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Summary record of the 104th meeting

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131. The CHAIRMAN pointed out that the same difficulty would arise whatever procedure were followed in respect of reservations. At the present stage the Commission was merely endeavouring to determine the difficulties that would result from the solution recommended by the Court in its Advisory Opinion.

132. Mr. HUDSON drew the Commission's attention to a passage in the written statement of the Government of the United States of America to the International Court of Justice, advocating the system which the Court had adopted in its opinion. The passage in question stated that that method would simplify the role played by the depositary, who would be relieved of the necessity of taking any initiative and whose actions, it was argued, would be completely automatic.[11]

133. Mr. LIANG (Secretary to the Commission) pointed out that the depositary would in any event have to decide what effects reservations had on the entry into force of the treaty, and so on.

134. The CHAIRMAN suggested that the words " legal effect " be substituted for the word " admissibility ".

135. Mr. HUDSON thought the words suggested by the Chairman were much to be preferred.

The meeting rose at 1.5 p.m.

104th MEETING

Friday, 15 June 1951, at 9.45 a.m.

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

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.

[11] *I.C.J., Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Pleading, oral arguments, documents,* written statement of the U.S.A., p. 43.

Closing date of the third session and arrangements for the fourth session

Closing date

.....

It was decided to fix 27 July as the closing date of the third session.

Place and date of the fourth session

.....

It was decided by 10 votes to 2 to recommend that the fourth session of the Commission be held in Geneva.

.....

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] (*continued*)

PARAGRAPH 15 (*paragraph 25 of the " Report "*) (continued)

27. The CHAIRMAN stated that he had redrafted the text which he had suggested should be added after paragraph 13, in order to take into account the various comments made towards the end of the previous meeting, particularly those of Mr. Liang. His redraft, which would be substituted for paragraph 15 of document A/CN.4/L.18, read as follows:

> " The Commission believes that these considerations have a special pertinence to multilateral conventions of which the Secretary-General of the United Nations is the depositary. The Secretary-General is already the depositary of more than a hundred such conventions, and may be expected to become the depositary of many more. The Commission is impressed with the complexity of the task which he would be required to discharge if reserving States can become parties to multilateral conventions despite the objections of some of the parties to this reservation. He would have no power of determining any difference that might arise as to the legal effect of a reservation tendered, and it would be his duty to keep account of the manifold bilateral relationships into which such a rule would tend to split a multilateral convention."

He requested the Commission to consider that new text sentence by sentence.

First sentence

28. Mr. HUDSON suggested that the words " to which the Commission paid special attention " be added after the words " these considerations ", so as to reflect the fact that the Commission had had in mind the instructions it had received from the General Assembly in resolution 478 (V).

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

29. The CHAIRMAN thought the sentence would be less cumbersome if it ran:

" The Commission has been asked to pay particular attention to multilateral conventions of which the Secretary-General of the United Nations is the depositary, and it believes that these considerations have a special pertinence to such conventions."

The first sentence was adopted in the form read out by the Chairman, subject to any minor drafting changes.

Second sentence

30. Mr. ALFARO pointed out that the second sentence merely stated an undeniable fact.

The second sentence was adopted.

Third sentence

31. Mr. YEPES asked that the English word " impressed " should not be rendered in French by " *impressionné* " or in Spanish by " *impresionado* " both of which would be too strong.

32. Mr. CORDOVA suggested that the words " is impressed with " be replaced by the words " is aware of ", and Mr. ALFARO suggested that they be replaced by the word " realizes ".

33. The CHAIRMAN urged that the present text be maintained, but that Mr. Yepes's observation be borne in mind when it came to translating it.[2]

It was so agreed.

Last sentence

34. Mr. HUDSON asked that the word " yet " be inserted after the word " and ".

35. Mr. SCELLE approved the idea expressed in the last sentence. He thought it should be pointed out that in certain extreme cases the question would arise whether a convention was or was not in force. That would happen when, in connexion with a convention which provided for possible reservations, a difference of opinion arose as to whether a reservation tendered was or was not in accordance with those provisions of the convention that related to reservations. Similarly, real deadlocks might occur if the ratifications which made up the number necessary for a convention to enter into force included ratifications subject to reservations, to which objection was taken by some of the other States that had ratified.

36. He personally did not believe that such difficulties could be avoided.

37. Mr. HUDSON wondered whether it was really the depositary's responsibility to keep account of the manifold bilateral relationships which reservations would tend to bring about. He did not think it was the Secretary-General's duty to keep an up-to-date list of the commitments between individual States. As the United States Government had declared in its statement to the International Court of Justice on the question of reservations to the Convention on Genocide, those functions did not belong to the Secretary-General.

38. Mr. KERNO (Assistent Secretary-General) agreed that the word " duty " was too strong, as the depositary had no legal obligations in that respect. There was no doubt, however, that the Secretary-General would in fact keep account of the various situations that arose, since he considered himself to be the trustee of the parties to the convention and of the other Member States. He wished to be in a position to reply to their enquiries and he knew that he was the only one who could do so.

39. Mr. HUDSON proposed that the words " it would be his duty " be replaced by the words " he would be expected ".

40. Mr. ALFARO considered that the important point was to enable interested governments to obtain information from the Secretary-General on request, and he suggested that the beginning of the second part of the last sentence be reworded as follows: " and the inquiries from interested quarters would compel him to undertake the task of keeping account . . .".

41. Mr. HUDSON thought that, supposing State A made a reservation, it would be submitted by the Secretary-General to certain other States — exactly to whom was not yet settled. In reply, State B sent a note which was not clear, and the Secretary-General asked for clarification. The second note from State B was still open to two possible interpretations. Had the Secretary-General then to say whether or not State B had rejected the reservation, or had he to leave it to the parties to the convention to decide?

42. Mr. KERNO (Assistant Secretary-General) thought that in that particular case the Secretary-General could rest content, if need be, with an ambiguous reply. In practice, he would endeavour to obtain clarification, and in point of fact usually succeeded, but there could be no doubt about the fact that the final decision rested with the State which was the author of the reply in question.

43. With reference to the first part of the last sentence, Mr. SANDSTRÖM recalled that difficulties regarding the legal effect of reservations could arise even under the practice hitherto followed, though to a lesser degree than under the system recommended by the majority of the judges of the International Court of Justice. There was, therefore, no difference of kind between the operations the Secretary-General would have to carry out under the two systems.

44. The CHAIRMAN agreed that it was only a difference of degree. In his text he had emphasized the complexity of the Secretary-General's task.

45. Mr. SANDSTRÖM thought the new text would have to repeat Mr. Scelle's remarks with regard to deadlock resulting in certain extreme cases.

46. The CHAIRMAN pointed out that the complications which could arise from the fact that a convention made entry into force dependent on the deposit of a certain number of ratifications, were already referred to in the last sentence of paragraph 13 of the draft report. He saw no point in repetition.

47. Mr. SANDSTRÖM thought that the idea should be referred to again in connexion with the Secretary-General's functions as depositary.

[2] It was translated in French by "*frappé*", en in Spanish by "*se ha dado cuenta cabal*".

48. Mr. SCELLE, reverting to what could be called deadlocks, put forward the hypothesis that a State tendered a reservation to a convention which explicitly provided for reservations, under certain conditions, and that another State party to the convention was of the opinion that the State which had made the reservation had had no power to do so. In such a case, would the Secretary-General accept or refuse the reservation? To leave it to him to choose would be to ask him to discharge a duty which was not his. In order to avoid imposing that duty upon him, could the Commission not transfer it to the International Court of Justice by laying down that, when the Secretary-General was caught between the divergent opinions of two States, he would have the power to ask the Court for an advisory opinion?

49. Mr. KERNO (Assistant Secretary-General) pointed out that the Secretary-General had not that power. The General Assembly could, however, authorize him to ask for advisory opinions under Article 96, paragraph 2, of the Charter.

50. Mr. SCELLE thought that, under Article 96, it would be necessary to propose to the General Assembly that it formally recognize the Secretary-General's right to ask the Court for advisory opinions. In the case of a conflict between two parties, one of which had made a reservation that it believed to be permitted under the convention whereas the other did not accept that reservation as valid, what authority was to settle the question? If it were the Secretary-General, he would be exercising judicial functions. It was therefore better to allow him to ask the judicial organ for advice.

51. The CHAIRMAN pointed out that the same difficulty arose whatever the procedure followed in respect of ratifications, under the Pan-American system, under that recommended by the Court, or under the traditional system. It arose whenever a convention contained ambiguous clauses relating to reservations.

52. Mr. HUDSON thought that Mr. Scelle's point would be met if the following words were used in the first part of the last sentence: " Situations may arise in which he would have to take a position concerning a difference as to the legal effects of a reservation tendered." Administratively the Secretary-General was bound to take a position. His position could, however, be challenged by the General Assembly or by a State, and the two States in question could also bring the question before the International Court of Justice under article 36, paragraph 2, of the Statute of the Court.

53. In using the words " take a position ", he was in no sense recognizing the Secretary-General's duty to take a final decision.

54. Mr. SCELLE observed that, under the text proposed by Mr. Hudson, the depositary would be able to bring a convention into force or not.

55. Mr. HUDSON pointed out that the depositary's decision in such a case could be subsequently overruled.

56. Mr. SPIROPOULOS thought that the Secretary-General was not empowered to settle a difference of opinion on the legal effect of a reservation, and that he could go no further than take a position. When the twentieth ratification of a convention, whose entry into force in fact depended on twenty ratification instruments being deposited, was deposited subject to a reservation, the Secretary-General had, of course, to take a position, but final settlement of the question lay outside his powers. Moreover, his discretionary powers only came into play when he was called on to give a ruling on a convention's entry into force. In every case, the depositary's duty was confined to communicating to the other parties any reservations or objections he received, without stating an opinion on the question.

57. The text under consideration was not clear and might be interpreted as preventing the Secretary-General from taking even a provisional administrative decision.

58. Mr. SANDSTRÖM thought it should be stated more clearly that it was desirable to allow the Secretary-General to reply, in delicate cases, to the two questions: Who is party to the Convention? and Is the Convention in force?

59. The CHAIRMAN referred to the words which Mr. Hudson had proposed with that end in view.[3]

60. Mr. EL KHOURY proposed that the words " provisionally at least " be added after the words " it would be his duty ".

61. Mr. HUDSON accepted that suggestion.

62. Mr. KERNO (Assistant Secretary-General) said that the Secretariat regularly published complete information about the status of the conventions concluded under the auspices of the United Nations. The Secretary-General must therefore be allowed to decide what details should be included in those lists.

63. Mr. HUDSON submitted the following case: Under article 36, paragraph 2, of the statute of the International Court of Justice, Paraguay made a declaration recognizing, for an unspecified period, the jurisdiction of the Court as legally binding; it subsequently announced that it withdrew that undertaking, and no objection was made to that new decision.

64. In its annual report, the Court included Paraguay among the States which recognized its jurisdiction as binding, but it added a footnote explaining the special features of the case. On the other hand, he himself, in drawing up the list of States which recognized the jurisdiction of the Court, for his *World Court Reports* and for his annual articles in the *American Journal of International Law*, did not include Paraguay, but explained the special situation of that country in a note. In that way, both he and the Court took positions, neither of which was final.

65. Mr. SCELLE agreed that the depositary should be authorized to take a position, provided it was clearly understood that it was not regarded as a final decision.

66. The CHAIRMAN proposed that the first part of the last sentence of his new text be replaced by the wording suggested by Mr. Hudson.

67. Mr. EL KHOURY thought that it was addition rather than substitution that was called for. The first part of the last sentence of the redraft would remain, and

[3] See para. 52 above.

would be followed by the words proposed by Mr. Hudson, preceded by the word " but ".

68. Mr. HUDSON said he had no objection to that being done, but would prefer that the words " He would have no power " should not be used.

69. The CHAIRMAN said he too would prefer substitution to addition.

70. Mr. SANDSTRÖM suggested that the word "easily" or the word " often " be inserted before the word " arise " in the wording proposed by Mr. Hudson.

71. Mr. Hudson thought that the word " easily " could be used. The sentence would then read as follows: " Situations may easily arise . . .".

72. He drew attention to the practice of the Universal Postal Union. The Bureau exercised very broad discretionary powers in respect of conventions, and was constantly taking amazingly bold decisions. No objections was ever made, however, to those decisions, all of which were tacitly endorsed by the States concerned.

73. Mr. SCELLE pointed out that the legality of the decisions taken by the Bureau of the Universal Postal Union derived from the fact that the States in question made no objection and were therefore regarded as accepting them.

74. Mr. YEPES wondered whether the text suggested by Mr. Hudson gave the Secretary-General the necessary power to classify reservations that were deposited. In the case of a convention that made no provision for reservations and of a State attaching to its ratification what it stated was a reservation, but what was in reality only an interpretation, did the text under consideration authorize the Secretary-General to declare that the reservation was not a reservation in the technical sense of the term, and not to treat that interpretation as though it were a reservation?

75. The CHAIRMAN, supported by Mr. KERNO (Assistant Secretary-General), pointed out that in such cases the Secretary-General took a position provisionally. In practice he acted in the way that Mr. Yepes had just indicated.

76. The CHAIRMAN asked the Commission whether it agreed to the text suggested by Mr. Hudson, in its new form as amended by Mr. el Khoury.

The text as thus amended was adopted.

77. The CHAIRMAN recalled that, after the words which had just been adopted, it had previously been proposed[4] that the text continue " and he would be expected to keep account . . .".

78. Mr. AMADO, reverting to the text which had just been adopted, said that he could not accept the word " easily ".

79. Mr. SANDSTRÖM, recalling that the addition of that word had been proposed by him, explained that it had been his intention to bring out as clearly as possible the distinction between the system recommended by the Court in its advisory opinion and the traditional practice of international law. He did not insist on its being retained.

[4] See para. 39 above.

80. Mr. HUDSON proposed that the word " legal " be deleted as unnecessary and as open to criticism on the part of those who believed, like Mr. Scelle, that if the text was too far-reaching it would have the effect of giving the depositary judicial powers.

It was agreed to delete the word " legal ".

The whole of the last sentence of the new text was adopted subject to the above amendments.

PARAGRAPH 16 (*paragraph 27 of the " Report "*)[5]

81. The CHAIRMAN read out the first sentence of paragraph 16, omitting the words " of course ".

82. Mr. SCELLE pointed out that reservations to multilateral conventions could give rise to difficulties, even when the convention contained perfectly clear provisions on the matter.

83. Mr. HUDSON accordingly proposed that the words " raise difficulties only " be replaced by the words " usually raise difficulties ". He also suggested that the two parts of the first sentence be transposed.

84. The first sentence, moreover, only mentioned provisions limiting the admissibility of reservations. Conventions could also contain provisions concerning the effects of objections to reservations.

85. The CHAIRMAN proposed that the words " and for the effect of objections to such reservations " be added to the sentence in question.

86. Mr. KERNO (Assistant Secretary-General) put the following question: When a convention provided that reservations could be made in respect of articles X, Y and Z, did it follow that reservations made in respect of other articles were inadmissible, even if all the contracting parties unanimously agreed to them?

87. Mr. SCELLE thought that such reservations were certainly inadmissible.

88. Mr. HUDSON believed, on the contrary, that given unanimity, nothing was impossible. In the case in point, if reservations were tendered in respect of articles other than X, Y and Z and accepted by all the contracting parties, it amounted to a revision of the convention.

89. Mr. FRANÇOIS said that in that case the whole revision procedure must be followed, including approval by parliaments. Governments could not by themselves revise a convention by accepting reservations to it.

90. Mr. KERNO (Assistant Secretary-General) said that that was the point he had wished to have clarified.

[5] Paragraph 16 read as follows:

" 16. Reservations to multilateral conventions raise difficulties only when the convention itself contains no provision on the matter, and it is of course always within the power of negotiating States to provide in the text of the convention itself for the limits within which, if at all, reservations are to be admissible. An annex to this part of the Report contains a number of draft model clauses. One or other of these, depending on whether uniformity or universality is regarded as the more important in any particular case, would, it is believed, be suitable for inclusion in most multilateral conventions. Much difficulty and dispute may be averted if some such model clauses could be adopted by the General Assembly and recommended to the organs of the United Nations, the specialized agencies and to States, for selection and insertion in the multilateral conventions negotiated by them, wherever the nature of such conventions warrants."

91. Mr. SANDSTRÖM, taking up the hypothetical case presented by Mr. Kerno, asked whether objection to reservations in respect of articles X, Y and Z was excluded.

92. Mr. SPIROPOULOS thought that it was. If a reservation fell within the limits of those provisions of a convention that related to reservations, it did not need to be accepted.

93. Mr. HUDSON thought that Mr. Spiropoulos' observation was well-founded.

94. He proposed that the last sentence of paragraph 16, beginning with the words " Much difficulty ", be placed immediately after the first sentence, viz: before the sentence beginning with the words " An annex to this part of the report ".

95. *It was decided to leave it to the Rapporteur* to recast paragraph 16 in the light of the various suggestions put forward and to decide the order of sentences.

PARAGRAPH 17 (*paragraph 28 of the " Report "*) [6]

96. Mr. HUDSON pointed out that in paragraph 17 two separate questions were placed in juxtaposition. That of the right of States which had merely signed a convention to object to reservations was described with extreme brevity at the end of the paragraph; in fact it constituted a major difficulty and would certainly be brought up in criticism of the Commission's position in the matter. There was nothing but advantage to be gained from stating clearly the weak point of an argument without for one's opponent to discover it, and replying in advance to possible criticisms. Frankness was always appreciated, and it was good psychology to display it.

97. He proposed that a new paragraph be begun after the words " in paragraph 19 below " and that the point be developed.

98. Mr. AMADO fully subscribed to Mr. Hudson's remarks and proposed that the whole of that part of the paragraph beginning " The Commission is aware " be made a separate paragraph, numbered 18.

NEW PARAGRAPH 18 (*paragraph 29 and 30 of the " Report "*)

99. The CHAIRMAN thought that a special debate would have to be devoted to the point that had been raised: What States had the right to object to a reservation?

100. Mr. HUDSON said that the Conventions drawn up at the Red Cross Diplomatic Conference at Geneva in 1949, for example, had been signed by sixty-one States, but that unfortunately they had provided for entry into force only after the deposit of ratification instruments by two States. Switzerland and Yugoslavia had been the first to ratify, and the Conventions had entered into force as a result.

101. If State A made its ratification subject to a reservation and if Switzerland and Yugoslavia accepted it, then, in the event of States which had merely signed the conventions being disqualified from objecting to reservations accompanying ratifications, fifty-eight other States would be prevented from tendering objections to the reservation tendered by State A.

102. That was a very awkward situation. It was the weak point of the Commission's argument. To escape from it an intermediate solution must be proposed. The Commission might compromise by recommending inclusion in conventions of a clause fixing a time-limit during which States which had merely signed the convention might lodge objections to a reservation. A further provision might also be added that in such cases the exercise of that right should be subject to early subsequent ratification.

103. He had just been dumbfounded to learn that Yugoslavia, one of the two States which had ratified the Geneva Conventions, had itself tendered reservations. That dit not however affect his conclusions one iota.

104. Mr. FRANÇOIS submitted a proposal which he thought might get over the difficulties of which Mr. Hudson had just spoken, while at the same time respecting the principle that the consent of signatory States was necessary to give effect to ratifications with reservations. His proposal was to substitute the following for subparagraphs (1) and (2) of paragraph 19 of the draft report: [7]

> " When, whether before or after the entry into force of a multilateral convention, a State signs, ratifies, accedes to or accepts the convention subject to a reservation, that State may become a party to the convention if all States which, at the time the reservation is tendered, have signed, ratified, acceded to or accepted the convention, expressly or tacitly consent to the reservation. The consent of a State which has not ratified or accepted the convention within three years of its signature shall not, however, be required."

105. That provision more or less followed the procedure adopted in the Convention on Terrorism dated 16 November 1937. A provision in article 23 of that convention, however, that reservations tendered within three years of the convention's entry into force should be liable to rejection by States which had merely signed the convention, had appeared impracticable because it would permit a State which had signed the convention, but had no intention of ratifying it, to prevent a reserving State from becoming a party to the convention, by refusing to accept the reservation.

[6] The beginning of paragraph 17 was identical to paragraph 28 of the " Report ". Then paragraph 17 read as follows:

" . . . On the whole, the Commission believes that such a rule is to be found in the practice hitherto followed by the Secretary-General, and it has formulated its views on this in greater detail in paragraph 19 below. The Commission is aware that certain authorities in international law, notably the Harvard Research, would extend the right of excluding a reserving State from participation in a multilateral convention to all the signatories, and it believes that strong arguments can be adduced in favour of a rule to this effect. On the whole, however, the Commission believes that such a rule would be unduly restrictive. A signatory is under no obligation to, and very often does not, ratify a convention, and unless it does so it will ultimately have no interest in the convention. It is believed that such interest as it has pending ratification can be sufficiently protected by providing that reservations should be communicated to signatories so that will have an opportunity to raise objections if they wish to do so."

[7] Paragraph 34 of the " Report ".

106. He had thought it preferable to say that a reservation could not be refused by a State whose signature had not been followed within three years by ratification. In other respects his proposal reproduced the relevant provisions of the convention he had quoted.

107. The CHAIRMAN observed that Mr. François' proposal put forward a very interesting compromise solution.

108. Mr. SPIROPOULOS said he wished to stress the fact that the proposal did not correspond to existing law.

109. Mr. SCELLE pointed out that members of the Commission were not there merely to confine themselves to stating existing law.

110. Mr. HUDSON also thought that the Commission should propose a practical solution.

111. The CHAIRMAN said there was no point in continuing detailed consideration of the draft report until the Commission had decided which rule it was going to recommend. There were three possibilities, the Secretariat rule, stated in the conclusions of the report, the Harvard rule (articles 14–16) and an intermediate solution such as that suggested by Mr. François. The Commission should indicate which solution it preferred.

112. He had not referred to acceptance by signatories, because it often happened that signatories did not ratify a convention and took no interest in what might happen afterwards.

113. He approved Mr. Francois' proposal, which covered the difficulty by fixing a time-limit.

114. Mr. FRANÇOIS said that the system under which only States which had ratified a Convention could refuse to accept reservations to it presented another disadvantage. If certain States tendered reservations to which other States objected, the acceptance of reservations, and thus the entry into force of the convention, would depend on chance since, if the convention were first ratified by States which accepted the reservations, then the reservations would be accepted, but if it were first ratified by States which did not accept the reservations, then the reservations would not be accepted. The situation to which the system thus gave rise could make for perennial doubt and could not be tolerated.

115. Mr. KERNO (Assistant Secretary-General) wondered whether he understood Mr. François' proposal correctly. It seemed that in one respect the number of States which had a say in the matter was larger than under the system proposed in the draft report, since States which had merely signed the convention were given the right of objecting to a reservation. In another respect the number was smaller, for under the system advocated in sub-paragraph (1) in the draft report, all those States which had ratified or acceded to the convention by the time of its entry into force had a say in the matter, even if they had not ratified it or acceded to it till after the reservation had been entered. Under the system proposed by Mr. François, the relevant time, for the purpose of determining what States could make objections, was the time when the reservation was entered.

116. Mr. HUDSON asked if Mr. François would agree to alter slightly the last two lines of his proposal. He did not think the Commission should say " within three years of signature ", since experience had shown that it was rare for a multilateral convention to be ratified by more than a few States within two or three years of signature. The 1949 Geneva Conventions had been concluded in August; a year later they had been ratified by two States and now by nine.

117. The CHAIRMAN saw the force of Mr. Hudson's argument and asked what changes he suggested.

118. Mr. HUDSON replied that he was in a quandary.

119. Mr. FRANÇOIS thought that three years were usually sufficient. It should be remembered that the 1949 Geneva Conventions raised exceptional difficulties. In the case of the Netherlands, their translation, for example, had required a considerable time. It could however be said that States were usually in a position within three years to decide whether or not they accepted a convention.

120. Mr. HUDSON remarked that the observer from the International Committee of the Red Cross had informed him that three years was long enough to enable the parliaments of most States in the world to examine the convention. As Mr. François had pointed out, however, before submitting the text of a convention to parliament, the Ministry of Foreign Affairs had to study it carefully, and that might take a long time. He did not think the Commission could do more than suggest that a time-limit be fixed in each case with due regard to circumstances. The Montevideo Convention on the Nationality of Women, of 26 December 1933, for example, comprised only one article; in that case, study of the convention should not have required much time.

121. Mr. KERNO (Assistant Secretary-General) said he felt it necessary, in view of Mr. Hudson's remarks, to point out that the Commission was only considering cases where a convention made no special provision. The usefulness of the Commission's work lay in indicating to States which were negotiating a convention what the position would be if they made no provision regarding that question. If they then wished to adopt a different solution, they would make appropriate provision in the convention. Mr. Hudson appeared to have in mind the drafting of a standard clause.

122. Mr. HUDSON said in reply that the Commission was perhaps engaged both in trying to draft a standard article for inclusion in conventions, and also in trying to establish a procedure for present and future conventions which contained no provisions regarding that question.

123. Mr. SPIROPOULOS thought that the Commission must fix a time-limit for conventions which were silent on the point. Otherwise there was no means of knowing who was to fix it.

124. Mr. FRANÇOIS pointed out that the first sentence of paragraph 17 of the draft report indicated that the Commission was establishing rules for cases where negotiating States had omitted to include a special rule.

125. Mr. HUDSON thought that a signatory State which objected to a reservation must be in a position to say that it was actively considering ratification of the convention, or that ratification procedure was in progress. If it decided not to ratify the convention, and made a

statement to that effect, its objection should no longer be valid.

126. He thought that in cases where conventions made no special provision, the Commission might suggest that objections submitted within a certain period, which the Secretary-General would decide from purely objective considerations, would prevent the reserving State from becoming a party to the convention, provided that the signatory State which had submitted those objections was ableto say that its ratification procedure was in progress.

127. Mr. FRANÇOIS thought it would be very difficult for a State to commit itself in that way. Everything depended on the consent of parliament.

128. Mr. HUDSON stressed the fact that a State would only have to say that ratification procedure was in progress. That did not prejudice the outcome. If parliament refused its consent, the State would say that it was not ratifying the convention and would withdraw its objection, and the reserving State would no longer be prevented from becoming a party to the convention.

129. Mr. FRANÇOIS said he could not accept a solution which made the validity of an objection dependent upon a declaration by the State which was the author of the objection that ratification procedure was in progress, or that it intended to ratify. That introduced an element of considerable uncertainty. The Secretary-General would wonder whether to include such States among those accepting, and the consequences could be imagined if he included them among those who accepted the convention and their parliaments subsequently rejected it.

130. Mr. HUDSON replied that the objection of one State would prevent a reserving State from becoming a party to the convention, but that the situation would be changed if the State which had lodged the objection declared that it was not going to ratify the convention; the reserving State would then no longer be prevented from becoming a party to it.

131. Mr. EL KHOURY said there were two possible solutions: either to wait indefinitely, or to fix a reasonable time-limit after which States which had not ratified a convention should be considered as not ratifying it, and their objections would no longer be valid.

132. Mr. HUDSON suggested saying that an objection by a State signing the convention would be valid provided that State ratified the convention within x months.

133. The CHAIRMAN observed that that suggestion amounted to the same thing as Mr. François' proposal, except that the period suggested was shorter.

134. Mr. FRANÇOIS pointed out that a period of a few months would not be sufficient. He preferred the method he had proposed, which was also more simple.

135. Mr. EL KHOURY considered that a year should be sufficient, since in general parliaments held one or two sessions annually.

136. Mr. AMADO thought that the system proposed by Mr. François did away with every difficulty. The Commission should have the courage to take a decision. He personally accepted the three-year period. If the Commission was going to discuss the likelihood or otherwise of parliaments ratifying etc., there would be no end to it.

137. Mr. SCELLE observed that the system proposed by Mr. François obliged Governments to deal with conventions; if a time limit were fixed, it was more probable that they would settle down seriously to studying them. A three-year period was just right.

138. Mr. CORDOVA wondered whether Mr. François' proposal would constitute an obligation on signatory States to ratify conventions, an obligation which the Commission had refused to recognize.

139. Mr. FRANÇOIS said that the answer was a categorical negative. Once the time-limit had expired, a signatory State which did not ratify would only lose its right to object to a reservation.

140. Mr. AMADO pointed out that Mr. François' proposal put the emphasis on consent. If a State was slow about giving its consent, the international community was kept in uncertainty; and if consent was not given, the benefits that could be expected from the treaty were diminished. He approved Mr. François' proposal, which represented a practical solution of the problem under consideration.

141. The difficulties that had arisen in the Commission's discussions, and the stages through which it had had to pass in order to arrive at that conclusion, would be clearly seen.

142. The CHAIRMAN said that in that way one of the major difficulties in the systems recommended by the Harvard Research and by the United Kingdom was done away with, in that it became impossible for a signatory to abuse his right of objection.

143. Mr. HUDSON said he was in favour of the first part of Mr. François' proposal. He proposed that the last part read:

> " An objection to the reservation may be made by a State which is signatory only, subject to that State proceeding within [a period of time of . . .] to deposit its ratification."

144. As the observer of the International Committee of the Red Cross could confirm, a number of Governments were expediting ratification procedure for the 1949 Geneva Conventions. They should surely be entitled to give their views on a reservation.

145. What the text he proposed said was, that an objection would be effective whether made by a State party, a State which had previously deposited its instrument of ratification, or a signatory State, but that in the last-named case the objection would cease to have the effect of debarring the reserving State unless the State that had made the objection proceeded to deposit its instrument of ratification within a period of x months.

146. The CHAIRMAN requested the Commission to take a decision in principle between the three possibilities that were open, which were, firstly, the rule recommended by the Secretariat and contained in paragraph 19 of the report; secondly, the rule that all signatory States must give their consent; and lastly, the intermediate system proposed by Mr. François, whereby a State which signed

a convention but did not ratify it could not prevent the reserving State from becoming a party to it.

147. He asked Mr. Kerno whether the system proposed by Mr. François would present any difficulties in practice.

148. Mr. KERNO (Assistant Secretary-General) replied that the Secretariat could put any of the systems into practice, provided it received guidance from the Commission; the only difference would be that it would take rather longer to apply the system proposed by Mr. François.

149. Mr. CORDOVA asked whether the three years period was to date from the entry into force of the Convention.

150. Mr. HUDSON replied that it would run from the date of notification of the reservation.

151. Mr. YEPES said that he was in favour of the text proposed by Mr. François, as he agreed that the period during which States should be entitled to object to a State's becoming party to the convention should be restricted as much as possible.

152. The CHAIRMAN stressed the importance of the Commission's taking a decision. He wished to have guidance from the Commission on the question of principle. A decision would not be irrevocable and would not prevent representatives from subsequently submitting objections.

Mr. Francois' proposal was unanimously adopted in substance.

153. Mr. KERNO (Assistant Secretary-General) thought that one point required clarification. Mr. François said that there was a decisive juncture for noting what States could submit objections, namely, when a reservation was notified. No doubt could arise if the reservation were entered at the time of ratification or accession. But what would happen if the reservation was entered at the time of signature? The time of signature by the reserving State should therefore be the time selected for ascertaining which States had signed and which might therefore object to the reservation.

154. Mr. FRANÇOIS thought that was a question of detail which could be settled with the Secretariat.

155. Mr. KERNO (Assistant Secretary-General) held, on the contrary, that the question was very important, since some considerable time might elapse between the submission of a reservation and ratification by the reserving State.

156. Mr. FRANÇOIS explained that the time limit for each State began to run from the date of its signature.

157. Mr. KERNO (Assistant Secretary-General) said that the question was to ascertain the number of States entitled to object; it might be three one day, five the following week and fifty the following year, so that if a State signed with a reservation and only three other States could object, the issue would depend on those three States. If the reserving State ratified much later, States which had ratified earlier would be debarred from consultation on the reservation. The fixing of the starting time was important, because only States which had signed by that time were qualified to object.

158. Mr. SCELLE pointed out that the memorandum he had submitted concerning reservations to multilateral conventions (A/CN.4/L.14) referred only to the original signatories. The other States could not be regarded as signatories, but must be counted among the States acceding to the Convention, since they had not framed the text.

159. Mr. HUDSON explained that various South American and Central American States were not invited to The Hague Conference of 1899 and that the Convention resulting from that Conference was put into effect just before The Hague Conference of 1907. The States in question had been authorized to sign and ratify the 1899 Convention, in other words, to accede to the Convention.

160. Mr. SCELLE agreed. Without re-stating the theory which he had expounded in his memorandum in order to show the relationship between national and international legislation, he would point out that in 1909 no South American State had been deemed to have participated in the framing of the Convention on the Pacific Settlement of International Disputes and that, having been invited to sign the Convention, the States of Latin America acceded to it.

161. The CHAIRMAN suggested that the discussion be adjourned until a text was drafted [8] and proposed that the Commission meanwhile examine the first part of paragraph 17, which was self-contained.

It was so agreed.

PARAGRAPH 17 (*paragraph 28 of the "Report"*) (resumed) [9]

First three sentences

162. Mr. HUDSON proposed the substitution of the words "or effect of" for the words "or otherwise of" in the first sentence of paragraph 17.

163. In his view, that sentence raised the whole question of the possibility of establishing a classification of multilateral conventions. In the written statement submitted by the United States to the International Court of Justice [10] a distinction was drawn between "organizational" conventions and other conventions. The former might be on a plane which enabled a very different rule to be applied to them. In one of his reports [11] Mr. Brierly had pointed out that the Government of Haiti, among others, had made a reservation to the Hague Convention of 1907 for the establishment of an International Court of Prize, which would have prevented the Court from being set up. There were therefore certain types of reservations which were inadmissible, or whose effect must be limited, in the case of conventions which established an organization.

164. He had tried without success to frame categories for multilateral conventions.

165. The CHAIRMAN said that he also had found it very difficult to classify such conventions.

[8] See summary records of the 105th meeting, para. 2 and of the 106th meeting, para. 35.

[9] See paras. 96–98 above.

[10] I.C.J., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Pleading, oral arguments, documents*, Written statement of the U.S.A., p. 43.

[11] A/CN.4/41, para. 14.

166. Mr. KERNO (Assistant Secretary-General) thought that the Commission was not drawing a sufficient distinction between conventions which contained and those which did not contain a provision covering the point under review. The Commission was studying cases where a decision had to be taken failing a provision in the Convention. In such cases no uniform rule could be wholly satisfactory. Only approximate solutions were available and one such was to be found in the Secretariat's rule; but a solution must be found.

167. Mr. AMADO observed that General Assembly resolution 478 (V) did not include the classification of conventions among the questions which the General Assembly had requested the Commission to study. The Assembly had, in fact, invited the Commission " in the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions from the point of view of codification and from that of the progressive development of international law". He himself hoped that the professors of law and the publicists would study the question of conventions and give a ruling on the point, but the Commission was restricted by the directions it had received from the Assembly. He therefore did not think that it could deal with the question.

168. Mr. HUDSON felt it might perhaps be stated in the first sentence of paragraph 17 that it would be difficult to establish a classification of multilateral conventions.

169. The CHAIRMAN said that he would expand the sentence and explain that multilateral conventions varied greatly among themselves and that it did not seem possible to establish a classification. He would add the Commission's view that, where the convention contained no appropriate provision, no wholly satisfactory uniform rule could be applied.

170. Mr. HUDSON said that he had been disturbed by Mr. Scelle's criticism that even if the negotiating States had mentioned the admissibility of reservations in the text, certain difficulties might arise as to their application.

171. Mr. SCELLE pointed out that the Commission was at that stage solely concerned with the rules to be applied where a convention contained no provision. It had been said that reservations were admissible only where there was unanimity — but unanimity among whom? Among all States that were, or would in all likelihood be, parties to the convention, that was to say, the original signatories who were responsible for the text. All that the other signatories could do, in fact, was to accede to the convention. If a reservation was made it could be rejected by the States responsible for the convention, but not by other States. He would repeat that the question affected only the original signatories. States which signed subsequently could only make reservations with the unanimous consent of the authors of the convention.

172. The convention was a law, and the text of paragraph 17 contained the words " when the negotiating States have omitted to deal etc.". It was clear that States which signed after the final drafting of the convention were not negotiators. The example given by Mr. Hudson was typical. The States invited to the 1907 Conference could not be regarded as negotiators of the 1899 Convention.

173. Mr. FRANÇOIS disagreed with Mr. Scelle. Many conventions contained a provision to the effect that they could be signed within a certain time limit. Therefore, States which were not among the negotiators were entitled to sign them up to a certain date. If a reservation was made such States were signatory States and must be consulted.

174. Mr. SPIROPOULOS pointed out that the Commission had settled the point by accepting Mr. François' proposal in substance, but that it could review the question when the Rapporteur submitted his text.

175. Mr. SCELLE said that Labour Conventions were drawn up after negotiations which became final when they were accepted by a two-thirds majority. The final draft of the relevant convention was then prepared and all States signing or ratifying it subsequently would accept the convention in its then form.

176. Mr. HUDSON thought that Mr. François would accept the Barcelona Convention and Statute on Freedom of Transit, of 20 April 1921, as a good example of a convention open for signature by certain States whether they had participated in its preparation or not.

177. The CHAIRMAN said that he would endeavour to draft a text.

178. He proposed that the Commission proceed to examine paragraph 18, which was unconnected with those questions.

PARAGRAPH 18 [12] (*paragraph 33 of the " Report "*)

179. Mr. HUDSON thought the phrase " (or the prohibition of making) " was redundant. He proposed that the end of the paragraph be amended to read " provisions relating to the admissibility and effect of reservations."

180. The CHAIRMAN accepted that amendment.

181. Mr. LIANG (Secretary to the Commission) thought that it might perhaps be advisable to amend the beginning of the text to some extent. He had some difficulty in grasping what was meant by " organs . . . negotiating conventions". The Charter referred to the negotiation of conventions only in the case of the Economic and Social Council. He suggested that the phrase " Members of the United Nations " be substituted for the phrase " organs of the United Nations ". Organs never negotiated.

182. Mr. KERNO (Assistant Secretary-General) pointed out that organs framed texts.

183. Mr. HUDSON proposed the substitution of " negotiators " for "organs of the United Nations ", since paragraph 18 might refer to States which were not members of the United Nations.

184. Mr. SPIROPOULOS agreed.

[12] Paragraph 18 reads as follows:

" 18. The Commission suggests that all organs of the United Nations, specialized agencies and States, whenever negotiating multilateral conventions, consider the suitability of inserting therein provisions relating to the making (or the prohibition of making) of reservations."

185. The CHAIRMAN confirmed that the text applied to States which were not members of the United Nations.

186. Mr. KERNO (Assistant Secretary-General) pointed out that in the case of the Convention on Genocide, among others, discussion had taken place in an organ, namely, the General Assembly, and that the States concerned were not negotiating States but members of the United Nations. Nevertheless, the result of their work was the text of the convention. Therefore, in practice, the clause relating to reservations would be incorporated in the convention during such a procedural discussion in an organ of the United Nations, and provision must be made for such an eventuality, even if some other formula were adopted.

187. Mr. LIANG (Secretary to the Commission) referred to the terms of Article 62, paragraph 3, of the Charter, which stated that the Economic and Social Council "may prepare draft conventions for submission to the General Assembly with respect to matters falling within its competence". He therefore suggested that the word " prepare " be used.

188. The CHAIRMAN accepted that suggestion.

189. In reply to a question by Mr. YEPES, the CHAIRMAN said that the present text was not limited to States Members of the United Nations.

190. Mr. HUDSON hoped that the text would apply to the States which had met at Geneva to negotiate the 1948 Convention. He suggested the wording: " during the negotiation or preparation of multilateral conventions it is advisable to consider the suitability . . .".

191. The CHAIRMAN then proposed the deletion of the word " all " and the use of the phrase " during the preparation of conventions, States consider . . .".

PARAGRAPH 19 (*paragraph 34 of the " Report "*)

Sub-paragraph (3) [13]

192. The CHAIRMAN explained that discussion of sub-paragraphs (1) and (2) had been adjourned until a text was prepared.

193. Mr. YEPES said that he would submit an amendment to sub-paragraphs (1) and (2) when the discussion on the latter was resumed. He could not accept them in their existing form.

194. Mr. HUDSON, referring to sub-paragraph (3), said that account must be taken of reciprocity between the reserving State and the other States.

195. The CHAIRMAN thought that the point was covered by the words " limits the effect of the convention".

The meeting rose at 1 p.m.

[13] Sub-paragraph (3) read as follows:

" (3) A duly accepted reservation to a multilateral convention limits the effect of the convention in the relations of the reserving State with the other States which have become or may become parties to the convention."

105th MEETING

Monday, 18 June 1951, at 3 p.m.

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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 (*continued*) (A/CN.4/L.18) [1]

1. The CHAIRMAN said that he was by no means satisfied with the two draft texts he had had distributed, and which he had drawn up on the basis of the proposal submitted by Mr. François at the previous meeting and approved in substance by the Commission.[2]

NEW PARAGRAPH 18 (*paragraphs 29 and 30 of the "Report"*) (resumed from the 104th meeting)

2. The CHAIRMAN said that the first was intended to replace the last part of paragraph 17 of his draft report, from the words " The Commission is aware . . .",[3] and to form a new paragraph 18. It read as follows:

" 18. The Commission believes that, in substance, the tender of a reservation constitutes a proposal of a new agreement, the terms of which are not the same as those of the agreement negotiated by the plenipotentiaries, and that for this proposal to take effect it must be accepted by all the contracting States, as would have been necessary if it had been put forward in the course of the negotiations. The difficulty of applying this principle lies in defining the States whose acceptance of a reservation is necessary in order that it may take effect. The practice followed by the Secretary-General

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

[2] See summary record of the 104th meeting, paras. 104–152.

[3] *Ibid.*, footnote 6.