Law of Treaties* (1938), p. 107).

² Though, even if it is not so recorded, the fact of acceptance by other States means it must be implied as part of the convention. See Malkin, "Reservations to Multilateral Conventions", *British Yearbook of International Law* (1926), p. 159.

6. The report then proceeds to deal with the case of a State becoming a party to a multilateral convention drawn up at a conference in which that State did not take part (e.g., the case of Austria, which caused the report to be drawn up). Having described the historical process by which multilateral conventions came to be open to signature by States not represented at the conference the Report observes:

"When the treaty declares, as we have seen above, that it permits signature by Powers which have not taken part in its negotiation, such signature can only relate to what has been agreed upon between the contracting Powers. 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."

7. The above report was made by a body which was, in some sense, the historical predecessor of the International Law Commission, and the latter will, therefore, no doubt wish to give due weight and respect to the observations made in it. Nevertheless it must be pointed out that the passage quoted immediately above contains an ambiguity on an important point. Who are the "contracting parties" who must be consulted before a State (say State A) which has not been represented during the negotiations for a convention may become a party to the convention subject to reservation. Who are the States who must accept the reservation? The following possibilities exist:

- (a) The States represented at the conference;
- (b) The States who have signed the convention up to the date on which State A signs, ratifies, accedes or does some other act whereby it accepts the convention whether provisionally or finally;
- (c) The States who have signed, or may at any time sign;
- (d) The States who are "contracting parties" in the strict sense (i.e., are actually bound by the convention) at the time State A becomes or tries to become a party subject to reservation;
- (e) All the States who at any time are parties in the strict sense (i.e., actually bound by the convention).

It has been pointed out in the Harvard Draft on the Law of Treaties³ that the report dealt with the particular circumstances which gave rise to it and that "the question as to whether or not a signatory State which had no part in the elaboration of a treaty could effectively object and prevent a signature with reservations by a State which did participate therein was not before the Committee of Experts at all."

8. The question to be examined in the first place is whether juridical opinion or State practice gives a

³ *American Journal of International Law*, vol. 29 (1935), Supplement, p. 884.

clear guide to any rule of international law? Annex B contains extracts from a number of writers who deal specifically with reservations and it will be seen that they show a lack of unanimity. Thus, some say that a reservation made at signature must be repeated at ratification,⁴ some that it need not be,⁵ and some that reservations at ratification are not admissible at all,⁶ some that failure to object to a reservation implies consent⁷ and some that it does not.⁸ Hyde draws tacit distinction as to the latter point according to the nature of the reservation.⁹ Some denounce the use of reservations root and branch; but, although these include distinguished names¹⁰ they constitute a small minority.

9. It is concluded that the views of writers are of little assistance on the points on which they are not unanimous. Many agree generally that a reservation made before a treaty has come into force requires the consent of all the signatories. As to the position when a convention is already in force the writers do not clearly indicate whether the consent of the existing parties is enough or whether that of signatories is also required. Hyde¹¹ uses both expressions in the same paragraph and adds furthermore that practice is not uniform on the question whether in relation to such reservations tacit consent is sufficient. Another writer¹² considers that "there is no evident reason why reservations should require the consent of signatories which are no longer likely to become parties at all".

10. The second question is whether state practice gives such a clear guide that any rules of law can be said to exist in the matter of reservations. A body of practice can be cited for the rule that if a State or States signatory to a treaty object to a reservation made by another signatory or a State subsequently attempting to become a party, the latter must either withdraw the reservation or refrain from signing or ratifying. Further, according to the League of Nations practice (hitherto followed also by the United Nations) it is the duty of a depository when a State presents a ratification or similar instrument of acceptance subject to a reservation, to consult the other signatories and parties before accepting the instrument as definitely deposited. The practice of the Pan-American Union differs on these two points.¹³ According to that practice (1) the depository may accept an instrument of acceptance subject to reservation, (2) the reserving State may become a

party but will only be bound under the treaty towards those States not objecting to the reservation.

11. It would seem that this practice of the Pan-American Union is of recent growth, notwithstanding the attempts by one writer¹⁴ to argue that "ample precedents" exist for it. On the other hand, the practice followed by the League of Nations is also of comparatively recent origin for multilateral conventions themselves begin in the nineteenth century. Neither rule is intrinsically unreasonable and in one case¹⁵ the United Nations adopted, for special reasons, the Pan-American rule in the text of a convention. What the legal position is in the absence of special stipulation is the question now before the International Court of Justice, and until the Court has rendered its opinion the Commission may most usefully occupy itself with examining the possibility of drafting model clauses which would be suitable for insertion in conventions, and which would settle, in so far as those conventions are concerned, the various problems which may arise regarding reservations. A number of treaty provisions in conventions are collected in annex C. It will be seen that they vary considerably in their effect. Some (e.g., paras. 5, 7) allow only certain reservations specified in the text, and prohibit all others; these do not bear on the position of a depository or the question of States being consulted in regard to reservations, for such questions cannot arise as no reservations at that stage are permissible. Others (paras. 11 and 12) allow only such reservations as have been agreed upon at the time of signature. Others (paras. 2 and 4) record in the text acceptance of certain reservations and allow others to be made subsequently and provide a procedure regarding their acceptability. In some conventions there are more detailed provisions. On the basis of the study of these and other conventions it may be practicable to draft model clauses, such as are put forward for consideration in Annex E. In approaching this task it would appear that the Commission has to bear in mind two main principles. First there is the desirability of maintaining the integrity of international multilateral conventions. It is to be preferred that some degree of uniformity in the obligations of all parties to a multilateral instrument should be maintained. One of the ways in which international law is developed is by a consistent rule of general application being laid down in multilateral (or what amounts in practice to the same

⁴ Fauchille, cited in annex B, para. 1.

⁵ Accioly, *Traité de droit international public* (trans. 1941), vol. II, p. 453; Hoijer, *Les Traités internationaux*, vol. I, p. 147.

⁶ See the references to Nys, Anzilotti and Baldoni cited in annex B, para. 3. See also annex B, para. 14.

⁷ *Ibid.*, paras. 3, 4, 5, 6.

⁸ *Ibid.*, para. 13, at least in the case of States which have deposited their ratification.

⁹ *Ibid.*, para. 2.

¹⁰ Wehberg in Strupp, *Wörterbuch des Völkerrechts* (1925), vol. II, pp. 672-673; Judge de Visscher in *Recueil des Cours de l'Académie de droit international* (1925), I, p. 423.

¹¹ Annex B, para. 2, last citation.

¹² Jobst, annex B, para. 9.

¹³ See annex B, para. 11.

¹⁴ Sanders, *Ibid.* In reply to an inquiry by the Secretariat the Director of the Pan American Union wrote (20 February 1951): "We have had very few practical cases in our Organization in connection with reservations to multilateral treaties. The first one is mentioned on page 8 of the report submitted to the International Court of Justice. The other two are of recent date and came about as a result of a reservation made by the Senate of the United States to the Charter of the Organization of American States, and by the Government of Guatemala to the Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro in 1947. Inasmuch as both these reservations were made at the time of ratification, in accordance with Inter-American procedure, it was found necessary to consult the governments. We are now receiving the replies and on the basis thereof these two governments will decide whether or not to proceed to the deposit."

¹⁵ Annex C, para. 13.

thing a succession of closely similar bilateral) conventions. An example of this may be seen in the rule, now fairly generally accepted, and yet of intirely conventional origin, that *consuls de carrière* possess certain personal immunities, though under customary international law they originally possessed none. Frequent or numerous reservations by States to multilateral conventions of international concern hinder the development of international law by preventing the growth of a consistent rule of general application.

12. Secondly, and on the other hand, there is the desirability of the widest possible application of multilateral conventions. It may be assumed, from the very fact that they are multilateral, that the subjects with which they deal are of international concern, i.e., matters which are not only susceptible of international regulation but regarding which it is desirable to reform or amend existing law. If they are to be effective, multilateral conventions must be as widely in force or as generally accepted as possible. An example of this may be seen in the Red Cross Convention of 1949 signed by some 60 States. These are Conventions to which it is clearly desirable to have as many ratifications as possible.

13. In making recommendations with respect to reservations the task of the Commission is to reconcile these two principles. The first principle would tend, if maintained absolutely, to discourage or prohibit reservations completely. Some writers have not hesitated to argue for such a policy; but it is clearly misconceived as it merely defeats the end in view. For, if reservations were literally prohibited in any circumstances, the result would be, not to maintain uniformity of obligations, but to cause States desirous of making reservations to refrain from assuming any obligations at all. In other words the second principle stated above would be violated. On the other hand, if absolute licence is given to States to make reservations that is a case where one State is allowed to make use of its liberty of action to prejudice the interests of the international community.

14. No single rule on the subject of reservations can be satisfactory in all cases because treaties are too

diversified in character. Some reservations would make nonsense of a treaty. For example, in connexion with the Convention of 1907 for the Establishment of an International Court of Prize, Haiti, and a number of other Central and South American States, reserved¹⁶ article 15. This was the article providing for the composition of the Court, and, if the Convention had entered into force, it would have been impossible, by reason of the attitude of the above-mentioned States, to constitute the Court at all. This was a case therefore, in which a reservation was carried to such a point, and was of such a nature, that it made a mockery of the whole Convention; so that, if the Convention had ever entered into force, it would have been completely nullified.

15. Again some treaties admit of no reservations at all; by their very nature they are such that States must become parties thereto on equal and unqualified terms, e.g., the Charter of the United Nations. Other treaties are such that reservations can only be tolerated within very narrow limits. Conventions laying down detailed regulations of a technical or humanitarian character probably fall into this category, e.g., the Conventions on Safety of Life at Sea, Red Cross Conventions, etc. Even if reservations to such Conventions are not prohibited they must, in the nature of the case, be restricted.

16. For these reasons the Commission should recommed that an article be included in treaties stating the practice to be followed therein as regards reservations. Model clauses adapted to varying types of treaties are annexed hereto (Annex E). It is realized that States may not always be willing to adopt this advice, and that, therefore, it will be necessary to give some guidance as to the practice which should be followed by a depository when the text of a treaty is silent on the subject. In view, however, of the questions now pending before the International Court of Justice it is considered that it would be inappropriate to make recommendations on this point until the Court has rendered its opinion.

¹⁶ *The proceedings of the Hague Peace Conference* (Carnegie Endowment, 1920), vol. I, p. 167.

ANNEX A

Summary of debates in the Sixth Committee of the General Assembly

(1) *The position of the Secretariat*

1. At its 285th plenary meeting on 26 September 1950 the General Assembly decided to allocate to the Sixth Committee the question of reservations to multilateral conventions. This subject was discussed by the Committee at its 217th-225th meetings held between 5 and 20 October 1950. The Committee had before it a report of the Secretary-General on reservations to multilateral conventions (A/1372) in which he described the practice in this matter followed by the Secretariat as follows:

"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." (A/1372, para. 46.)

This also was the practice followed by the League of Nations. In paragraph 47 (c) of the report it is stated:

"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 depository, 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 best can be

achieved by confining the power to reject a reservation to the States most directly affected—namely, to actual parties to the convention in question.”

On the other hand it is admitted in paragraphs 47 (c) and 48 that though this rule should be the one followed where no specific provision exists on the subject of reservations, it need not be inflexibly followed in all conventions, and that provisions may be made, according to the nature of the case, adopting in particular conventions (a) the rule that only specified reservations are allowed; (b) the rule that signatories, and not only parties (i.e., those who have ratified or acceded) should be allowed to object to a reservation, (c) the Pan-American rule that a State may be a party to a convention although the consent of all States entitled to object has not been obtained.

(2) *Position of Soviet Union, Poland, Byelorussian Soviet Socialist Republic, Czechoslovakia*

2. The above is the attitude of the Secretariat. Mr. Lachs, speaking (Official Records of the General Assembly, Fifth Session, Sixth Committee, 220th meeting) as representative of Poland, traced the origin of the use of reservations to the development of the majority vote in the drafting of conventions, as opposed to the earlier use of unanimity even in the preparation of the text. Since the drafting conference no longer required the full agreement of all prospective parties before the final text could be adopted he asserted that reservations were a device which enabled the minority to continue as parties. He concluded by emphasizing the danger which could arise from the majority rule if the principle of the unanimous acceptance of reservations were added to it. The principle of the sovereignty and equality of States could not be modified by a decision taken by a majority-vote. The Czech delegate agreed in general with this view and “was convinced that abundant proof had been offered of the existence of the right to make reservations and to preserve the partnership relationship in a treaty even when the reservations had not been accepted.” (*Ibid.*, 223rd meeting, para. 23.) The representative of the Byelorussian Soviet Socialist Republic adopted the same attitude.

3. The delegate of the Soviet Union considered that the basic premise of the Secretary-General’s recommendations (that the Secretary-General was entitled to refuse to accept instruments of ratification for deposit if accompanied by reservations to which other parties to the Convention objected) “was incompatible with the principle of State sovereignty and was contrary to the fundamental principles of international law.” (*Ibid.*, 222nd meeting, para. 5). He thought that States Parties to multilateral conventions had an “inalienable right to formulate reservations at the time of the ratifications of, or accession to, these conventions.” (*Ibid.*) He stressed the point that, according to the system advocated by the Secretary-General, it would be possible for one State to prevent a State which had made a reservation from participating in the agreement, and that, according to the United Kingdom position, it would even be possible for a State to frustrate participation although it had not even signed the convention but merely taken part in preparing the original text. In his opinion “the consequence in law of a reservation made at the time of the signature or ratification of, or accession to, multilateral conventions was that the provisions of the convention in respect of which the reservation had been made would not apply between the State which had made the reservation and all the other participants in the convention”.

(3) *Position of United Kingdom and Australia*

4. Mr. Fitzmaurice, speaking (*Ibid.*, 217th and 222nd meetings) for the United Kingdom, agreed with the Secretary-General’s Report, except for one point. This point was the question of which States should have the right to raise objections to reservations made at the time of signature, ratification or accession. In the opinion of the United Kingdom delegation, not only parties but signatories to a convention should have the right to object, even though such signatories were not yet bound by the convention. He said that “if a signatory was not actually a party to a convention and therefore did not have definitive rights as such it still had certain provisional rights. It had the right to ratify the convention, and to ratify it

in the precise form in which it had signed it. It had the right, when the time came for ratification, not to find the convention completely altered by far-reaching reservations”. (*Ibid.*, 217th meeting, para. 70.) Mr. Fitzmaurice adduced in support of this point of view, two reasons: (1) there were countries which owing to their slow constitutional procedures could not ratify the convention until a considerable time after signature, (2) it was possible that, before such countries were in a position to ratify, the convention might have entered into force subject to important reservations agreed upon by those countries which by their ratification had put it into effect (and some conventions required only a few ratifications to bring them into force). In such cases, if the signatories did not have the right to object to the reservations made, it would be possible for a small group of States, acting in concert, to bring into force a convention “with important reservations agreed upon by them and to place the majority of signatories in the position of being forced to accept the reservations or not to become Parties to the convention” (*Ibid.*, para. 72). Mr. Fitzmaurice added (*Ibid.*) that this would “permit States or groups of States to re-introduce into the text of the convention clauses which had been expressly rejected in the course of the negotiations or to eliminate clauses which had been deliberately included”. Speaking of the Pan-American system Mr. Fitzmaurice observed that it contained elements which might lead to abuse. It would be possible, he said, under that system, for a State that was desirous of making important reservations to find a friendly State which would accept or at least not make express objections to—such reservations. As a consequence the State making the reservation would become a Party to the convention although it would not be in force between it and other States not accepting the reservation. In the case of important multilateral conventions, such as the Covenant of Human Rights, the result would be to bring them into disrepute. The same applied to the Convention on Genocide, the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, and indeed most United Nations Conventions. “The reason was that those conventions were not a set of mutually reciprocal rights and obligations operating between each State a Party to them, and each other State also a Party. They consisted of obligations owed by each Party to the other Parties as a whole or to the United Nations itself, and it did not make sense that there should be a convention to which two States were Parties, although the convention was not in force between them.” (*Ibid.*, 222nd meeting, para. 54.) If, for example, the Pan-American system had applied to the Charter, the Charter would have been unworkable.

(4) *Position of Uruguay, Guatemala*

5. The delegation of Uruguay filed a memorandum (A/C.6/L.117), setting forth the arguments in support of the Pan-American system. The memorandum explained that under the Pan-American system it was possible, even though a reservation had been rejected by a number of States, for the State making the reservation to be a Party to a convention, though the result was that the convention was not in force between the latter State and the former. This had the advantage that, for example, where a multilateral treaty had been concluded by 18 States and 17 of them accepted a reservation made by State A the latter was not prevented from becoming a party merely by reason of an objection by 1 State out of 18. The choice between the Secretariat’s position and that of the Pan-American Union (said the memorandum) was one of pure expediency and was not governed by rules of law. Both systems were perfectly proper and acceptable under international law. However, the Pan-American system was, in practice, the superior of the two because it facilitated the making of reservations and this had the effect of increasing the number of ratifications and of widening the use and scope of treaties; it therefore encouraged the progressive development of international law by means of multilateral conventions. The memorandum added (para. 23): “We cannot, of course, ignore the class of treaties, which by their special nature require universal and complete acceptance by all the ratifying States since a reservation by any one of them would destroy the *do ut des* relationship for all the others. But this type of treaty is very exceptional indeed. The law must be made for the ordinary case *quod plerumque fit* and not for the exception. Moreover, when treaties of this special nature are negotiated there is nothing to

prevent the insertion in the text of the clause proposed to us in the Secretary-General's report as the rule."

The same position in general was adopted by Guatemala (A/1372, annex I, section IV).

(5) *Position of Netherlands*

6. Mr. Røling, speaking for the Netherlands, said that the International Law Commission "would deal with the problem in general for the future, and would be able to draw up standard types of solutions which would answer any needs, so that future drafters of multilateral conventions would have at their disposal precisely formulated standard provisions to be chosen from according to the needs of the moment" (*ibid.*, 219th meeting, para. 22).

7. Mr. Røling took the attitude that neither the Pan-American system nor that of the Secretary-General could be adopted as a uniform rule. He said "it was not in the first place the *scope* of the convention but the *kind* of convention that decided which system was appropriate. The Pan-American system corresponded to multilateral agreements which were primarily the junction point of bilateral relations". (*Ibid.*, para. 24.) On the other hand, there were some conventions of which it could be said that a Party was only prepared to bind itself on the condition that other Parties bound themselves similarly. "That," he added, "was the crucial point: some multilateral treaties would need the Pan-American solution,

some would need another. The fact that a multilateral treaty was concluded under the auspices of the United Nations was not sufficient to conclude that it belonged to a special category, viz; to the law-creating treaties." (*Ibid.*) In conclusion, he said: "In looking back upon the many multilateral conventions entered into under the auspices of the League of Nations and the United Nations, it could not be denied that there existed the almost frivolous practice of signing draft conventions and then failing to ratify them. Since it was not the signature but the expected ratification which provided the legal basis for the right to approve or to reject reservations proposed by others, the logical conclusion was that the State which did not intend to ratify forfeited the right to oppose a reservation and thereby to exclude the ratification of the other State. Consequently a reasonable solution would be that in case a ratification with reservations was offered only those signatories might effectively object which had ratified or declared their intention to ratify in due time."

8. Mr. Røling thus adopted an intermediate position, saying that the solution must depend on the nature of the treaty. In the case of such treaties as the Genocide Convention he held the view that only those signatories should be entitled to oppose reservations: (a) which had ratified, (b) which expressed their intention to ratify within a reasonable period.

ANNEX B

Opinions of writers

1. P. Fauchille, *Traité de droit international public*, tome I (part III), p. 313 (8th edition):

"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 traité 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."

Thus Fauchille holds (1) that a reservation made at the time of signature requires the consent of all other contracting parties (by which he means probably all the other signatories), (2) such consent may be given expressly or tacitly, (3) if the other signatories refuse their consent the State desiring to make the reservation cannot sign the treaty without withdrawing the reservation.

Further, Fauchille writes (*Ibid.*, p. 314):

"Lorsqu'une réserve est présentée à la signature deux situations distinctes peuvent se produire. Ou bien l'Etat l'ayant faite n'en parle plus au moment de la ratification, et alors la ratification pure et simple doit effacer la réserve faite antérieurement, ou bien, au contraire, au moment de la ratification, l'Etat maintient sa réserve, et dans ce cas il faut en tenir compte dans les conditions précédemment indiquées."

Thus Fauchille asserts that a reservation made at the time of signature (even *semble*, if it is accepted by the other signatories) is not part of the treaty unless it is reaffirmed at the time of ratification (Fauchille is here presumably referring to treaties which are subject to ratification).

2. C. C. Hyde, *International Law* (1947), vol. II, p. 1440 (Second revised edition):

"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,¹ it is reasonable to conclude that if the latter with knowledge of the fact² proceed, without more ado, to make the instrument binding upon themselves, as by deposit of ratifications, their conduct amounts to acceptance of the reservation. Under such circumstances, and in special view of the character of its reservation, there is given to the reserving State reason to demand that affirmative steps be taken by such other parties as would reject its proposal."

Hyde is here saying that in relation to the particular type of reservation of which he speaks tacit acquiescence implies consent; the other parties must actively reject the reservation if such consent is not to be inferred. He does not say how long a period of time must elapse before such consent is inferred. In a footnote,³ however, he clarifies his thought on this point by expressing the view that acquiescence by the prospective parties is not to be deemed definitive until they have taken "the final steps which, according to the terms of the arrangement shall serve to render it binding upon them (such as, for example, the deposit of ratifications with a specified depository by a minimum number of States)".

Proceeding (and in continuation of the paragraph quoted above), Hyde states:

"This is not the case, however, where the reservation purports to enlarge rather than diminish reciprocal burdens sought to be imposed by the treaty, even though the action of the reserving State precedes such action by any of the other parties as may be necessary to cause the instrument to become binding upon themselves. Inaction on their part in relation to such a reservation would probably not be deemed to constitute acceptance of it.

¹ Note by Rapporteur: This phrase is somewhat ambiguous; in the case of a treaty open to signature all the States of the world are prospective parties.

² Note by Rapporteur: It is not clear which "fact" Hyde is referring to: presumably the reservation itself.

³ *Ibid.*, footnote 6, p. 1441.

Thus the implications in relation to acceptance of a reservation under which a prospective party announces a willingness to make binding upon itself the terms of a multipartite treaty before the perfecting of the contractual relationship as between or among any of the other parties, appear to depend upon the character of the condition which the reserving State endeavours to project."

Thus Hyde affirms that tacit acquiescence is equivalent to consent to a reservation in some cases but not in others. Fauchille (see above para. 1) does not draw this distinction, nor it would seem, do other writers.

In relation to conventions already in force Hyde is clearly of the opinion that consent to a reservation by a State attempting to sign or ratify the treaty cannot be inferred from mere silence on the part of "existing parties".⁴ He writes:

"If, however, a State be permitted, as by the headquarter government, to sign or deposit its ratifications after the treaty has become binding upon other parties, it may be greatly doubted whether the reservation, regardless of its purport, need be made the object of affirmative disapproval as a means of safeguarding the existing parties to the arrangement from the imputation of acceptance. Practice is not uniform: and it is to be anticipated that the existing or prospective parties⁵ to a treaty that is binding upon any of their number will be disposed to register a protest against permitted reservations in which they are not prepared to acquiesce." (pp.1442-1443.)

Thus, in relation to treaties already in force we find Hyde saying (1) that practice is not uniform on the question whether a reservation by an outstanding party requires express consent or whether tacit consent is enough, and (2) in this type of case there is a greater probability that other States will be sufficiently interested to be moved to an express statement of rejection or acceptance.

Hyde concludes that, in the experience of the United States, reservations made by it have been expressly either rejected or accepted and so there has not arisen "the question whether, under the circumstances of the particular case, acquiescence should be implied." (1444)

3. K. Strupp, *Eléments du droit international public* (1930), vol. I, p. 286:

"La réserve est une déclaration de volonté faite par un État qui entend se soustraire aux obligations résultant de certaines dispositions ou d'une certaine interprétation d'un traité. La réserve peut être faite au moment de la signature ou au moment de la ratification d'un traité. Elle exige l'assentiment des autres cosignataires."

Here we find Strupp saying it is the consent of the other signatories that is required. Strupp (*ibid.*, p. 287) criticises the 1927 Report of the Committee of Experts alleging that in a juridical sense a reservation is a new offer to the co-signatories of the treaty, the substance of which is that the State making it proposes a modified treaty with that State. If the reservation is made at the time of signature the States ratifying the treaty with knowledge of the reservation accept the reservation. As regards States which have already ratified, if they remain silent, they must be held to have accepted the new offer. If they all protest there is no treaty between them and the State making the reservation. Strupp observes that it is controversial whether a reservation can be made at the time of ratification. He considers that it can, citing for the contrary opinion, Nys, *Le droit international*, vol. II, p. 513; Anzilotti, *Cours de droit international* (Gidel Ed.), pp. 208, 225; Baldoni, *Rivista di diritto internazionale* (1929), p. 362.

4. C. Rousseau, *Principes généraux du droit international public* (1944), tome I, p. 290:

"La réserve c'est la déclaration faite par un État partie à un traité portant qu'il entend exclure une disposition de ce traité, en

⁴ Note that here, unlike the case where the convention is not yet in force, Hyde speaks only of "existing parties" and not "prospective parties".

⁵ Note that here Hyde adds "prospective parties" to "existing parties".

modifier la portée ou lui attribuer un sens déterminé. Plus brièvement, on peut dire que c'est une stipulation dérogatoire à la réglementation générale. C'est un mode unilatéral de limitation des effets du traité formulé par les États contractants avant son entrée en vigueur."

This definition appears to be lacking in precision. The last sentence shows that Rousseau uses the term "Contracting States" to mean States not yet actually bound. In the first sentence of the definition he speaks of a State "party" to a treaty clearly signifying a State purporting to be a party. In his discussion of the conditions of the validity of reservations (pp. 296-301) Rousseau lays down:

- (a) Conditions of form;
- (b) Conditions of substance.

As regards conditions of form, Rousseau says the reservation must be in writing and drawn up in a special diplomatic instrument, such as protocol of signature, instrument of ratification or accession according to the time at which the reservation is made.

As regards conditions of substance, he says (speaking of a reservation): "l'une des Parties ne saurait l'introduire par sa seule volonté dans le corps du traité, l'avis d'un seul ne pouvant modifier ce que le consentement de plusieurs a établi" (p. 297). This implies that a reservation requires, in order to form part of the treaty regime, the consent of all the States who took part in establishing the definitive text, i.e., all represented at the conference where it was drawn up. "en d'autres termes, la validité juridique de la réserve dépend du consentement de l'autre partie et cela par application du principe de l'act contraire." (*Ibid.*)

The assent of the other "Contracting Parties" may be express or tacit. It is tacit when they sign or ratify the document in which the reservation is set forth without objection. This is necessarily the case with a State acceding to the treaty after the reservation has been formulated.

The assent of other States is sometimes obtained (a) before the reservation is actually formulated (citing the French reservation to Brussels Act 1890), (b) at the time of ratification without objection by other Contracting Parties, (c) *a posteriori*—States becoming parties to a treaty already in force with reservations.

On the effect of reservations, Rousseau says: The reservation only concerns the legal relationship between the State making the reservation and other signatories. Thus a treaty is in force between A B C and D. It is signed or ratified by R with reservations. There are five distinct regimes: ABCD, AR, BR, CR, DR. If subsequently, another State T becomes a party, e.g., by accession or signature, then we have a further single regime ABCDRT.

A reservation is always subject to reciprocity, i.e., it can be invoked against the State making it by all other parties to the treaty.

In a brief study of the abuse of reservations, Rousseau mentions the following methods of preventing such abuses:

(1) Total prohibition of reservations (citing article 65 of the Declaration of London (1909)—which never came into force—and article 1 of the Covenant of the League of Nations.)

(2) The number of possible reservations may be limited to certain categories: article 39 of the General Act 1928; article 20 of the Hague Convention 1930 respecting the conflict of nationality laws.

(3) The League of Nations, especially in connexion with conventions of an economic character, organized consultation amongst the signatories. This took three forms:

(i) consultation with the technical body concerned, e.g., Convention of 1923 for the simplification of Customs Formalities, article 6, protocol of 3 November 1932;⁶

(ii) collective consultation of signatories (articles 6 and 17 of the Convention of 8 November 1927 for the Abolition of Restrictions on Imports and Exports);

⁶ For another example of a case where this procedure was suggested, see Hackworth, *Digest of International Law*, vol. V, p. 109.

(iii) individual and written consultation of signatories effected through the intermediary of the Secretary-General of the League of Nations. (Article 17 of Convention 14 December 1928 about Economic Statistics, article 22 of the Counterfeiting Convention 29 April 1929, article 23 of the 1937 Terrorism Convention.)

5. Malkin, in his article "Reservations to Multilateral Conventions" in the *British Year Book of International Law* (1926), vol. VII, pp. 141-162, analyses a number of cases between 1883 and 1920 in which reservations were made. He reaches the following conclusion:

"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. Where the reservation is embodied in a document (which must have formed the subject of previous discussion and agreement) signed by the representatives of the other Contracting Powers, consent is express; where the reservation had been previously announced at a sitting of the conference and was repeated at the time of signature without any objection being taken, consent is implied." (*Ibid.*, p. 159.)

He points out that it is not unusual for reservations made at the time of signature to be embodied either in the Final Act or the Protocol of Signature, and continues:

"The most difficult case arises where a convention is left open for signature after the date on which it was originally signed or where there is an accession clause. In the first case, 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* meet and can deal with reservations which have been proposed since the conference separated; but, if the view of the legal position adopted in this article be sound, it is essential that the consent of the other signatories should in some manner be obtained in such cases before a reservation can be made." (*Ibid.*, p. 160.)

It is clear from the above passage that Malkin regards a signatory as a "Contracting Power," whether it is a case of a convention signed at the conclusion of a conference or a convention left open to signature. From this, one may conclude that, according to Malkin's view, the consent that is required is that of all States who have signed at the time the State which proposes to sign makes the reservation.

Further, it will be seen, on examination, that (1) in several of the cases cited by Malkin the reservation was declared at a conference where the State concerned was represented; these are the simplest cases and, as he himself points out, the real difficulties arise when a State not so represented attempts subsequently to become a party subject to reservation, and (2) apart from the case of China at the Peace Conference of Versailles 1919 he does not cite a case where objection was raised (and maintained) to a reservation with the result that the State making it failed to sign the treaty.

6. A. McNair, *The Law of Treaties* (1938), pp. 105-106, sets out the cases in which a State may make a reservation to a treaty and, referring to reservations made at the time of signature, ratification and accession, and after stating that in each of these cases "it is essential that all other parties to the treaty should assent to the making of the reservation", continues as follows:

"Cases may occur which are difficult to reconcile with the strict principle enunciated above, namely when 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. It is believed that in such a case after the lapse of a reasonable time their assent would be inferred and the signature, ratification or accession would thereupon become effective."

Here McNair uses the expression "the parties", and it is not clear whether by this he means all the parties actually bound by the treaty at the time the reservation is made, or whether he includes all those who may thereafter become parties.

7. "Harvard Draft on the Law of Treaties", *American Journal of International Law*, vol. 29 (Supplement), p. 870, avoids the use of the term "parties" and clearly specifies that if a treaty is signed by all the signatories on the same date, a State may make a reservation when signing only with the consent of all other signatories. In the comment on this provision it is said (p. 872):

"Yet in a particular case it may be that such a State"—i.e., a signatory—"is not bound by the treaty which has been signed on its behalf, and that it has given definite indication, either expressly or by clear implication that it does not intend to take the measures necessary to its becoming bound. Theoretically such a signatory might seek to prevent another State's becoming a party to the treaty subject to a reservation although... there is no evident reason why reservations should require the consent of signatory States which have clearly indicated an intention not to become parties. Practically it may be assumed such a situation will not arise."

8. F. S. Dunn, *Practice and Procedure of International Conferences* (1929), p. 219:

"The practice has become widespread of signing and even acceding to conventions with reservations. This of course weakens the force of the original agreement, but the practice has not been discouraged because it is often better to have a State become a Party with reservations than not become a party at all. Where a reservation goes to the substance of an agreement it is now generally agreed that before becoming binding on the *other contracting parties* it must be accepted by them. Yet after the conference has disbanded it is very difficult to determine whether a particular reservation goes to the substance of the agreement or not."

He recommends the practice adopted at the Conference for the abolition of Import and Export Restrictions, held at Geneva in 1927.⁷ Article 17 of the Convention provided that approximately six months after the close of the conference the signatory parties should send representatives to a meeting at which they should determine:

(a) The reservations which having been communicated to the High Contracting Parties may, with their consent, be made at the time of ratification.

(b) The conditions required for the coming into force of the Convention and, in particular, the number, and, if necessary, the names of the Members of the League, and of non-Member States whether they are signatories or not, whose ratification or accession must first be secured.

(c) The last date on which the ratifications may be deposited and the date on which the Convention shall come into force if the conditions required under the preceding paragraph are fulfilled.

9. V. Jobst, "Reservations to Multipartite Treaties" (*American Journal of International Law*, vol. 31 (1937), pp. 318-320):

"Since a multipartite treaty is an agreement in which each party finds a compensation for the obligations contracted in the engagements entered into by others, theory would seem to demand that the State proposing to ratify or accede subject to reservations should not be permitted to do so unless the other States, which are parties to the treaty, and likewise those States which are signatories of the treaty, and therefore potential parties consent to its so doing. Articles 15 and 16 of the Draft Convention on the Law of Treaties prepared by the Harvard Research in International Law are already drawn in accordance with that theory."

"Strict adherence to the above principle in actual practice may, however, lead to undesirable consequences in some cases. A State which is only a signatory and not yet a party to a multipartite treaty, and which may indeed never take the steps necessary to make it a party, might by withholding its consent prevent another State from ratifying or acceding to the treaty subject to a reservation." (p. 319)

⁷ See annex C, para. 3.

He considers "there is no evident reason why reservations should require the consent of signatories which are no longer likely to become parties at all," but does not indicate how it is to be determined whether they are "likely to become parties."⁸

10. M. O. Hudson in *American Journal of International Law*, vol. 32 (1938), p. 335, commenting on article 23 of the Convention for the Prevention and Punishment of Terrorism (the text of which is set forth in Annex C of this memorandum), observes:

"This provision represents an innovation in setting two time limits: (1) a time limit of three years from the date of the instrument within which signatories which have not proceeded to ratification are nevertheless to be consulted as to proposed reservations; and (2) a time limit of six months within which a negative reply to any consultation may be made. Aside from this innovation, it recognizes 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 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. . . . Many difficulties may be avoided if this or some provision along similar lines should become a standard article for multipartite conventions."

11. W. Sanders, in his article "Reservations to multilateral treaties made in the act of ratification or adherence", *American Journal of International Law*, vol. 33 (1939), p. 488, discusses the difference between League of Nations practice and that of the Pan-American Union with regard to the effect of a reservation when one or more signatory States or parties object. According to the view of the Committee of Experts 1927 the non-acceptance of the reservation by a single signatory or party excludes the State formulating the reservation from any participation in the treaty. According to the view held by the Pan-American Union a State may become a party to a treaty in spite of the refusal of one or more States to accept a reservation formulated by the former.

The difference between the two views in practice is (1) under the League of Nations rule the depositary will refuse to accept a ratification unless all other States interested have accepted it whereas under the Pan-American rule the depositary will accept it, (2) under the League of Nations rule the reserving State cannot be a party to the treaty if one or more States object to the reservation. Sanders observes:

"The precedents cited to show that instruments of ratification containing new reservations have not been accepted for deposit prior to the approval of the reservations by the other parties appear to be inconclusive on that point. It cannot be denied that there are many precedents in support of that view but the universality claimed for the practice is debatable." (p. 494)

Later, he says: "There is ample precedent in support of the proposition that a depositary may accept for deposit a ratification of a multilateral treaty containing reservations not previously communicated or assented to by the other signatories or parties to the treaty" (p. 497). He cites, in support of this statement, a communication by Sir Edward Grey to the American Chargé d'Affaires in 1913 to the effect that "due note" had been taken of the "fact of deposit" of a ratification by the United States with a reservation, and the Belgian action in 1937 in accepting without more ado the deposit of ratification with a reservation.⁹ With reference to

⁸ See the case of Costa Rica and the Protocol of Accession by the United States to the Statute of the Permanent Court, *Harvard Draft*, p. 910.

⁹ Upon reference to the U.S. Treaty Information Bulletins cited by Sanders it is not clear that the Belgian Government proceeded in the manner alleged by him. The Convention concerned was the subject of a Senate resolution of 6 May 1937 attaching an "understanding" to the ratification of the United States. Ratification took place on 26 May 1937. The Belgian Foreign Office notified the American Ambassador in Brussels that 29 June 1937 was "the recorded date of the deposit of the instrument of ratification by the United States". A somewhat

Pan-American practice, he says: "The object, therefore, is to give the ratifying or adhering State an opportunity to determine, before consummating the ratification through deposit, the objections which the other states may have to its reservations. It is then in a position to decide, on the basis of the observations made by the other States, whether it will be more to its advantage to ratify or adhere with the reservations, without the reservations, or to abandon its effort to participate in the treaty" (pp. 498-499). Towards the end of his article, however, the author refers to the Pan-American method as a "change in procedure" a "change in method" and a "new procedure" which admits inferentially that the League of Nations rule is the traditional one.

12. Hudson, Introduction to *International Legislation*, vol. I, p. XLIX:

"A reservation made in the course of negotiations ought to be repeated or referred to at the time of signature, or at the time of ratification. A reservation made at the time of signature may generally be taken to be agreed to by any other State whose representatives sign at the same time or subsequently, or which ratifies subsequently, but it would seem desirable that their agreement be clearly set forth in a protocol of signature, or otherwise; perhaps the reservation need not be, though it usually is, repeated at the time of ratification. If it has not been agreed to, it would seem necessary that all other signatory States have an opportunity to object to it. Any fresh reservation made at the time of ratification, either in the instrument 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. . . ."

An authority designated as the depositary of ratifications would not be justified in allowing a definitive deposit of a ratification which is subject to reservation unless the consent of other signatory States were obtained, though the consent may in some cases be inferred from failure to object after adequate opportunity. 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; such consent expresses an agreement to the reservation.

13. Hackworth, *Digest of International Law*, vol. V (1943), p. 130:

"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. As to signatories whose ratifications had been deposited prior to the receipt by them of notice of the deposit of a ratification with reservations, acceptance by such States of the reservations by some positive act would seem to be necessary in order to give the treaty binding force as between the parties who had already deposited their ratifications and the party subsequently ratifying with reservations. There is authority for the proposition that failure to object to a reservation should be regarded as acceptance thereof. The better view, however, would appear to be that the mere failure to object to a reservation, in the absence of some act by the party which has already deposited its ratification indicating that it regards the treaty as operative between it and the party making the reservation, does not constitute acceptance of the reservation. As to signatories whose ratifications are deposited subsequent to the receipt by them of notice of the deposit of a ratification with reservations, acceptance of the reservations would seem to be implied from failure to object.

"Whether a multilateral treaty may be regarded as in force as between a country making a reservation and countries accepting such reservation, but not in force as regards countries not

different version of this incident from that given by Sanders appears in Hackworth, *Digest of International Law*, vol. V, p. 138, who says that the Belgian Government "apparently" did not regard the "understanding" as a reservation at all. However that may be, Sanders perhaps overstates his case in describing these two examples as "ample precedent".

accepting the reservation, depends upon whether the treaty as signed is susceptible of application to the smaller group of signatories. Some treaties are susceptible of such application while others are not. For example, the inter-American convention on the status of aliens (4 Treaties, etc. [Trenwith, 1938] 4722) did not require ratification by all the signatories or any specified number of them in order to bring it into operation. On the other hand, when a treaty requires ratification by all or a specified number of the signatories, a reservation by one of the signatories or of such specified number, as the case may be, would prevent it from becoming operative unless such reservation is accepted by a sufficient number of the ratifying countries to fulfil the requirement of the treaty."

14. Pomme de Mirimonde, *Les traités imparfaits* (1920). This is a study of the practice of reservations in connexion with the most important conventions concluded between 1885 and 1920. It is mainly an analysis of the effect of the reservations on the treaties in question and of French and American practice in the matter. The author states (p. 105) that reservations at the time of ratification were only made by the French twice over a period of 50 years, and, even in these two instances, the circumstances were such as to render the reservation harmless. "*En un mot la pratique française n'admet pas les réserves faites au moment de la ratification*" (p. 106). His objection to such reservations is that they amount to an imposition on the other Contracting Parties. A State intending to make a reservation should do so as quickly as possible so that its "partial" ratification may precede that of the other parties, and the latter may take cognizance of it in considering whether to ratify or not. He admits, however, that no machinery has yet been devised for achieving this (pp. 125-126).

15. Podesta Costa, "Réserves dans les traités" *Revue de droit international* (Lapradelle), 1938, vol. XXI (pp. 1-52) adds little to what is said by other writers. The following passage (pp. 16-17) is of some interest:

"... toute réserve a pour objet de modifier d'une façon ou d'une autre le sens ou la portée juridique du traité; en un mot, elle a le caractère d'une nouvelle clause contractuelle. L'une des parties ne saurait l'introduire par sa seule volonté. Sans le consentement de l'autre partie, la réserve ne serait qu'une manifestation unilatérale de volonté et, comme telle, ne créerait pas d'obligations pour l'autre partie. La réserve n'est pas un simple acte de souveraineté, une décision prise par le pouvoir public d'un Etat en vue d'exigences déterminées ou d'intérêts particuliers, décision qui se heurterait à l'autre pouvoir également souverain qu'est la partie adverse. La réserve est un épisode tardif d'une négociation qui semblait terminée, mais elle n'en demeure pas moins un acte contractuel. Tout négociateur a le droit de présenter une réserve, comme il a le droit de proposer successivement à l'autre partie des stipulations et des formules différentes; mais ce droit n'est pas absolu: il est limité par l'autre droit égal que possède l'autre partie, d'accepter ou de rejeter la proposition et même de formuler à son tour des contre-propositions, si elle le juge opportun.

"La présentation d'une réserve doit être interprétée comme une nouvelle offre adressée à l'autre partie. Si celle-ci l'accepte, l'accord est parfait, et une nouvelle clause vient s'incorporer dans le traité; si elle ne l'accepte pas, l'accord de volontés n'est pas réalisé et le traité n'est pas conclu, à moins que la partie auteur de l'offre ne renonce à la réserve et ne consente à devenir partie au traité sans qu'elle y figure. En résumé, la validité juridique de la réserve dépend du consentement de l'autre partie.

" Cette règle, indiscutable en ce qui concerne les traités bipartites, s'impose avec plus de force encore par rapport aux traités multipartites. Tout traité constitue un ensemble équilibré de droits et d'obligations, une unité juridique à laquelle on est parvenu moyennant des concessions réciproques: l'une des parties cède sur un point de ses prétentions en échange d'une compensation équitable de l'autre partie. A mesure que le nombre des contractants augmente, la nécessité de faire des concessions réciproques tend à croître, pour que l'harmonie soit établie entre tous les intérêts en présence. C'est pourquoi le traité multipartite est souvent loin de satisfaire les desiderata de chacune des parties, prise isolément. Il est à supposer que les signataires ne désirent pas rompre par un acte

unilatéral l'harmonie qu'ils ont constituée. En outre, en introduisant des réserves lors de son adhésion à un traité, un Etat se place dans une position privilégiée et, tandis que les Etats originaires ont cédé dans leurs prétentions jusqu'au maximum possible, afin de trouver le niveau commun à tous, lui ne cède rien: bien au contraire après avoir froidement pesé le pour et le contre des stipulations conclues, il choisit celles qui lui conviennent et rejette tout ce qu'il considère comme onéreux et contraire à ses intérêts. Si cette position était acquise sans l'assentiment des autres parties, la situation de celles-ci deviendrait intenable. "

16. Margaret Owen, "Reservations to Multilateral Treaties", *Yale Law Journal*, vol. 38 (1929), p. 1086.

In spite of the title the first part of this article in fact deals with bilateral treaties. In relation to multilateral treaties she says (p. 1105):

"At this point it may be permissible to hazard the proposition that, as things stand at present, reservations may be made by both signatories of and parties acceding to a treaty up to and including the time of ratification. Such reservations become ineffective only upon a positive expression of dissent from an earlier party to the treaty."

Elsewhere (p. 1113) she says:

"Where ratification on the part of one or more of the signatories has already taken place at the time the reservation is formulated the consent of the signatories should be sought afresh. The custom, however, which permits one to imply the consent of such signatories from a mere failure on their part to protest has probably established a rule, and it might reflect the present practice more accurately, if one were to say that the reservations are effective in the absence of express dissent on the part of any signatory. But however tacit the consent, consent there must be. And hence it follows that there must be communication also of the proposed reservations. It seems to be here rather than in the thorny field of their content that a distinction may be made between a reservation and an interpretative declaration such as is made in the report from the Senate Committee on Foreign Relations on the Multilateral Treaty for the Renunciation of War. This distinction denies international validity to the interpretative declaration."

With regard to accession she states the consent of all the other signatories is acquired to a reservation made by the acceding State. The article (which was the fruit of work done in a Seminar at Columbia Law School) contains a number of items of useful information. Thus she says that the London Sugar Convention of 1882 was the "earliest case at least of modern times where reservations were introduced into a multilateral convention". This was signed by five Powers, each subject to the proviso that all the other Powers would ratify it without reservations. Hence it never came into force. She says that between the London Sugar Convention of 1882 and the Brussels Convention upon Maritime Collisions and Salvage of 1910 there were at least 22 multilateral conventions to which reservations were attached at signature. Since 1910, she records, it has become more common to attach them at ratification, and she found only five cases between 1920 and 1929 where reservations were made at signature. The earliest example of a reservation at ratification is that of France to the Anti-Slavery Convention of Brussels of 1890.

She repudiates the suggestion that a reservation made at signature must be repeated at ratification.

17. *Journal of the USSR Academy of Sciences*, No. 4, Moscow, 1948 (pp. 285-286). The following is an extract (translated from the Russian) from the record of a public oral examination of a candidate for membership of the Soviet Academy of Sciences, who presented a thesis on the ratification of international agreements. Professor Keilin was one of the examiners, Mr. Polenz was the candidate. The extract contains criticisms of the thesis expressed by Professor Keilin.

"The possibility, Professor A. D. Keilin goes on, that an agreement may be ratified subject to certain reservations, shows, according to the author of the thesis, that 'an international agree-

ment that is subject to ratification is not regarded before its ratification as an agreement that has been concluded.' Nevertheless, on the next page, the author of the thesis himself rejects this viewpoint by pointing out quite correctly that 'reservations that are made during ratification cannot be of a unilateral nature: they must be agreed to by all the States that are parties to that international agreement.' It must be regarded that the view prevailing in International Law found its expression in the resolution adopted by the Assembly of the League of Nations on 25 September 1931, which is cited by the author, and according to which 'a reservation can only be made at the moment of ratification if all the other signatory States agree or if such a reservation has been provided for in the text of the Convention.'

...

"Com. O. E. Polens states that 'An Agreement is regarded as having been concluded only from the moment it is ratified.' Under such a definition the question of its implementation or its entry into force is confused with the question of the conclusion of an agreement, which has a meaning of its own. The author is also incorrect in his assertion that, because of the possibility of future reservations, an international agreement is not regarded as having been concluded until it is ratified, just as he is incorrect in his assertion that a signed agreement is merely a draft agreement."

ANNEX C

Examples of clauses in conventions regarding reservations

1. *Copyright Convention of 1908*,¹ article 27:

"La présente Convention remplacera, dans les rapports entre les États contractants, la Convention de Berne du 9 septembre 1886. . . Les États signataires de la présente Convention pourront, lors de l'échange des ratifications déclarer qu'ils entendent, sur tel ou tel point, rester encore liés par les dispositions des Conventions auxquelles ils ont souscrit antérieurement."

2. *Protocol to the Convention on the Simplification of Customs Formalities*² (1923), paragraph 6:

"In view of the special circumstances in which they are placed the Governments of Spain, Finland, Poland and Portugal have stated that they reserve the right of excepting Article 10 at the time of ratification and that they will not be bound to apply the said Article until after a period of five years from this day.

"A similar declaration has been made by the Governments of Spain, Greece, and Portugal in respect of paragraph 8 of Article 11 of the Convention and by the Governments of Spain and Portugal in respect of paragraph 3 of the same Article. The Government of Poland has made a similar declaration in respect of the application of the whole of the same article.

...

"Any exceptions which may subsequently be formulated by other Governments, at the time of their ratification or accession, with reference to Article 10, Article 11 or any particular provisions of those Articles, shall be accepted, for the period referred to in the first paragraph above, and subject to the conditions laid down in the third paragraph, if the Council of the League of Nations so decides after consulting the technical body mentioned in Article 22 of the Convention."

3. *Convention on Import and Export Restrictions*³ (1927), article 17:

"The present Convention shall come into force under the conditions and on the date to be determined at the meeting provided for hereinafter.

"Between June 15 and July 15, 1928, the Secretary-General of the League of Nations shall invite the duly accredited representatives of the Members of the League of Nations and of non-Member States on whose behalf the Convention shall have been signed on or before June 15, 1928, to attend a meeting to determine:

"(a) The reservations which, having been communicated to the High Contracting Parties, in accordance with Article 6,

paragraph 4, may, with their consent, be made at the time of ratification;

"(b) The conditions required for the coming into force of the Convention and, in particular, the names of Members of the League and of non-Member States, whether they are signatories or not, whose ratification or accession must first be secured;

"(c) The last date on which the ratifications may be deposited and the date on which the Convention shall come into force if the conditions required under the preceding paragraph are fulfilled.

"If, on the expiration of this period, the ratifications upon which the coming into force of the Convention will be conditional have not been secured, the Secretary-General of the League of Nations shall consult the Members of the League of Nations and non-Member States on whose behalf the Convention has been ratified and ascertain whether they desire nevertheless to bring it into force."

4. *Convention on Economic Statistics*⁴ (1928), article 17:

"The High Contracting Parties agree to accept the reservations to the application of the present Convention which are set forth in the Protocol to this Convention and in respect of the Countries therein named.

"The Governments of countries which are ready to accede to the Convention under Article 13, but desire to be allowed to make any reservations with regard to the application of the Convention, may inform the Secretary-General of the League of Nations to this effect, who shall forthwith communicate such reservation to the Governments of all countries on whose behalf ratifications or accessions have been deposited and enquire whether they have any objection thereto. If within six months of the date of the communication of the Secretary-General no objections have been received, the reservation shall be deemed to have been accepted."

Article 22, of the Convention on the Suppression of Counterfeiting⁵ (1929) is almost verbally the same with the omission of the first paragraph and the variation at the end, as follows: "The participation in the Convention of the country making the reservation shall be deemed to have been accepted by the other High Contracting Parties subject to the reservation."

5. The Protocol⁶ signed at Paris on 9 December 1948 amending the above Convention on Economic Statistics contains in article IV the following provision:

"States may become Parties to the present Protocol by:

"(a) Signature without reservation as to acceptance;

¹ Martens, *Nouveau Recueil Général* (Third Series), vol. IV, p. 590.

² Hudson, *International Legislation*, vol. II, p. 1120.

³ *Ibid.*, vol. III, p. 2160.

⁴ *Ibid.*, vol. IV, p. 2575.

⁵ *Ibid.*, vol. IV, p. 2692.

⁶ *United Nations Treaties Series*, vol. 20, p. 232.

"(b) Signature with reservation as to acceptance, followed by acceptance;

"(c) Acceptance.

"Acceptance shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations."

6. *General Act for the Pacific Settlement of Disputes*⁷ (1928), article 39:

"1. 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. These reservations may be such as to exclude from the procedure described in the present Act:

(Sets forth categories of reservations.)

"3. If one of the parties to a dispute has made a reservation, the other parties may enforce the same reservation in regard to that party."

Article 40: "A Party whose accession has been only partial, or was made subject to reservations, may at any moment, by means of a simple declaration, either extend the scope of his accession or abandon all or part of his reservations."

The Revised General Act adopted by the General Assembly on 28 April 1949 contains identical provisions.⁸

7. *Convention providing a Uniform Law for Bills of Exchange*⁹ (1930), article 1:

"The High Contracting Parties undertake to introduce in their respective territories, either in one of the original texts or in their own languages, the Uniform Law forming Annex 1 of the present Convention.

"This undertaking shall, if necessary, be subject to such reservations as each High Contracting Party shall notify at the time of its ratification or accession. These reservations shall be chosen from among those mentioned in Annex II of the present Convention.

"The reservations referred to in Articles 8, 12 and 18 of the said Annex II may, however, be made after ratification or accession, provided that they are notified to the Secretary-General of the League of Nations, who shall forthwith communicate the text thereof to the Members of the League of Nations and to the non-Member States on whose behalf the present Convention has been ratified or acceded to. Such reservations shall not take effect until the ninetieth day following the receipt by the Secretary-General of the above-mentioned notification.

"Each of the High Contracting Parties may, in urgent cases, make use of the reservations contained in Articles 7 and 22 of the said Annex II even after ratification or accession. In such cases they must immediately notify direct all other High Contracting Parties and the Secretary-General of the League of Nations. The notification of these reservations shall take effect two days following its receipt by the High Contracting Parties."

A similar provision appears in the Convention providing a Uniform Law for Checks (1931).¹⁰

8. *Sanitary Convention for Aerial Navigation*¹¹ (1933), article 67:

"The signature of the present convention shall not be accompanied by any reservation which has not previously been approved by the High Contracting Parties who are already signa-

tories. Moreover, ratifications or accessions cannot be accepted if they are accompanied by reservations which have not previously been approved by all the countries participating in the Convention."

9. *Convention for the Prevention and Punishment of Terrorism*¹² (1937), article 23:

"1. Any Member of the League of Nations or non-member State which is prepared to ratify the Convention under the second paragraph of Article 21, or to accede to the Convention under Article 22, but desires to be allowed to make reservations with regard to the application of the Convention, may so inform the Secretary-General of the League of Nations, who shall forthwith communicate such reservations to all the Members of the League and non-member States on whose behalf ratifications or accessions have been deposited and enquire whether they have any objection thereto. Should the reservation be formulated within three years from the entry into force of the Convention, the same enquiry 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."

10. *Convention concerning Exemption from Taxation for Liquid Fuel and Lubricants used in Air Traffic*¹³ (1939), article 9:

"(1) The reservations to the application of the present Convention set forth in the Annex thereto are accepted in regard to the territories named therein.

"(2) Any Government which is prepared to ratify the Convention or to accede to the Convention or to apply the Convention to any territory under paragraph (2) of Article 11 but desires to be allowed to make a reservation with regard to the application of the Convention not specified in the Annex may so inform the Government of the United Kingdom, who shall forthwith communicate such reservation to the Governments of all countries on whose behalf an instrument of ratification or notification of accession has been deposited and enquire whether they have any objection thereto. Should the reservation be formulated within three years from the entry into force of the Convention, the same enquiry shall be addressed to Governments of countries on whose behalf the Convention has been signed but not yet ratified and to the Governments of countries whose ratifications or accessions are not yet effective because made subject to conditions not yet fulfilled or reservations not yet accepted. If, within six months from the date of the communication of the Government of the United Kingdom, no objection to the reservation has been made, it shall be treated as accepted.

"(3) In the event of any objection being received, the Government of the United Kingdom shall inform the Government which desired to make the reservation and request it to state whether it is prepared to ratify or accede without the reservation or whether it prefers to abstain from ratification or accession.

"(4) Any reservations accepted under paragraph (1) or paragraph (2) of this Article may be withdrawn by the High Contracting Party in whose favour they were accepted by notice of withdrawal addressed to the Government of the United Kingdom. Any notice of withdrawal shall be communicated by the Government of the United Kingdom to the Governments of all countries on whose behalf the Convention has been signed and accessions thereto deposited."

⁷ Hudson, *International Legislation*, vol. IV, p. 2529.

⁸ *Signatures, Ratifications, Acceptances, Accessions, etc. concerning Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depository* (United Nations, Lake Success, 1949), p. 23.

⁹ Hudson, *International Legislation*, vol. V, p. 516.

¹⁰ *Ibid.*, vol. V, p. 889.

¹¹ *Ibid.*, vol. VI, p. 292.

¹² *Ibid.*, vol. VII, p. 862.

¹³ *Ibid.*, vol. VIII, p. 269.

11. *European Broadcasting Convention*¹⁴ (1948)

This Convention which was "adopted" at Copenhagen in 1948, signed, and made subject to ratification, was rather unusual in that, although reservations were permitted at the time of signature, nothing was said in the text of the Convention¹⁵ about reservations at the time of ratification. The Final Protocol formally "takes note" of a reservation by Portugal, and a large number of statements having the character of reservations were made at the conference by signatory governments; these also are recorded. As regards non-signatories article 4 of the Convention provides as follows:

"1. The Government of a country of the European Broadcasting Area which is a Member of the International Telecommunication Union, and not a signatory of this Convention, may accede to it at any time. Such accession shall be notified to the Government of Denmark, shall extend to the Plan¹⁶ and shall be without reservations.

"2. The instruments of accession shall be deposited in the archives of the Government of Denmark. The latter shall inform each signatory and each acceding government and the Secretary-General of the Union.

"3. The accession shall take effect on the day of deposit unless the act of accession contains any stipulation to the contrary."

12. *International High Frequency Broadcasting Agreement*¹⁷ (1949)

This Agreement was signed at Mexico City on 10 April 1949. It contains no provisions regarding ratification¹⁸ or accession but article 3 provides as follows:

"(a) This Agreement shall be subject to approval by the governments of the signatory countries; this approval shall contain no reservation which has not been annexed to the Agreement by the time of its signature.

"(b) This Agreement shall be open to acceptance by or on behalf of any country or group of territories listed in Annex I of the International Telecommunication Convention of Atlantic City, and by any country which acceded to the Convention in

¹⁴ Text published at Berne in 1948 by the General Secretariat of the International Telecommunication Union; also in *Treaty Series No. 30* (1950), Cmd. 7946. London.

¹⁵ Article 3 (2) states: "Ratification of the Convention shall include approval of the Plan." Possibly it was to be inferred from this that reservations after signature were not to be allowed.

¹⁶ Being the detailed technical regulations annexed to the Convention.

¹⁷ A mimeographed text of this Agreement has been produced by the Secretariat of the International Telecommunication Union at Geneva, October 1949.

¹⁸ The preamble states that the parties have "adopted" it "subject to approval" by their governments.

accordance with the procedure for such accession.¹⁹ This acceptance, which makes this country a Party to this Agreement, shall contain no reservation.

"(c) The instrument of approval or acceptance shall be addressed to the Secretary-General, who will immediately so inform the countries listed in Annex I of the Atlantic City Convention and those which have acceded to the Convention.

"The approval and acceptance shall take effect as of the day of receipt of such notification by the Secretary-General."

13. *United Nations Convention on the Declaration of Death of Missing Persons*²⁰ (signed 6 April 1950), article 19 :

"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."

The Convention was not signed but was made open to accession in the following terms (article 13):

"1. The present Convention shall be open for accession on behalf of Members of the United Nations, non-member States which are Parties to the Statute of the International Court of Justice, and also any other non-member State to which an invitation has been addressed by the Economic and Social Council passing upon the request of the State concerned.

"2. Accession shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations.

"3. The word 'state' as used in the present Convention shall be understood to include the territories for which each Contracting State bears international responsibility, unless the State concerned, on acceding to the Convention, has stipulated that the Convention shall not apply to certain of its territories. Any State making such a stipulation may, at any time thereafter, by notification to the Secretary-General, extend the application of the Convention to any or all of such territories."

¹⁹ No such procedure is prescribed in the text of the Agreement.

²⁰ United Nations Treaty Series, V. 199, p. 99. This is an example of the practice of the Pan-American Union being followed by the United Nations. See the Secretary-General's memorandum (A/1372), p. 21 where it is referred to as a special case. The nature of the Convention was such that it could be regarded as the basis of a series of bilateral undertakings.

ANNEX D *

Practice with regard to reservations

1. There is some practice to support the view that if a State or States signatory to a treaty object to a reservation made by a signatory or by a State purporting to become a party [in some other way] (by ratification or accession) the latter should either withdraw the reservation or refrain from signing or ratifying the treaty.

Examples:

(a) British accession to the International Sanitary Convention 1893¹

(b) British reservation to the Convention for the Adaptation of the Principle of Maritime Warfare 1899²

(c) Ottoman reservation at the International Sanitary Conference 1903³

(d) Nicaraguan accession to the Hague Convention II 1907⁴

(e) German reservation at the White Slave Traffic Conference 1910⁵

* See also the Report of the Secretary-General (A/1372) containing material it is not thought necessary to reproduce here.

¹ *Harvard Draft on the Law of Treaties, American Journal of International Law*, vol. 29 (Supplement), p. 907.

² *Ibid.*, p. 881.

³ *Ibid.*, p. 876.

⁴ *Ibid.*, p. 908.

⁵ *Ibid.*, p. 875.

- (f) Chinese reservation at the Peace Conference 1919⁶
 (g) American reservations to the Convention of St. Germain 1919⁷
 (h) British accession to the Agreement regarding Industrial Property 1920⁸
 (i) Austrian reservation to the Opium Convention 1925⁹
 (j) Hungarian accession to the Slavery Convention 1925¹⁰
 (k) Cuban reservations in 1931 to the signature of the Protocol on the Revision of the Statute of the Permanent Court of International Justice¹¹

The practice of the Pan-American Union¹² runs counter to these precedents. In the case of the Havana Convention on Consular Agents 1928 the Dominican Republic presented a ratification with reservations which was accepted by the Pan-American Union for deposit without question and without consulting other parties to the Convention. The United States government protested, saying that it did not regard the Convention as being in force between it and the Dominican Republic.¹³

2. Miller, *Reservations to Treaties* (1919), p. 119, writing with reference to the Sanitary Convention of 1903 mentions certain reservations made by the United States at the time of signature of the Convention and reproduces a note by the French Chargé d'Affaires at Washington, transmitting to the United States Secretary of State a draft of protocol "which was substantially that adopted at the time of the deposit of ratifications." In the note the Chargé d'Affaires writes:

"In the month of June last you advised this Embassy that the Government of the United States, concurring in the views of the Government of the Republic touching the ratification of the Sanitary Convention of Paris (1903), had decided not to submit again that international act to the advice and consent of the Senate and to ratify the said Convention and would confine itself to a request that the reservation in which the American Health authorities are interested be inserted in the proces-verbal of deposit of the ratifications.

"As you are aware an insertion of this nature can only be allowed if the signatories to the said proces-verbal agree to it."

In connexion with the same Convention he writes (p. 124):

"A comparison of the proces-verbal of signature with that of the deposit of ratifications, discloses the very interesting fact that the declaration of Great Britain at signature regarding the denunciation or modification of the Convention, was adopted by all the Powers upon deposit of the ratifications and thus made general in character.

"This is an illustration of a very important principle, namely that a reservation made by one Power at signature may be adopted by and for others upon ratification; in other words no Power need contract with any other on a basis different from that, as limited by a declaration, which the deposit of its instrument of ratification will accept as to the declaring Power. This principle must be borne in mind particularly in connection with the Hague Conventions where numerous reservations were made at signature."

Elsewhere he states:

"Any Power depositing an act of ratification or adhesion after having received notice of a reservation contained in an act of ratification, previously deposited would thereby expressly assent thereto." (*Ibid.*, p. 142)

⁶ *Harvard Draft on the Law of Treaties, American Journal of International Law*, vol. 29 (Supplement), p. 875.

⁷ *Ibid.*, p. 899.

⁸ *Ibid.*, p. 908.

⁹ *Ibid.*, p. 883.

¹⁰ *Ibid.*, p. 911.

¹¹ *Ibid.*, p. 904.

¹² This is described in detail in the written statement filed by the Union with the International Court of Justice in the request for an advisory opinion on reservations to the Genocide Convention.

¹³ "Harvard Draft on the Law of Treaties", *Op. cit.*, p. 900.

His final conclusions are as follows:

"It is believed that there have been examined all treaties of the United States to which have been made reservations of any character, and that no case can be found in the precedents where any such declaration regarding a treaty which has gone into force, has not been expressly accepted by the other Party or Parties to the treaty.

"The conclusion reached on the subject is that reservations to a treaty, of whatever nature, require the assent of the other signatory Power or Powers, and that in the absence of such assent the treaty is not in force as between the declarant and Powers which have not so assented; for the reservation made by the declarant is a part of the agreement of that Power and acceptance of the whole agreement by the other Party or Parties thereto is essential. Assent to a reservation must be made by the treaty-making branch of a Government, and is expressly recorded, either in the instrument of ratification or in the proces-verbal or other record of the exchange or the deposit of ratifications." (*Ibid.*, pp. 160-161.)

3. A considerable body of evidence of practice is collected in Hackworth, *Digest of International Law*, vol. V (1943), pp. 101-153, some of it not consistent with the views expressed by some writers. A point not generally dealt with by the latter is: what is a reservation? A definition is given in the Harvard Research Draft (article 13) — "a formal declaration by which a State when signing, ratifying or acceding to a treaty specifies as a condition of its willingness to become a party to the treaty certain terms which will limit the effect of the treaty in so far as it may apply in the relations of that State with the other State or States which may be parties to the treaty." In this connexion an incident is cited by Hackworth¹⁴ which may serve as an illustration. A convention of 23 December 1936 was signed by Argentina, Columbia, Paraguay and El Salvador with reservations and also by the United States. The Senate gave its advice and consent to the ratification of the Convention with a declaration to be made a part of the ratification that

"The United States of America holds that the reservations to this Convention do not constitute an amendment to the text but that such reservations, interpretations, and definitions by separate governments are solely for the benefit of such respective governments and are not intended to be controlling upon the United States of America."

4. The exact meaning of this statement is not clear but it is sufficiently clear to indicate that a statement by one Government as to how it interprets particular provisions of the Convention or its legal implications is not necessarily a reservation. Thus the American reservations to the Narcotics Convention 1931 included a declaration that signature by the United States did not amount to recognition of any co-signing or acceding government or involve any obligation on the part of the United States to a country represented by an unrecognized government. The Government of El Salvador (then unrecognized by the United States) gratified the convention subject to certain "reservations", one of which expressed disagreement with this American reservation. The Secretariat of the League of Nations appears to have regarded these observations as protests which did not amount to reservations and to have regarded the Salvadorean ratification as effective without acceptance of the "observations," by the other parties.¹⁵

5. From this instance it would appear that the depositary (in this case the Secretariat) took it upon himself (or itself) to decide whether a statement was a reservation or not.¹⁶ Strictly speaking this would seem to be a function of interpretation appropriate only to the signatories of the convention. The various "understandings," recorded by signatories of the Pact of Paris 1928 were also not deemed to amount to "reservations".¹⁷

6. According to the view expressed by the United States to the French Foreign Office in connexion with the signature of the Air Navigation Convention 1919 reservations should be made at the

¹⁴ Hackworth, *Digest of International Law*, vol. V, p. 103.

¹⁵ Hackworth, *Digest of International Law*, vol. V, p. 106.

¹⁶ See for another "apparent" example of such action (on this occasion by the Belgian Government), *ibid.*, p. 138.

¹⁷ *Ibid.*, p. 144; other examples, pp. 144-150.

time of signature of a convention, not (as maintained by the French) at the time of ratification. The reason given by the United States for this view was that it was "in order that all the parties to the treaty may previous to, and in considering, ratification understand to what extent each signatory is bound by the terms of the treaty." "This" (added the United States) "has been the practice followed in signing preceding conventions where the United States and numerous other countries stated their reservations at the time of signature." The statement continued: "To defer the statement of reservations until the deposit of ratifications would be to keep other Governments in ignorance of the reservations and might actually result in refusal to accept ratification."¹⁸ The position adopted by each of the two governments was, however, not typical of their usual attitude.

7. The United States seems to have come close to adopting the view that tacit acceptance of a reservation by ratifying a treaty with knowledge of it, is not enough. Copies of reservations made by the United States were communicated by the French Government (the depositary Government) to all the signatories of the Air Navigation Convention 1919. As stated above the French Government objected to these reservations being made at signature. The following observations occur in a memorandum written in the Department of State at the time:

"Now there being no mention of reservations in the Treaty or following our Plenipotentiary's signature to the treaty, or in any formal paper signed by all the Plenipotentiaries, the mere ratification of the Treaty by any government would not be an acceptance of the reservations by that government; and as the Treaty doubtless provides for deposit of ratifications with the French Government and, as our ratification would be subject to the reservations we made, and will include the reservations, it is essential to the French Government, in order that it may accept our ratification, to know whether the deposit of the ratification with the reservations included will be acceptable to the signatory governments. For this reason I think it would be proper for the French Government to inquire of the other signatory governments whether the reservations made to the treaty were acceptable to them or in other words whether they authorized the French Government to accept the United States' ratification with the reservations included."¹⁹

8. Some examples are collected by Hudson²⁰ of the practice followed by depositaries in the matter of reservations. The Convention for limiting the Manufacture of Narcotic Drugs²¹ 1931 entered into force as to some thirty States on 19 July 1933. Japan was a signatory. On 27 March 1933 (before the entry into force) Japan stated that her ratification was subject to a certain reservation. The Secretary-General of the League of Nations communicated this statement to the signatories. No objection was expressed by any State. On 23 January 1935 the Secretary-General said he was prepared to act "on the assumption that these Governments which have not replied by the contemplated date of December 31, 1934 have no objection to the said reservation." The Japanese ratification was deposited on 3 June 1935. The Convention for facilitating the International Circulation of Films in 1933 was opened to accession by certain non-signatory States. It entered into force on 15 January 1935. On 28 March 1935 the USSR said it wished to accede to the Convention subject to a certain reservation. On 11 May 1935 the Secretary-General of the League of Nations informed the parties of this. On 21 November 1935, the Chilean Government whose ratification was deposited on 20 March 1935, expressed doubts as to the possibility of its being able to accept the reservation. The Soviet Government said it had no objection to the Convention being regarded as not binding between it and Chile. The latter agreed to this course. Other Governments expressed their assent to the reservation except the Swiss and Iranian Governments. The latter reserved its right to express its

¹⁸ *Ibid.*, pp. 107-108. In fact, however, the United States has frequently made reservations at the time of ratification, e.g., London Naval Treaty 1930. *Ibid.*, p. 136.

¹⁹ *Ibid.*, pp. 109-110.

²⁰ *American Journal of International Law*, (1938), vol. 32, pp. 332-333.

²¹ Hudson, *International Legislation*, vol. V, p. 1048.

views on the reservation; the former doubted the propriety of the accession. It appears that the USSR took no further steps in the matter.²²

9. Schachter in his article in the *British Year Book of International Law* (1948), p. 91 on the "Development of International Law through the legal opinions of the United Nations Secretariat" discusses, *inter alia*, reservations to multipartite treaties and reports two actual cases in which the responsibilities of the Secretary-General of the United Nations as a depositary have been in issue. In an instrument of acceptance of 1948 the United States whilst accepting membership of the World Health Organization made its acceptance subject to a Joint Resolution of Congress which contained an "understanding that the United States reserves its right to withdraw from the Organization on a one year notice." The Secretary-General decided that this amounted to a reservation. He did not consult the parties but as the World Health Assembly was due to meet in a few days' time submitted the admissibility of the reservation to the judgment of that body. The Assembly ultimately decided that the United States' ratification could be accepted. In the case of the Constitution of the IRO a number of countries inserted reservations in their instruments of acceptance. Here, however, the competent organs were not yet in existence and the Secretary-General, without asking the parties for their express consent, confined himself to taking two steps: (1) he first communicated the text of the reservations to all signatory States, (2) at a later stage, when announcing the coming into force of the Constitution he referred to his previous communication and stated he intended to inform the parties of the entry into force of the Constitution on a given date, and requesting the transmittal of such observations as desired to make. None having been received it is to be presumed that the reservations were tacitly accepted by all members of the IRO.

In addition to citing the above examples a more recent article by Yuen-li Liang²³ states that under the United Nations few multipartite instruments have contained provisions concerning reservations. He cites three conventions, two²⁴ of them excluding reservations, and one²⁵ allowing certain specific reservations.

10. The Secretary-General of the United Nations has followed the League of Nations practice of not accepting for deposit a ratification subject to reservations until it has been accepted by all the other Contracting Parties. In connexion with a South African reservation to the Protocol modifying certain provisions of the General Agreement on Tariffs and Trade the Secretary-General took the position that the collective assent of the signatory governments was required to make it effective.²⁶ At a session held by the Contracting Parties a Declaration accepting the reservation was unanimously adopted. A similar procedure was followed in the case of a Southern Rhodesian reservation to the Protocol modifying certain articles of the General Agreement on Tariffs and Trade.²⁷ It appears, however, that, in that case, the Southern Rhodesian representative did not regard his statement accompanying the instrument of acceptance as a reservation at all.

11. In the case of certain reservation made on signature of the Convention on Genocide 1949 the Secretary-General inquired of States which had already ratified the Convention what their attitude was towards the reservations and 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 thereto prior to the day on which the first twenty instruments of ratification or accession should have been deposited."²⁸

²² *American Journal of International Law* (1938), vol. 32, pp. 333-334.

²³ *American Journal of International Law* (1950), vol. 44, pp. 117-128.

²⁴ The European Broadcasting Convention 1948; the International Frequency Broadcasting Agreement 1949. See annex C, paras. 11 and 12.

²⁵ The Revised General Act for the Pacific Settlement of International Disputes adopted by the General Assembly. See annex C, para. 5.

²⁶ *American Journal of International Law* (1950), vol. 44, p. 124.

²⁷ *Ibid.*, pp. 125-126.

²⁸ *Ibid.*, p. 128.

ANNEX E

Draft articles on reservations

EXPLANATORY NOTE TO ANNEX E

The following articles have been drafted in collaboration with the Secretariat. The scheme of the articles, as indicated in the Report, has been to provide a flexible series of options adaptable to varying situations. They have also been drafted in compliance with the instruction of the Resolution of the Assembly that particular account should be taken of the views expressed in the Sixth Committee.

Part I contains clauses of various types on the admissibility of reservations any of which could be selected by a Drafting Commission as the most appropriate for the particular Convention they are dealing with. Part II sets out various options representing practices now current. Part III deals with the procedure to be followed by the depositary but is drafted in such a way as to be adaptable to any of the options set out in Part II. Part IV deals with the procedure for objections and is linked up with the drafting of Part III.

Part I

ADMISSIBILITY OF RESERVATIONS

A

No reservations shall be permitted to this Convention whether formulated before or after it has entered into force.

B

1. Each High Contracting Party may, at the time of signature, ratification, or accession notify the depositary that it desires to make a reservation to the Convention.

2. Such a reservation must be chosen from among those set forth in annex hereto.

C

1. Each High Contracting Party may, at the time of signature, ratification, or accession notify the depositary that it desires to make a reservation to the Convention.

2. If such a reservation is formulated by a State which has signed but not ratified the Convention it must be chosen from those set forth in annex hereto. If it is formulated by a State which has not signed the Convention but desires to become a party thereto it must be chosen from those set forth in annex hereto.¹

D

1. Each High Contracting Party may, at the time of signature, ratification, or accession notify the depositary that it desires to make a reservation to the Convention.

2. If such a reservation is formulated before the entry into force of the Convention the depositary shall consult with such governments as are entitled to consultation, as provided in article. . . .² If it is formulated after the entry into force of the convention the central organ of the organization shall at its next meeting following the presentation of the reservation consider its admissibility and proceed to vote thereon.³

E

The reservations to the application of the present convention set forth in the annex thereto are accepted in regard to the territories named therein.⁴

¹ The case contemplated here is where a Convention is signed by ten States each of whom are willing to allow particular reservations as between themselves but are not willing to admit the same reservations by other States who may subsequently become parties.

² See clauses under Part II.

³ This is drafted with a view to the practice described by O. Schachter, annex D, para. 9.

⁴ See annex C, para. 10.

Part II

STATES ENTITLED TO BE CONSULTED AS TO RESERVATIONS

The following classes of States shall be entitled to be consulted as to any reservations formulated after the signature of this convention (or after this convention has become open to signature or accession):

- (a) States entitled to become parties to the convention,
- (b) States having signed or ratified the convention,
- (c) States having ratified or acceded to the convention.

Should the reservation have been formulated within x years of the date specified in the convention for the determination of the date of the entry into force, States whose signature of the convention has not been followed by ratification shall also be entitled to be consulted.

Note: It will be seen that the classes entitled to be consulted are set out in the gradually decreasing number, the largest class being Class A and the smallest, Class C. It will be for the Drafting Commission to select which class it considers to be appropriate for the convention in question. The above classes therefore represent a series of options which will vary in practice, particularly according as to whether the day specified for determining the date of the entry into force of the convention has or has not arrived. (See Part III, article 3 b and 3 c.) The last paragraph of Part II has been added as taking into account the views expressed by Mr. Röling in the course of the debates of the Sixth Committee. (See annex A and also annex C, para. 9.) It should further be noted that Class A is included as an option, although opinion is divided as to whether in the absence of express provision this should be, or is, a class entitled to be consulted. All three classes are included in question III of the General Assembly resolution requesting an advisory opinion from the International Court of Justice (A/1517).

Part III

DEPOSITARY'S FUNCTIONS

1. The depositary for the purpose of this convention shall be (insert name of depositary).

2. Where any State deposits, together with its instrument of ratification or accession, or makes at the time of signature any formal declaration which purports to qualify or limit the effect of the Convention in so far as it may apply in the relation of that State with the other States which may be or become parties to the treaty, the depositary shall follow the procedure prescribed below.

3. The depositary shall:

(a) Whether or not the Convention is in force communicate the text of any reservation to the Governments of all States on whose behalf the Convention has been signed or who are parties or entitled to become parties to the Convention;

(b) If the day specified in the Convention for the determination of the date on which it shall enter into force has not yet arrived, enquire of all States entitled to be consulted (selected from Part II) whether or not they accept the reservation;

(c) If the day specified in the Convention for the determination of the date on which it shall enter into force has passed, enquire of all States entitled to be consulted (selected from Part II) whether or not they accept the reservation.

Part IV

PROCEDURE FOR OBJECTIONS

1. Where such an enquiry as is specified in article 3 (b) of Part III above is made, any of the governments to whom it is addressed may, at any time before the day specified in that Article, notify the depositary it does not accept the reservation.

2. Where such an enquiry as is specified in article 3 (c) of Part III is made, any of the Governments to whom it is addressed may, at

any time within x months of such inquiry, notify the depositary that it does not accept the reservation.

3. In the event of any Government notifying the depositary pursuant to paragraphs (1) or (2) above, that it does not accept the reservation, the depositary shall so inform the Government desiring to make the reservation, and request it to inform him:

(a) If the notification is made under paragraph (1), within x months, or at any time before the day specified in article 3 (b), whichever period is the longer,

(b) If the notification is made under paragraph (2), within x months of the date of the request, whether it is prepared to withdraw the reservation,

and, if, within the appropriate period, as defined in sub-paragraph (a) and (b) above, that Government has not replied, it shall be deemed not to be a party (or a signatory) to the Convention.

4. If, in reply to the request by the depositary specified in paragraph (3) the Government desiring to make the reservation states that it desires to withdraw the reservation, it shall be deemed to be a party (or signatory) to the Convention as from the date when its reply is received by the depositary.

5. If, within the appropriate period as prescribed in paragraphs (1) and (2) above no objection to the reservation has been received

by the depositary, it shall be treated as accepted by all States entitled to be consulted and the Government making the reservation shall be deemed to be a party to the Convention as from the date when the above-mentioned period has expired.

6. If the Government desiring to make the reservation states, in reply to the enquiry by the depositary specified in paragraph (3), that it maintains its reservation:

(i) It shall not be a party to the Convention: *or*

(ii) It shall be a party to the Convention but shall not be bound under it in relation to any State:

(a) Which has notified the depositary that it does not accept the reservation,

(b) Which, by reason of the fact that it was not among the States entitled, under this Convention, to be consulted at the time the reservation was formulated, did not receive the enquiry provided for in articles 3 (a) and 3 (b) of Part III.

Note: The options provided in paragraph (6) represent two different practices now current, but, as pointed out in the Report, it may be desirable, for special reasons and in the case of particular Conventions, to depart from whichever practice is usual amongst the High Contracting Parties. See annex C, para. 13.

DOCUMENT A/CN.4/L.9*

Mémoire présenté par M. Gilberto Amado

[Texte original en français]

[31 mai 1951]

1. Dans son rôle de dépositaire d'instruments de ratification et d'adhésion relatifs aux traités internationaux négociés sous les auspices des Nations Unies et pour bien accomplir les fonctions qui lui incombent d'après l'Article 102 de la Charte, le Secrétaire général se trouve souvent embarrassé par des doutes au sujet des effets juridiques des réserves aux conventions multilatérales.

2. Jusqu'à présent, si le traité ne contenait pas une stipulation expresse sur la procédure à suivre relativement aux réserves, le Secrétaire général a choisi de suivre la pratique adoptée par la Société des Nations dans des cas pareils, d'après laquelle les réserves ne sont acceptées avant que l'accord de toutes les autres parties ne soit obtenu. Ce système, consacré par la pratique de plusieurs années dans la Société des Nations et dans les Nations Unies, n'est pas cependant parfaitement défini. Il y a des points douteux, des lacunes à combler. Ainsi il n'est pas très clair sur la question de savoir quels sont les États qui doivent être consultés et dont le consentement est indispensable pour l'acceptation des réserves: le droit de se prononcer sur les réserves appartient-il aux seuls États parties définitives dans les conventions, c'est-à-dire aux États qui auront déjà fait le dépôt des instruments de ratification ou d'adhésion? Ou pourrait-il être étendu aux simples signataires?

3. Pour assurer une directive sûre pour la procédure le Secrétariat a demandé l'inclusion de la question des

réserves aux conventions multilatérales dans l'ordre du jour de la cinquième session de l'Assemblée générale. La demande du Secrétariat fut provoquée surtout par des questions suscitées relativement aux effets juridiques de réserves formulées par plusieurs parties à la Convention sur le génocide, adoptée par l'Assemblée générale le 9 décembre 1948. D'après l'article XIII de cette convention, elle devrait entrer en vigueur le quatre-vingt-dixième jour qui suivrait la date du dépôt du vingtième instrument de ratification ou d'adhésion. Lors du début de la cinquième session de l'Assemblée, en septembre dernier, le nombre de ratifications requis pour l'entrée en vigueur de la convention était presque complet. Cependant, quelques États en la ratifiant avaient formulé des réserves à plusieurs de ses articles. Ces réserves ont été rejetées par d'autres parties à la Convention. Il était alors question de savoir si lesdites ratifications sous réserves seraient comptées pour compléter le nombre de ratifications nécessaire pour rendre valide la convention. Parmi ces réserves les plus controversées étaient celles de l'Union soviétique, de la Biélorussie, de l'Ukraine, de la Tchécoslovaquie et de la Bulgarie, concernant l'article IX, d'après lequel les différends entre les parties contractantes relatifs à l'interprétation, l'application ou l'exécution de la convention seraient soumis à la Cour internationale de Justice, à la requête d'une partie au différend, et l'article XII, qui écarte l'application automatique et immédiate de la Convention aux territoires non autonomes. D'autre côté les Philippines ont souscrit à la Convention sous réserves de l'article IV pour sauvegarder l'irresponsa-

* Incorporant le document A/CN.4/L.9/Corr.1.