Document:-
A/CN.4/SR.101

Summary record of the 101st meeting

Topic:
Reservations to multilateral conventions

Extract from the Yearbook of the International Law Commission:-
1951 , **vol. I**

same question. He suggested that the rapporteur reconsider those texts in the light of their similarities.

147. The CHAIRMAN, speaking as rapporteur, said that if he were free to do so he would delete article 4, paragraph (1).

148. Mr. YEPES was in favour of keeping article 4 for the same reasons as article 3.

It was decided, by 7 votes, to delete article 4, paragraph (1).

149. The CHAIRMAN asked whether it was necessary to keep article 4, paragraph (2), which assumed that in the absence of constitutional provisions the Head of the State was competent.

150. Mr. SANDSTRÖM, relying on the previous comments of Mr. Spiropoulos, pointed out the connexion between the text of that paragraph and article 2 of the draft examined at the beginning of the meeting. He thought that those texts should be examined in conjunction and proposed deferring their drafting till the next session.

151. Mr. HUDSON pointed out that in article 2 (A/CN.4/L.5) the words " through an organ competent for that purpose " introduced an idea which was not the essential one. Those words could be transferred, in a different form, to article 4, paragraph (2). The Special Rapporteur could make the necessary changes.

152. Mr. SPIROPOULOS, recalling that he would have preferred to delete both articles of chapter II, said that he was quite willing to adopt Mr. Hudson's suggestion if article 3 were kept.

153. Mr. KERNO (Assistant Secretary-General) explained that the two texts in question did not relate to the same problem. Article 4 related to the competence of State to make treaties, whereas article 2, which had been previously discussed, related to the assumption of treaty obligations by States.

It was decided to entrust the Chairman, in his capacity as Special Rapporteur, with the preparation of a new draft for article 4.

154. Mr. KERNO (Assistant Secretary-General) thought that for the current session, the Commission had practically finished examining the report on the Law of Treaties. At its next session it would be advisable for the Commission finally to settle the question of the Law of Treaties. In his first report (A/CN.4/23), para. 1 the Special Rapporteur had mentioned his intention of adding further chapters dealing with the interpretation of treaties and with their termination and possibly also with the obligation or effect of treaties.

155. The CHAIRMAN confirmed that it was his intention to submit at the 1952 session a complete draft covering the whole problem of treaties.

General Assembly resolution 478 (V) of 16 November 1950: Reservations to multilateral conventions (item 4 (*b*) of the agenda) (A/CN.4/L.18)

DISCUSSION OF MR. BRIERLY'S DRAFT REPORT

156. The CHAIRMAN presented his draft report, explaining that he had not wished to pre-judge any solutions that might be arrived at in debate and was submitting it merely as a working paper.

157. The researches he had made, in particular the study of the General Assembly's discussions and of the Advisory Opinion of the International Court of Justice of 28 May, had shown him that the question of reservations was extremely complex.[14] The conclusions he had reached in his second report were somewhat different from those contained in the first. The development of his views would explain any differences between them.

The meeting rose at 6.10 p.m.

101st MEETING

Tuesday, 12 June 1951, at 9.45 a.m.

CONTENTS

Chairman: Mr. James L. BRIERLY
Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

General Assembly resolution 478 (V) of 16 November 1950: Reservations to multilateral conventions (item 4 (*b*) of the agenda) (A/CN.4/L.18) [1] *(continued)*

DISCUSSION OF MR. BRIERLY'S DRAFT REPORT (A/CN.4/L.18) (*continued*)

GENERAL REMARKS

1. The CHAIRMAN, after recalling that the Commission had already embarked on a general discussion of the

[14] See " Reservations to the Convention on Genocide, Advisory Opinion ", *I.C.J. Reports 1951*, p. 15.

[1] Mimeographed document only, the text of which corresponds with drafting changes to Chapter II of the *Report of the International*

question of reservations at its second session [2], suggested that the Commission now examine, paragraph by paragraph, the draft report he had prepared.

2. Mr. YEPES wished to submit some observations of a general character. He praised the report prepared by the Chairman and if he differed from its conclusions on certain points, it was only with deep regret and after considerable hesitation. He did not underestimate the great difficulties inherent in the problem.

3. However worthy of respect the opinion expressed by the International Court of Justice on the question of reservations to the Convention on Genocide,[3] he himself considered that, in the case in question, the Court's conclusions were not well-founded. They were based on the inadmissible concept of multilateral treaties, considered as a series of bilateral treaties. The opinion delivered by the Court would, in practice, considerably complicate the task of the depositary. Though well aware of the seriousness of such a decision, he considered, as did the Rapporteur himself, that the Commission could not adopt the Court's opinion.

4. To consider the question from another angle, the General Assembly, which, in its resolution 478 (V) of 16 November 1950, invited the International Law Commission " to report on the matter, especially as regards multilateral conventions of which the Secretary-General is the depositary ", did not forbid the Commission to concern itself with reservations to bilateral treaties. Such reservations obtained, and provision should be made for them.

5. Similarly, the draft report did not contain any definition of a reservation. Admittedly, it was difficult to provide a definition, but, if the Commission did not say what a reservation was, all its work in that connexion would be useless.

6. Many of the formulae accompanying the ratification of treaties, and formally described as reservations, were not reservations in the strict sense of the word. The prospective definition should exclude them.

7. That was the case, for instance, in regard to the formula by which a ratifying State declared that such and such an article of the treaty could not be interpreted in such an such a way. That sort of formula constituted an interpretative clause. It was not a reservation, as it did not limit the application of the treaty.

8. Again, the formula " subject to subsequent ratification ", which was at times attached to the signature, was not a reservation in the strict sense of the word. It did not limit the scope of the treaty ; it was a suspensory condition.

9. Yet again, when, in ratifying a treaty, the Head of a State stipulated that the exchange of instruments of ratification should not take place before the intentions of the signatory States were known or, alternatively, before the acceding States had taken certain legislative or other domestic measures in their respective countries, that did not constitute a real reservation. Such formulae did not limit the effects of the treaty; they were merely suspensory conditions.

10. Similarly, in the case of a treaty concluded between neighbouring States to regulate the admission of travellers and goods into their respective territories, if one of the parties stipulated that it excluded one of its ports from the application of the treaty, it did not make a real reservation, but merely withdrew a part of its national territory from the application of the treaty's provisions.

11. The Commission should, therefore, begin by defining a reservation. In that connexion he had himself drawn up two formulae for submission to the Commission, which were largely based on the definition contained in the Harvard draft (article 13) [4]. Those formulae were as follows:

(*a*) " A reservation is a formal declaration by a State party to a treaty, when signing, ratifying or acceding to the said treaty, whereby it limits the effect of certain clauses of the treaty, in so far as they apply to the relations between the State formulating the reservation and the other States parties to the said treaty ".

(*b*) " A reservation is a formal declaration by a State party to a treaty, when signing, ratifying or acceding to the said treaty, whereby, while accepting the treaty as a whole, it excludes from its acceptance certain specified clauses of the said treaty, in respect of which it does not consider itself bound to the other States parties to the said treaty ".

12. He also wished to make some further remarks on the way in which the Rapporteur had rejected the Pan-American Union solution of the question of reservations. He was a supporter of the practice followed by the Pan-American Union, and not of that advocated by the Rapporteur. Actually, the Pan-American Union's practice facilitated both the ratification of multilateral treaties and the making of reservations.

13. According to United Nations practice, it was necessary, for a reservation to be valid, that it be expressly accepted by all the States parties to the treaty, i.e. that it receive their unanimous consent. According to Pan-American practice, on the other hand, a reservation by a State was considered as tacitly accepted by the other parties, with the exception of those specifically objecting thereto. In such cases the treaty did not come into force between the State making the reservation, and the State which had announced that it did not accept the said reservation.

14. The United Nations had introduced an undesirable practice into the conclusion of treaties. It conferred on the parties to a treaty a veritable right of veto in a field in which, as it came within the sphere of the General Assembly, the veto was not applicable. There might be, for instance, a multilateral treaty concluded between all

Law Commission covering the work of its third session. (See vol. II of the present publication.) The drafting changes are indicated in the summary records of the 101st to 106th meetings. However, the " Annex " to doc. A/CN.4/L.18, which was not retained in the final text, was reproduced as a separate document in vol. II of the present publication.

[2] See summary record of the 53rd meeting.

[3] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951* p. 15.

[4] See A/CN.4/23, Appendix A.

the States Members of the United Nations where one of those States made a reservation of secondary importance, (referring, for instance, to time limits), which did not affect the purpose of the treaty. That reservation was communicated to all the other members, and it was only when they had all accepted it that the State making the reservation became a party to the treaty. If a single one of those States objected, that would prevent the State making the reservation from becoming a party to the treaty.

15. He did not know whether the Commission had decided to endorse that right of veto, but, in his opinion, such a practice made it almost impossible for multilateral conventions to come into force, and, in any event, delayed them considerably. That had been clearly seen, for instance, in the case of the Convention on Genocide.

16. The draft report maintained that the practice of the Pan-American Union (which was the most scientific and the most democratic, and which, moreover, facilitated the codification of international law) was invented to meet the requirements of the American continent. That was not correct. Other conventions, concluded in the past, between countries in other parts of the world, some under the auspices of the United Nations, had followed that practice, perhaps without being aware of it. It was not, therefore, merely of regional interest.

17. In 1935, the Soviet Union wished to accede to a League of Nations convention for facilitating the International Circulation of Films of an Educational Character (Geneva, 11 October 1933) and made a reservation to which Chile objected. In a Note to the Secretary-General of the League of Nations, the Government of the Soviet Union made the proposal that the Convention should not be applicable in the relations of the USSR with Chile. That was tantamount to proposing the Pan-American system. The Chilean Government accepted the arrangement and Mr. Litvinov addressed a communication to the Secretary-General of the League of Nations in which he stated that, in his opinion, should no other signatory oppose the reservation, it might be considered as accepted by all, except Chile.

18. In 1912, that was to say, before the foundation of the League of Nations, the International Radio-Telegraph Convention, signed at London, appointed the British Government to act as depositary. When ratifying, the United States. made a reservation. The British Government accepted that reservation and communicated it to all the other signatories. In reply to the Government of the United States the head of the Foreign Office, at that time Sir Edward Grey, stated that cognizance had been taken of the reservation which had been communicated to all parties. By so doing, the British Government adopted the Pan-American system in advance of its establishment.

19. The Belgian Government, as depositary for ratifications of the International Convention for the Unification of Certain Rules relating to Bills of Lading for the Carriage of Goods by sea, signed at Brussels in 1924, had taken the same course in regard to the reservation which accompanied the United States ratification. It had accepted that reservation and communicated it to all the governments.

20. Mr. AMADO remarked that an important point was, whether the conventions in question contained any provisions regarding reservations.

21. In reply to a question by Mr. SPIROPOULOS, Mr. YEPES said that, in the above instances, the effect of the reservation was that the signatory formulating the reservation at the time of ratification became a party to the agreement. It was assumed that, failing a declaration on their part to the contrary, the other parties tacitly approved the reservation.

22. Mr. AMADO remarked that nobody denied that a State could make reservations. It was the juridical effect of the reservation that was in question.

23. Mr. KERNO (Assistant Secretary-General) pointed out that Mr. Yepes had said in his statement that the Secretary-General of the United Nations was not aware of the practice of tacitly accepting reservations. That statement was not correct. The United Nations was aware of, and applied the practice of tacitly accepting reservations. In that connexion, he would refer to the written statement addressed to the International Court of Justice by the Secretary-General, dealing with that very Convention on Genocide. [5]

24. Mr. YEPES felt that the report on the question of reservations, (A/1372) submitted to the General Assembly by the Secretary-General in 1950, was not altogether objective. It described the United Nations practice, but not that of the Pan-American Union. As a result the Assembly had not been able to study the structure, procedure or consequences of the Pan-American system.

25. The case of the Convention on the Declaration of Death of Missing Persons, signed on 6 April 1950, showed that the Pan-American system had been applied by the United Nations. That instance, and the others quoted above, showed that the Pan-American practice was not an invention, peculiar to one particular area of the world, but had been used by the United Kingdom, Belgium, the Soviet Union and even, in 1950, by the United Nations.

26. Only brief reference was made in the Chairman's draft report to the system adopted for conventions prepared by the International Labour Conference. It was true that those were very special conventions of a pronounced legislative character, bearing on special problems and approved not only by the representatives of States, but by employers' and workers' representatives as well. However that might be, reservations to those conventions were not admitted. That prohibition, which was to be recommended in the case of treaty laws, had enabled the depositing of more than a thousand ratifications. It therefore facilitated them. Some countries, such as India, Peru and Cuba, had attached reservations to their instruments of ratification, but the Director-General of the International Labour Office had drawn their attention to the above prohibition and, in most cases, those countries had withdrawn their reservations. The

[5] I.C.J., *Reservations to the Convention on the prevention and punishment of the crime of genocide. Pleadings and oral arguments*, pp. 97–103.

entry into force of those conventions had been facilitated and the development of labour law accelerated thereby.

27. The Commission might perhaps suggest to the General Assembly that it consider the banning of reservations accompanying the ratification of treaty laws. Most States would, doubtless, accept such a regulation and withdraw any reservations other than those of an essential nature that they might be tempted to make, rather than see themselves excluded from a convention which, from the point of view of international law, represented a step forward.

28. In paragraph 12 of the Chairman's draft report (A/CN.4/L.18), it was suggested that the Pan-American Union's practice, though well adapted to the relations between States within a defined geographical area, was not equally suited to the requirements of conventions concluded under the auspices of the United Nations. But more than a hundred conventions of all kinds, often in no way of a regional character, to which 21 States were parties, had been ratified in accordance with that practice. The American Treaty on Pacific Settlement (Bogota, 1948) for instance, was of immense importance and scope. Ecuador had made reservations to the Inter-American Treaty of Reciprocal Assistance (Rio de Janeiro, 1947), which had served as a prototype for the North Atlantic Pact but had nevertheless become a party to that treaty. Other treaties concluded in conformity with that practice were those concerned with Maritime Neutrality (Havana, 1928) and the Rights and Duties of States (Montevideo, 1933).

29. In all the above instances, the State ratifying with reservations had become a party to the treaty, but the treaty did not come into force as between it and the States which had signified their formal opposition to the said reservations. States that did not do so were considered as having tacitly accepted the reservation and were bound by the treaty.

30. The above all went to show the importance of the problem and how necessary it was for the Commission to study it exhaustively and to weigh the responsibility it would assume in adopting a decision contrary to the opinion of the International Court of Justice. The Pan-American practice should be extended, wherever possible, to conventions adopted by the General Assembly. It would not be the first time that a South American legal provision had found world-wide acceptance, and the experience gained since 1890, or even since 1826, (first Pan-American Conference at Panama, convoked by Bolivar) would prove of great value for the development of international law.

31. The CHAIRMAN considered that the Commission might give further consideration to Mr. Yepes' observations, and to those regarding the Pan-American Union's practice in particular, when examining the draft report. Two questions should, however, in his opinion, be settled first: the one concerned the definition of a reservation, and the other the possible extension of the Commission's study to reservations to bilateral treaties. In his opinion, those two questions did not fall within the Commission's competence and were foreign to the mandate conferred on it by General Assembly resolution No. 478 (V).

32. As regards definition, that was superfluous; the General Assembly was aware of the point at issue, while reservations to bilateral treaties would appear to be excluded by General Assembly resolution 478 (V).

33. Mr. YEPES argued that the use of the words "especially as regards" in paragraph 2, sub-paragraph (*a*), of the resolution, gave the Commission a great deal of latitude. On the other hand, reservations to bilateral conventions were current practice. The treaty between Colombia and the United States for the settlement of difficulties arising out of the independence of Panama, had been ratified by the United States with reservations.[6]

34. The CHAIRMAN pointed out that a careful perusal of the paragraph in question would show that the only question which the International Law Commission was invited to study was the question of reservations to multilateral conventions.

35. Mr. SPIROPOULOS felt that the problem of reservations did not arise in the case of bilateral treaties. If one of the States made a reservation, either the other accepted it, in which case there would be a new treaty, or it did not accept it, in which case there would be no treaty at all.

36. Mr. AMADO wished to avoid a theoretical discussion on a matter which the Commission had already considered at its second session. He did not wish to recall the shades of thought which divided his views on the practice of the Pan-American Union in regard to reservations from those of Mr. Yepes, but only to make the point that his silence did not denote full consent. He proposed that the Commission proceed to examine the draft report by studying the various paragraphs in turn. Examination of the draft, which had been very carefully prepared, would not prevent the members from putting forward, at the appropriate point, suggestions that might be of interest to the Commission.

37. Mr. SPIROPOULOS would have preferred the Commission to begin with the conclusions to the draft report.

38. The CHAIRMAN and Mr. HUDSON supported Mr. Amado's suggestion.

It was decided to examine the draft report paragraph by paragraph.

39. Mr. KERNO (Assistant Secretary-General) recalled that the Secretary-General had been responsible for drawing the General Assembly's attention to the serious difficulties to which reservations, and objections to reservations, gave rise, and that it had been the Assembly's decision to submit the matter to the expert knowledge of the International Court of Justice and of the Commission.

40. In order that the position should be quite clear, he himself had concluded a verbal statement before the International Court of Justice by saying: "The Secretary-General seeks only to be the faithful, conscientious and impartial servant of all those concerned. His sincere

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[6] Treaty of 6 April 1914; see Fauchille, *Traité de droit international public*, vol. 1, part 2, 1925, para. 513 (16), pp. 363–364.

desire is to be able to perform his depositary functions to the satisfaction of all. To do this, however, he needs a rule which is clear, universally accepted and easy to apply in practice."

PARAGRAPHS 1–5 (*Paragraphs 12–16 of the "Report"*)

There was no comment on paragraphs 1–5.

PARAGRAPH 6 (*paragraph 17 of the "Report"*)

41. Mr. KERNO (Assistant Secretary-General) remarked that the first two lines of paragraph 6 were of a historical nature and might well be included in paragraph 5

42. Mr. HUDSON proposed that the first two sentences of paragraph 6 be included in paragraph 5, and that paragraph 6 start with the words: "The Commission noted" ("however" being deleted).

The amendment was adopted.

43. Mr. HUDSON thought that the extract from the Court's opinion, quoted in the middle of the paragraph should be supplemented by the following further quotation from the Court's opinion: "The solution of these problems must be found in the special characteristics of the Genocide Convention".[7] That reference, which was intended to limit the application of the opinion, would make it easier for the Commission to justify the divergent conclusions it proposed to adopt as regards the question in general.

It was so decided.

44. As the result of a discussion on the sentence beginning with the words "In the second place", in which the CHAIRMAN, Mr. HUDSON, Mr. CORDOVA and Mr. SPIROPOULOS took part, *it was decided* to redraft the sentence to read as follows: "In the second place the Court, naturally, gave its advisory opinion on the basis of its interpretation of the existing law."[8]

45. Mr. YEPES suggested that the Commission mention in its report that the question of reservations to bilateral treaties had been raised in the course of discussion but had not been pursued.

46. Mr. HUDSON pointed out that the summary records provided details of the discussion. In his opinion, the study with which the Commission had been entrusted was limited by General Assembly Resolution 478 (V) strictly to the question of reservations to multilateral conventions.

Mr. Yepes' suggestion was rejected.

PARAGRAPH 7[9]

It was decided to redraft the paragraph and examine it at a later date.

PARAGRAPH 8 (*paragraph 18 of the "Report"*)[10]

47. Mr. HUDSON wondered whether the reference in the first line of the paragraph was to the practice adopted by the Secretariat of the League of Nations, or to that of the League of Nations itself.

48. The CHAIRMAN said that the reference was to the practice of the Secretariat, which had been approved by the Council of the League of Nations.

49. Mr. HUDSON proposed, if that were the case, to make the fact quite clear by amending the last phrase of the paragraph to read: "was approved by the Council of the League of Nations on 17 June 1927" (not 1922 as erroneously stated in document A/CN.4/L.18). He pointed out further that, as the practice of the League of Nations ante-dated the establishment of the Committee of Experts, the words "recommended by the Committee of Experts" were not accurate.

50. The CHAIRMAN proposed the substitution of "reviewed and endorsed" for "recommended."

51. Mr. SPIROPOULOS, supported by Mr. HUDSON, considered that the Commission should ascertain what the Committee of Experts had done and reproduce the expressions it had used. Had it actually formulated a recommendation?

52. Mr. SCELLE considered that it would be desirable to ascertain whether the Assembly of the League of Nations had not also itself approved the practice in question.

53. After a discussion, in which the CHAIRMAN, Mr. HUDSON, Mr. YEPES and Mr. KERNO took part, Mr. SCELLE expressed the opinion that such approval had probably been given. All that was required was, therefore, to consult the Council's Annual Report to the Assembly at its September 1927 session.

PARAGRAPH 9 (*paragraph 19 of the "Report"*)[11]

54. Mr. YEPES again recalled the case of the Convention on the Declaration of Death of Missing Persons, the provisions of which constituted an exception to the rule stated in the first sentence of paragraph 9, which was not therefore entirely accurate.

55. Mr. KERNO (Assistant Secretary-General) remarked that the Secretary-General had followed the practice referred to in paragraph 9 by omitting any reference to the subject in the Convention. It was not to be inferred therefrom that some other system could not have been expressly provided for. When, as in the case of the convention mentioned by Mr. Yepes, the conven-

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[7] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 23.

[8] The original sentence read as follows: "In the second place, the Court was asked to give its advisory opinion on the law as it existed". (See also summary record of the 133rd meeting, paras. 42–43.

[9] That paragraph read as follows: "The Commission considered the question of reservations to conventions at its ... meetings, from ... to ... (Here add gist of discussions on salient points)". It was later modified by the Special Rapporteur and embodied in para. 2 of doc. A/CN.4/L.22. See also summary record of the 125th meeting, para. 102.

[10] Paragraph 8 read as follows:

"It is noted that, according to the practice of the League of Nations, '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'. (League of Nations document C.357.M.130.1927.V.) This practice, recommended by the Committee of Experts for the Progressive Codification of International Law, was approved by the League of Nations on 17 June 1922."

[11] Paragraph 9 ended with the words "could properly be assumed."

tion contained express provisions on the question of reservations, the Secretary-General applied them. If there were none, he adopted the practice described in paragraph 9. That was quite clear from the first few words of paragraph 5 of the Secretary-General's report, quoted in paragraph 9 of Mr. Brierly's draft report.

56. Mr. HUDSON proposed the substitution of "has followed" for "follows". In that way the solution finally adopted would not be prejudiced.

Paragraph 9 was approved subject to the above amendment.

PARAGRAPH 10 (*paragraph 21 of the "Report"*) [12]

57. The CHAIRMAN explained that he had tried, in that paragraph of his report, to describe the Pan-American Union's practice. He wished to know whether the first two lines of the paragraph correctly described that organization.

58. Mr. ALFARO stated that the title Pan-American Union had been given to the Secretariat of the Organization of American States. He had opposed that decision at Bogota, as he had desired that name to continue to apply to the organization as a whole. The description given at the beginning of the paragraph was correct.

59. Mr. HUDSON proposed the wording: "The Pan-American Union, which is the general Secretariat of the Organization of American States, follows a different system."

60. Mr. LIANG (Secretary to the Commission) thought that the word "reservation" should be used in the English text (line 4), not "reservations".

61. Mr. HUDSON read out the following paragraph from the dissenting opinion presented by Mr. Guerrero, Sir Arnold McNair, Mr. Read and Mr. Hsu: "What is important to note is that the Pan-American Union procedure rests upon rules adopted by the Governing Body of the Union, as approved by the International Conference of American States held at Lima in 1938; that is to say, it depends on the prior agreement of the contracting parties." [13]

62. The CHAIRMAN considered that reference should be made in the report to the paragraph from the dissenting opinion, which Mr. Hudson had read. He proposed to mention, but not quote it.

63. Mr. SPIROPOULOS considered the paragraph to be very important and asked whether the American members of the Commission concurred with that passage in the dissenting opinion.

64. Mr. HUDSON recalled that the President, Mr. Guerrero, had been one of those presenting the opinion.

65. Mr. SANDSTRÖM asked whether the decision of the Governing Body, referred to in the Court's opinion, was the same as that quoted in Mr. Brierly's report. A good many years had elapsed between the decision and the Conference.

66. The CHAIRMAN explained that the question had been examined on two occasions.

67. In reply to an observation by Mr. Sandström, Mr. KERNO (Assistant Secretary-General) read out a passage from a memorandum submitted by the Pan-American Union:

> "At the Eighth International Conference of American States, held at Lima, Peru, in 1938, a resolution (XXIX) was adopted on 'methods of preparation of multilateral treaties', in accordance with which the Conference approved the six rules of procedure adopted by the Governing Board of the Pan-American Union in its Resolution of May 4, 1932, together with other rules adopted in 1934 and 1936 dealing with measures to be taken to promote the ratification of treaties. Paragraph 2 of the resolution introduces a new procedure of delaying the ratification of a treaty with reservations until inquiry can be made as to the attitude of the other signatories with respect to the proposed reservation. Paragraph 2 reads as follows:
>
> 'In the event of adherence or ratification with reservations the adhering or ratifying State shall transmit to the Pan-American Union, prior to the deposit of the respective instrument, the text of the reservation which it proposes to formulate, so that the Pan-American Union may inform the signatory States thereof and ascertain whether they accept it or not. The State which proposes to adhere to or ratify the treaty, may do it or not, taking into account the observations which may be made with regard to its reservations by the signatory States.'" [14]

68. Mr. YEPES explained that it was at the eighth Pan-American Conference that the rules provisionally accepted by the Governing Board had been finally adopted. The quotation in the report was incomplete. There were not only those three rules. Some rules, which Mr. Kerno had not read, were also to be found on page 14 of the Pan-American Union's memorandum. The decision taken should be quoted in its entirety. It was an excellent text and should be studied. It showed, for instance, amongst other things, that a reservation could be withdrawn by the State formulating it.

69. The CHAIRMAN said that he would complete the reference to the advisory opinion on page 37, by adding the text of the 1938 resolution.

70. Mr. HUDSON considered that Mr. Yepes was quite right in emphasizing the importance of that provision. He recalled that it had been held that a certain proposal by the United States constituted a reservation, and the American States had been consulting each other in the

[12] Paragraph 10 read as follows:

"10. The Pan American Union, which is now the central organ and general secretariat of the organization of American States, adopts a different system: the reserving State may become a party to a convention notwithstanding the refusal of one or more States to consent to the reservations proposed. The only juridical consequence of the rejection of a reservation is that the convention fails to enter into force between the parties immediately concerned, namely, between the reserving and the rejecting States. This legal effect was defined by the Governing Board of the Pan American Union in a resolution adopted on 4 May 1932:

"With respect...".

[13] *I.C.J. Reports 1951*, p. 37.

[14] *I.C.J. Reservations to the Convention on the prevention and punishment of the crime of Genocide, Pleadings and oral arguments*, p. 18.

matter for months. In due course they would send a reply to the United States, which would then consider whether it should maintain its reservation.

71. Mr. AMADO considered that the provision took on even greater importance when its origin was taken into consideration. It had resulted from a controversy on the effect of reservations formulated in regard to the Washington Economic Convention. The question had been referred to the Committee of Jurists at Rio, which had not yet presented its report. There had also been a controversy on the effect of the reservations formulated in regard to the Bogota Economic Convention (1948). There was still, therefore, a considerable divergence of opinion on the matter and complete agreement had not, as yet, been attained.

72. Mr. YEPES observed that it could be seen that the Pan-American system was still in course of evolution and should therefore be treated in greater detail. In his opinion it was taking the matter rather too casually merely to say: " the only juridical consequence of the rejection of a reservation is that the convention fails to enter into force between the parties immediately concerned, namely, between the reserving and the rejecting States ". That was only one of its juridical effects. The wording went too far.

73. The CHAIRMAN agreed to delete the word " only ".

74. Mr. HUDSON proposed the deletion of the words: " between the parties immediately concerned, namely ". They were superfluous.

75. The CHAIRMAN agreed to delete them.

PARAGRAPH 11 (*paragraph 23 of the " Report "*)[15]

76. Mr. HUDSON did not like the phrase: " applied yet another rule " and suggested: " adopted another criterion ". It had adopted the criterion that any reservation must be compatible with the object and purpose of the convention. It was incumbent on each individual State to decide for itself whether the reservation formulated was, or was not, compatible with the object and purpose of the convention.

77. He pointed out that the quotation at the end of the paragraph was already included in paragraph 5 of the report. It would perhaps be sufficient to refer to that paragraph, or alternatively to delete paragraph 11 altogether. The latter course would have the advantage that paragraph 12, which again referred to the Pan-American Union, would come immediately after paragraph 10.

78. Mr. SANDSTRÖM, on the contrary, considered that the paragraph should be retained. Actually, the beginning of paragraph 13 read: " Nor does the Commission believe that the criterion of the compatibility of a reservation with the object and purpose of a convention ", and paragraph 13 was some way away from paragraph 5. It should, however, be amended in the sense indicated by Mr. Hudson.

79. The CHAIRMAN remarked that, for the reader's purposes, paragraph 13 was not so very far away from paragraph 5.

80. Mr. ALFARO thought that the paragraph contributed to the clarity of the report, even if it did involve a repetition. Moreover, that itself was an advantage, as it called attention to the matter once more.

81. Mr. CORDOVA and Mr. HUDSON proposed that paragraphs 11 and 12 be transposed.

It was so decided.

82. After an exchange of views on an alternative wording for "applied yet another rule", in which the CHAIRMAN, Mr. YEPES, Mr. SPIROPOULOS, Mr. HUDSON and Mr.SCELLE took part, *the following wording was adopted:*

> " The International Court of Justice however adopted . . . the criterion of the compatibility of reservation with the ' object and purpose ' of the Convention."

83. Mr. SPIROPOULOS did not consider the wording adopted very satisfactory; he would come back to the point at the second reading.

84. The CHAIRMAN asked whether any useful purpose was served by retaining the quotation at the end of the paragraph.

85. Mr. HUDSON considered that, instead of the passage quoted in the paragraph under discussion, taken from the reply to question I, sub-paragraph (*a*) of the Court's reply to question 2 should be included instead. That sub-paragraph read: " that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention ". The words " which it considers to be incompatible " were very important, as they meant that any State could judge for itself whether a certain reservation was or was not compatible with the object and purpose of the convention.

86. He proposed that, as sub-paragraph (*b*) of the reply to question II also spoke of compatibility with the object and purpose of the convention, the whole of the reply to that question be included, with no mention of question I. He would repeat that the criterion was to be applied by each State for itself.

87. Mr. LIANG (Secretary to the Commission) pointed out that paragraph 13 constituted a criticism of the Court's reply to question I. Consequently if the reply to question II were inserted in the paragraph under discussion, the wording of paragraph 13 would have to be changed.

88. Mr. KERNO (Assistant Secretary-General) wondered whether the reply to question I was really at variance with that to question II. He believed that, in question I, the Court had wished to give an objective opinion on the criterion of compatibility, and that in its reply to question II it had said that " in fact " the criterion would be applied. The words " in fact " were very important. Briefly, the onus of replying was, in the first instance, placed on the parties. In his opinion, if the paragraph in question was to include any quotation, it should quote the replies to both question I and question II.

89. The CHAIRMAN, supported by Mr. Alfaro, said that he had no intention of quoting the whole of the

[15] Paragraph 11 ended with the phrase " otherwise, that State cannot be regarded as being a party to the Convention."

replies. He suggested that it would be sufficient to paraphrase them and that the matter might be left to the Rapporteur.

PARAGRAPH 12 (*paragraph 22 of the " Report "*) [16]

90. Mr. HUDSON did not like the phrase " the practice of the Pan-American Union may be well adapted ". He would prefer to tone it down and say, for instance " while the practice of the Pan-American Union as related in paragraph 10 may meet the requirements of a regional organization ". It would be better to word the sentence in that way, as the Commission did not consider that the Union's practice met the requirements of multilateral conventions in general.

91. Mr. HSU was not very satisfied with the wording of the paragraph. While he considered that it did not do justice to the Pan-American Union, that did not mean that he advocated the adoption of the Union's system by the United Nations. Moreover, in the Sixth Committee he had voted to refer the question to the International Law Commission, which proved that he had not yet formed his opinion.

92. The term " regional organization " implied that the system had only been applied in a region, which was not very satisfactory as the American region was extremely vast. Further, the wording of the paragraph gave the impression that, if the Pan-American system had not been adopted by one area only, it would be acceptable for world-wide Conventions. It would be preferable to say: " States of that area " instead of " States within a defined geographic area ".

93. The real objection to the universal adoption of the Pan-American system was that, although the American region was a vast one, the interests represented therein were not very different. International rivalries were not strongly marked. There were hardly any between the United States and Latin America, while, as between the Latin countries themselves, conflicts of interests were not pronounced. On the other hand, at a world level, there were so many conflicting interests that clashes between them were apt to be severe, and, if translated into reservations, would stultify conventions. That was the reason why he was opposed to the adoption of the Pan-American system.

94. He would like to amend the last sentence of the paragraph, as it did not take account of the fact that the framers of the Pan-American conventions hoped that they would become world-wide. He proposed that the end of the paragraph be re-drafted to read: " Such conventions often have a world-wide character and have to take into consideration the conflicts of varied interests which would weaken any convention if permitted to take the form of a reservation."

95. The CHAIRMAN did not see how the passage in question from his report could be considered as a criticism of the Pan-American Union.

96. Mr. YEPES wanted the whole paragraph redrafted. It gave the impression that its purpose was to disparage the Pan-American Union. The Commission should not adopt a text which presented the Pan-American Union in an unfavourable light. It could not be disputed that the practice followed by the Pan-American Union met the requirements of a regional organization, seeing that hundreds of conventions had been adopted under the Union's auspices.

97. He proposed that the first two lines of the paragraph be amended to read, " The Commission recognizes . . . is perfectly suitable " and to continue " and believes that it may be successfully applied to multilateral conventions in general and to those drawn up under the auspices of the United Nations in particular; in fact the Pan-American system has been applied by the United Nations ".

98. The CHAIRMAN said that, before considering any possible amendments, the Commission ought to decide whether or not it proposed to retain the paragraph.

99. Mr. CORDOVA did not believe that the paragraph under discussion was intended as a criticism of the Pan-American Union. It was perhaps going too far to say that the system was suitable. Should the Commission accept the paragraph, it might say that the system was suited to the requirements of the American States. In his opinion, the conventions concluded under the auspices of the Pan-American Union were just as multilateral as those established under the aegis of the United Nations. Further, he did not think that any solution could be based on the number of States parties to a convention. It would be better to avoid saying that the Pan-American Union system was not suited to conventions concluded under the auspices of the United Nations for the reason that such conventions were of more universal application. All the conventions in question were multilateral.

100. Mr. EL KHOURY did not see why the Commission should give its reasons for not following either the Pan-American system or the opinion of the Court.

101. It had been argued that the system of the Pan-American Union could not be adopted, as it was a regional organization adapted to the needs of States in a defined geographical area. Failure to adopt the Court's opinion had been excused on the grounds that it only bore on the Convention on Genocide. That was a dangerous proceeding. The Commission should state the question in general terms, delete paragraphs 12 and 13, and say that it was dealing with a special question for the United Nations and did not need to follow other systems. The Pan-American Union system was not, in any case, the only one. There was also the system adopted by the World Health Organization, which had been described in that Organization's long report to the Court, and the system of the International Labour Organization.

102. There should be a new paragraph of rules on reservations, adapted to world-wide requirements.

[16] Paragraph 12 read as follows:

" 12. The Commission, while recognizing that the practice of the Pan American Union, as related in paragraph 10, may be well adapted to the needs of a regional agency and to the close relations existing between States within a defined geographic area, does not believe that it is equally suited for the purpose of multilateral conventions in general, and to those drawn up under the auspices of the United Nations in particular. Such conventions often have a world-wide character; they are multilateral not only in form and in manner of adherence but in their purpose and essential juridical effect."

103. Mr. AMADO read out an extract from the memorandum on the question of reservations to the Bogotá Economic Convention, submitted to the Inter-American Economic and Social Council by the Brazilian delegation on 22 March 1950. That document, which was presented under the signature of Mr. Accioly, said :

" The documents contained in the two volumes of documentation on the question of reservations, circulated by the Inter-American Economic and Social Council, reveal a considerable divergence of opinion on the concept of a reservation and on the compulsory character of such reservations. The divergence of opinion on this point started with a memorandum by the United States delegation, dated 25 June 1948, which expounded two opinions on the question, one of which was that a reservation, in order to be effective, must be accepted by all the contracting parties, whereas the other maintained that reservations were applicable in regard to the relations of formulating governments with the signatory States accepting them . . . On 19 August 1948 the Government of Mexico maintained, through its representative, that the dominant principle in the matter was that contained in the last part of article 6 of the Havana Convention on Treaties, according to which, in the case of international treaties, concluded between several States, any reservation in the instrument of ratification made by one State only bore on the application of the clause to which it referred, in the relations of the State formulating the reservation with the other contracting States . . . The United States, subsequently, went back on its original position. On 23 September 1948, Chile stated that there was no established international criterion for determining which of the various theses as to the scope of reservations to multilateral treaties should prevail. On 15 October 1948 the Colombian representative stated that he could not approve the thesis based on the last part of article 6 of the Havana Convention."

Mr. Accioly concluded his memorandum of 22 March 1950 by saying that the question was so complicated that it should be submitted to the Inter-American Council of Jurists for the purpose of reaching an agreed view.

104. Mr. SPIROPOULOS said that the Commission was engaged in the discussion of the most important part of the whole question. He was not very satisfied with the drafting of paragraph 12 and had been impressed by Mr. Córdova's and Mr. el Khoury's remarks. He did not believe that it was by means of the reasons put forward in the paragraph that the thesis could be upheld. In his opinion both systems were good. The Pan-American Union was an organization covering a whole continent, and Mr. Yepes had quoted conventions in which the American system had been applied. That meant that it could be applied, even outside the American continent. If it should be necessary to look elsewhere for a system to recommend, the reason did not lie in the fact that the Latin American countries formed a region, but that the system which the Commission would propose must be based on existing international law. In the case of a convention concluded between the United States and some European and some Asiatic countries, for instance, it would be necessary to establish a rule on reservations acceptable to all the States. It was, therefore, necessary that the system conform to international law, as understood by the Commission. Should the Commission consider that it had to justify the solution it adopted — which, as Mr. el Khoury had said, was not, perhaps, necessary — it would suffice to point to the above rule. In that case, however, it should either give the real reason for the adoption of that rule, namely, that it considered it to be the law in force, or else give some other reasonable and positive explanation.

105. Mr. AMADO observed that the result of that course would be to reopen the whole question of American versus European international law. So far as the Pan-American Union was concerned, American international law was in force.

106. Mr. SPIROPOULOS replied that it was in force, but only in America. The Commission was dealing with general international law, and that was why he had, previously, put forward the case of a convention concluded between the United States, and European and Asiatic countries.

107. Mr. AMADO was of the opinion that paragraph 12 was perfectly accurate. It could not be denied that agreement between the Latin American countries was facilitatcd by cultural unity and the absence of historical antagonisms. Was it better to advance such material considerations, or look for a juridical justification. That was another matter. It was not possible to refer to the law, as applied by the League of Nations, as there had been too great a lapse of time. He did not quite see how to re-draft paragraph 12.

108. Mr. CORDOVA considered that the Commission should first decide whether it proposed to adopt the paragraph on Pan-American practice. If it did not, alternative texts could be suggested.

109. Mr. ALFARO considered that there was a great deal of truth in what Mr. Amado had said. As regards the fears expressed by Mr. Hsu and Mr. Córdova he was of the opinion that everything should be discarded that might be considered as a criticism of the Pan-American Union's system. But he also felt that any inhabitant of the American continent would be prepared to admit that so-called American international law was the application of universal international law to the particular problems arising in America, and that the way in which they had been solved did not afford any guidance for the solution of world-wide problems. The decision not to adopt the Pan-American Union's system might be based on the existence of very close relations between the twenty-one republics of the western hemisphere. He suggested that the paragraph be re-drafted to read : " The Commission, while recognizing that the practice of the Pan-American Union, as related in paragraph 10, may be well adapted to the needs of a regional agency and to the close relations existing between the American States, believes that in the case of a community of world-wide interests different rules would be required ".

110. The CHAIRMAN repeated that he did not see any criticism of the Pan-American Union in the wording of

the paragraph as it stood, and did not understand how some of his colleagues could have gained that false impression.

111. Mr. YEPES asked whether it was the intention of the report to discard the Pan-American system entirely.

112. Mr. HUDSON said that the report did not discard it. It left room for its application, as was shown by the alternative proposals in Part 4 of the annex to the draft report.

113. The CHAIRMAN observed that Mr. Yepes wished the Commission to recommend the application of the Pan American Union's practice in all cases where the parties had not expressed in the text of the treaty their wishes in regard to reservations.

114. Mr. YEPES said that it was one of the systems that could be applied in such cases.

115. The CHAIRMAN replied that, where the treaty made no reference to the matter, only one system could be recommended.

116. Mr. CORDOVA felt that, if the so-called Pan-American practice was a good one, it could be applied universally, but that if it were bad, it could not be good for America. An explanation should be provided as to why a juridical solution, valid for one quarter of the world, should have to be changed when applied to States in other continents.

117. The CHAIRMAN considered that the Pan-American Union system was applied in America because the States of that continent considered it to be suitable for their purposes.

118. Mr. HUDSON felt that it was desirable to state the fundamental problem, which was, on the one hand, the relative importance to be attached to universality and, on the other, the integrity of the text and its uniform application. In some cases the integrity of the text and its uniform application outweighed the desire for universality, and in others universality was of greater importance than uniform application.

119. It was not for the Commission to render an appreciation of the practice followed by the Pan-American Union. It had simply to say whether it wished that system to be applied generally.

120. The Rapporteur was right in saying that no one rule was applicable in all cases. (A/CN.4/L.18, Annex), and that the integrity of the instrument must be preserved.

121. The CHAIRMAN considered that the Commission had to decide whether to recommend that, where a Treaty contained no special provisions in the matter, the Pan-American rule should be applicable.

122. Mr. CORDOVA proposed that the vote be postponed until the following day.

It was so decided.

The meeting rose at 1 p.m.

102nd MEETING

Wednesday, 13 June 1951, at 9.45 a.m.

CONTENTS

Chairman: Mr. James L. BRIERLY

Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Law of Treaties: General Assembly resolution 478 (V) of 16 November 1950: Reservations to multilateral conventions (item 4 (*b*) of the agenda) (A/CN.4/L.18) *(continued)*

DISCUSSION OF MR. BRIERLY'S DRAFT REPORT (A/CN.4/L.18)[1]

PARAGRAPH 12 (*paragraph 22 of the "Report"*) (continued)

1. The CHAIRMAN observed that the Commission had before it a proposal by Mr. Yepes that if the parties to a treaty had not inserted in the text of the treaty provisions covering possible reservations, the procedure to be followed should be that of the Pan-American Union.[2]

2. Mr. YEPES explained that the reason why he had proposed the adoption of that procedure was that, after examining the matter closely, he had come to the conclusion that the procedure recommended in the report was not acceptable.

3. His proposal was to be regarded as a basis for discussion. If good reasons were put forward for rejecting the Pan-American Union practice and adopting the course recommended, he would be quite willing to accept them. The drawbacks to the former procedure and the advantages of the latter ought to be clearly established before any decision were taken. The Commission should not commit itself in advance or yield to argument just because the weight of authority was behind it. Not a single

[1] See summary record of the 101st meeting, footnote 1.

[2] *Ibid.*, para. 97.