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Summary record of the 653rd meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
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tions[10] and since the International Court had delivered its Advisory Opinion on reservations to the Convention on Genocide. The time had now come when it could make a signal contribution towards the settlement of a controversial problem.

85. Rather than discuss whether a unanimity rule existed and what should be regarded as a restriction on the sovereignty of states, the Commission should be guided by the clear endorsement by recent practice of the right to make reservations to multilateral treaties. The special rapporteur had rightly sought to endorse that right so long as the reservation was compatible with the nature and main purpose of the treaty. That criterion had been criticized as being subjective, but subjective criteria were by no means unknown in international law; an example was article 28 (*rebus sic stantibus*) in the Harvard draft.[11] He saw no danger in such a criterion and did not believe it would undermine the principle of the integrity of treaties.

86. The CHAIRMAN said that, after the conclusion of the general discussion, he would request the special rapporteur to indicate which issues of substance would need a decision by the Commission before the article could be referred to the Drafting Committee.

The meeting rose at 5.55 p.m.

653rd MEETING

Tuesday, 29 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Law of treaties (A/CN.4/144 and Add.1) (Item 1 of the agenda) (*continued*)

ARTICLE 17. — POWER TO FORMULATE AND WITHDRAW RESERVATIONS (*continued*)

ARTICLE 18. — CONSENT TO RESERVATIONS AND ITS EFFECTS (*continued*)

ARTICLE 19. — OBJECTION TO RESERVATIONS AND ITS EFFECTS (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of the three articles on reservations.

2. Speaking as a member of the Commission, he said that the main points on which the opinions of members differed related to the so-called principle of the integrity of the treaty and to the advisability of reverting to the traditional doctrine which seemed to have been generally accepted at least until 1951. Thus in 1938 Lord McNair could state that the analogy between international treaties and the contracts of private law was frequently pressed too far, but that in solving the problems to which the practice of attaching reservations to the signature or ratification of treaties gave rise, the analogy had been found useful.[1] He had gone on to compare reservations to counter-offers in domestic systems of law: the terms of the treaty were an offer to the parties for acceptance; the reserving state did not accept them, but instead made a fresh offer in a modified form to the participants for their acceptance. The fate of the reservation thus depended on the manner in which the counter-offer was received by the parties. That seemed to have been the general view at the time and a similar opinion had prevailed in the Commission in 1951, as was shown by the memorandum then submitted by Mr. Amado.[2]

3. However, as the special rapporteur's commentary showed, the General Assembly, on the Commission's recommendation, had not accepted that principle, and the International Court of Justice, in the case concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, had also refused to accept the so-called traditional doctrine as having been transformed into a rule of law. In view of that opinion, of the practice of states and of the debates in the General Assembly on the Commission's recommendation of 1951, he did not believe that it would be in keeping with the progressive development of international law to think of returning to the unanimity rule.

4. He was in substantial agreement with the special rapporteur's formulation of the underlying principles of the three articles. Their actual wording could be left to the Drafting Committee; the Commission should concern itself solely with the question of improving the statement of the basic principles.

5. He agreed with the special rapporteur and other members that the criterion of the compatibility of the reservation with the object and purpose of the treaty, taken from the opinion of the International Court, should be accepted, although it constituted no real guiding principle. Mr. Rosenne had suggested that the compatibility test should also be adapted to articles 18 and 19. That would limit objections, which would then be allowable only on the ground that the reservation was incompatible with the object and purpose of the treaty; if Mr. Rosenne's view was accepted, the question of consent would lose in importance. Nevertheless, even in that event, article 18 would still be necessary. If objections to a reservation could be made only on the ground of its incompatibility with the object of the treaty, they would remain without any immediate legal consequences and the matter would be left to the risk of the parties, as the special rapporteur had pointed out in paragraph 4 of the commentary. The question of consent in that case might seem irrelevant, but the principle laid down in article 17, paragraph 1 (*b*), still remained; under that provision, a reservation could still

[10] *Yearbook of the International Law Commission, 1951*, Vol. II (United Nations publication, Sales No.: 1957.V.6, Vol. II), p. 125.

[11] Supplement to the *American Journal of International Law*, Vol. 29, No. 4, p. 662.

[1] *The Law of Treaties*, 1938 Edition, p. 105.

[2] *Yearbook of the International Law Commission 1951*, Vol. II (United Nations publication, Sales No.: 1957.V.6, Vol. II), p. 17.

be admitted even if expressly or implicitly excluded under paragraph 1 (*a*), provided it received the consent of the parties. Article 18 therefore remained necessary, even if Mr. Rosenne's suggestion concerning the applicability of the compatibility test to objections were accepted.

6. A number of speakers had urged that reservations should not be encouraged. While he recognized that there was much force and wisdom in their views, he would submit that in the present international state of affairs, the balance of wisdom would incline towards not closing the door to reservations.

7. In view of the rapid development of regionalism, and because that development was not altogether without its mischief when the world's efforts should be directed to finding a new unity on a universal basis, it was essential to keep the door open to greater participation in measures designed to secure effective international action in a world-wide organization, rather than to force states to seek solutions in regional groups. He was, of course, not unmindful of the basic reasons for the establishment of regional groups and of their importance; the states of a particular region might have common problems and interests which were not shared by the rest of the world, and consequently the members of those groups might have an incentive to work together, especially if they had a common historical and traditional background which made it easier for them to reach joint solutions in such an organization than in a more heterogeneous group. But in view of the vast number and complexity of the problems which could be solved only by international action, the obligation to build and to perfect community life on a world-wide basis was forced on the peoples of the world by the necessity of coming to terms with changed circumstances. Even in the traditional field of state responsibility, all states had to realize that the effective discharge of their responsibilities depended upon events beyond their frontiers. In the modern world, states had become unprecedentedly inter-dependent, and instances of national insufficiency were occurring with increasing frequency. In the light of that development, the United Nations Charter itself constituted an attempt to solve international problems on a world-wide basis. It was with that background in mind that the Commission should take its decisions.

8. The two basic questions remaining to be settled were, first, whether the criterion of compatibility with the object and purpose of the treaty should be adapted to objections to reservations and, secondly, whether and to what extent the inter-American system which the special rapporteur had incorporated in his draft should be accepted.

9. Mr. PESSOU said that the draft articles should contain a provision which departed from the principle of the integrity of the treaty, although that principle had been defended by a number of speakers. It was obvious that the admission of reservations to certain provisions of a treaty could frustrate the very purpose of the treaty; to consent to a treaty and then withdraw that consent by artificial means was comparable to the practice censured in the old maxim of French domestic law, *donner et retenir ne vaut*. But it could not be denied that the practice of making reservations was admissible so long as the reservations were compatible with the object and purpose of the treaty.

10. Reservations were admissible only to multilateral, plurilateral and collective treaties, where the majority could mitigate the effect of the reservation. In the case of bilateral treaties, where the obligations undertaken by one party were counterbalanced by those assumed by the other, a reservation would obviously amount to refusal to ratify.

11. At the previous meeting, Mr. Gros had stressed the difficulties which would arise from a diversity of legal regimes in a treaty, and had expressed the view that such diversity was incompatible with the unifying functions of law-making treaties. He (Mr. Pessou) would suggest that, if agreement could not be reached on that question, articles 17 and 18 could be differentiated by first stating the general rule of the integrity of the treaty, and then formulating the exception constituted by reservations.

12. Mr. LACHS said that Mr. Ago and Mr. Briggs, in particular, had raised some serious questions, which went to the very heart of the problem before the Commission. Since the battle had been joined on the subject of reservations over ten years previously, a host of arguments had been put forward, both for and against the institution. Apart from the question of the integrity of the treaty, which Mr. Gros had raised, there were a number of other arguments against reservations; it was argued that, since a treaty was an agreement, the duties and rights it involved should be carefully weighed, so as not to lay a heavier burden on one state than on another; it was also argued that a reservation represented a further step in the negotiation of a treaty and that all parties should therefore be consulted; and Mr. Ago had argued that reservations were liable to lead to abuses and to unjustified privileges for some states.

13. In his (Mr. Lachs') opinion, however, examination of the arguments showed that they were not valid; the institution of reservations had become a part of contemporary international law. Among the features of the modern world were the great variety of states and of their interests in treaty making and the extension of international law to many new fields. Consequently, whenever more than two parties were involved in treaty making, their interests might not be identical. Moreover, in a number of cases accession without reservation might be of less value than accession with reservation; everything depended on an individual state's contribution to the treaty, since some states which acceded to a treaty without reservations merely regarded that step as a formal act. An unduly rigid rule might prevent a state whose participation was vital from becoming a party to the treaty and thus frustrate its very purpose. From the purely theoretical standpoint, moreover, the so-called unanimity rule was not part of international law; the International Court had rightly pointed out that the procedure endorsed in the report adopted by the Council

of the League of Nations in 1927 upholding the rule of the integrity of the treaty, constituted "at best the point of departure of an administrative practice".[3]

14. In view of the wide variety of their interests, it seemed advisable as far as possible to leave states free to decide the extent to which they should be bound by a treaty. Admittedly, there was a risk that reservations might become instruments of abuse, but the same argument could be applied to every legal institution; at the other end of the scale, there was the counter-risk of inaction and mere lip-service to a treaty. The historical process of the *rapprochement* of nations could not be completely disregarded out of fear of abuse.

15. The Commission should adopt a balanced approach to the problem. The divergent interests of states which concluded treaties could not be reconciled automatically by the application of a quantitative majority rule, for minority was not only a quantitative but also a qualitative notion. On the whole, the special rapporteur had submitted a sound solution and provided a number of safeguards against abuse.

16. He could not agree with those members who, at the previous meeting, had suggested that acceptance of the special rapporteur's proposals might jeopardize the whole treaty relationship. He could not follow Mr. Ago in that respect: reservations should be regarded as an outcome of the natural development of international law and as a means of evolving new treaty relations. As to Mr. Briggs' fear that the method advocated in the special rapporteur's report might create unduly complex relations within the treaty, that argument had been advanced by the United Kingdom Government in the International Court of Justice in connexion with the case of reservations to the Genocide Convention.[4] But in the practical operation of a treaty, those consequences might arise even without reservations; the inter-relationship between rights and obligations was brought into play by the contact of a treaty with life itself. Some clauses might become a dead letter, while others became increasingly substantive, as the result of individual States' interest in specific provisions. The nuances of those complex relationships could hardly be reduced to mere formulae.

17. If the practical application of the institution of reservations was taken into account, the inescapable solution was one which leaned towards a more liberal approach. For at least twenty-five years, the weight of many theorists had been against the institution and in favour of the principle of unanimity, and yet hundreds of reservations had been made to treaties concluded under the auspices of the League of Nations. Accordingly, reservations had acquired a definite and lawful place in international relations, and in the past decade many theorists had changed their views on the matter. Practice had thus prevailed over theory, as the special rapporteur had so rightly indicated in his report.

18. Mr. TUNKIN, replying to the arguments advanced by members against the institution of reservations, said that Mr. Gros had claimed that reservations destroyed the integrity of the legal regime established by the treaty by rendering it inapplicable to all parties, while Mr. Ago had contended that reservations would make universality illusory and had suggested that the attention of states should be drawn to the danger they represented. Admittedly, the practice of making reservations to treaties was not without danger, but that applied to almost everything in the world. Theoretically, some reservations might depart from the purpose of the treaty itself; but it would be wrong to draw attention to the danger of reservations without at the same time drawing attention to their advantages. The best course, in his opinion, would be to allow states to decide for themselves, particularly since the other states concerned in a treaty were free either to accept reservations or to object to them if they were not compatible with the object and purpose of the treaty.

19. If there were a unified regime of treaties, if the primary goal of the Commission were *elegantia juris*, and if it wished to adhere to the principle *vivat justitia pereat mundus*, then admittedly reservations could not be fitted into so rigid a system. But the Commission's approach should not be unduly abstract; it should always bear in mind the relationship of law to the realities of life and regard the effects of law only in the context of those realities.

20. The opinion had also been expressed that the articles should not encourage reservations. While he agreed with that view in theory, he would advocate a more radical approach. A reservation was the reaction of a state which considered itself unable to participate in a treaty without the reservation. Ideally, of course, there should be no reservations to a treaty, but the means of achieving that ideal was to make every effort during the negotiations to reach agreement on a text acceptable to all the states concerned: it was by encouraging conferences to settle treaties in universally acceptable terms that reservations would be discouraged.

21. There seemed to be a confusion in the minds of some members between the problem of specific reservations and that of reservations as an institution of international law. Specific reservations might be either innocuous or harmful; for example, the United Kingdom postulate in its note of 19 May 1928, relating to article I of the General Treaty for the Renunciation of War as an Instrument of National Policy, the Briand-Kellogg Pact,[5] had restricted the impact of the provisions of that very important international treaty, and had consequently been harmful.

22. It had already been pointed out that the institution of reservations opened up an opportunity for the participation of a greater number of states in a treaty — and that, as Mr. Lachs had said, was an outcome of

[3] *Reservations to the Convention on Genocide, Advisory Opinion:* I.C.J. Reports 1951, p. 25.

[4] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Pleadings, Oral Arguments, Documents*, p. 62.

[5] League of Nations *Treaty Series*, Vol. XCIV, p. 57.

modern developments in treaty practice. The experience of plenipotentiary conferences had shown that, even with the complete goodwill of all the parties, the time-limits imposed often prevented the participants from attaining results acceptable without reservation to all the states concerned. That being the case, it was hardly advisable to accept a system which would automatically exclude what might be a considerable number of states from participation in a treaty. Moreover, deliberately to debar certain states from participation in treaties which were of interest to the entire international community would hardly be in keeping with the spirit of modern international law, which encouraged collaboration between states.

23. It might therefore be concluded that the institution of reservations served a useful purpose as a practical means of promoting international co-operation. Indeed, it was indispensable in modern practice, for reservations usually related to relatively unimportant provisions of the treaty; if they were incompatible with the object and purpose of the treaty, the other parties were free to reject them.

24. Mr. Briggs had suggested that the two-thirds or other majority rule applied in the adoption of the text of the treaty should apply to the procedure of accepting or rejecting reservations and that, if the specified majority accepted the reservation, the treaty would become binding on all the parties. In that connexion, he wished to raise a theoretical point. The conclusion of treaties was a consecutive process, but reservations appeared after the process of forming an agreement had been completed, in other words, when the text had become final and could not be altered by the ordinary procedure of negotiation. Accordingly, reservations represented a kind of deviation from the straight line of treaty making, and yet in a sense also represented a co-ordination of the will of states, because a reservation could not be imposed on any party to the treaty.

25. He agreed with the view that a reservation was a kind of offer by the reserving state, which the other Parties, in the exercise of their sovereignty, were free to accept or to reject. Thus, Mr. Briggs' suggestion that the majority rule should govern the admissibility of reservations would certainly not be workable and would destroy the very substance of reservations, for their special characteristic was that they constituted a deviation from the continuous process of treaty making.

26. He was in general agreement with the provisions proposed by the special rapporteur, which seemed to constitute the only basis on which states could agree for the time being; provisions excluding reservations altogether would be unacceptable to a great many states. In his opinion, three principles should be laid down in the draft articles. First, that states were free to make reservations, unless the treaty specifically prohibited or restricted reservations. Secondly, with regard to the compatibility test, and there he agreed with Mr. Rosenne, that if the test was to apply to reservations, it should also apply to consents and objections to reservations. Thirdly, that if a reservation was accepted, the treaty was in force between the reserving state and all the consenting parties, with the exception of the article or articles to which the reservation was made. On the other hand, if a state objected to a reservation, it seemed premature to conclude that it would automatically not be bound by the treaty *vis-à-vis* the reserving state. It should be left to draw its own conclusions; the purpose of its objection might merely be to affirm its position, and not to sever treaty relations with the reserving state. Objecting states should therefore be left free to decide for themselves whether their objections should or should not carry those extreme consequences.

27. Mr. ROSENNE said that he wished to clarify further his views on the place which the compatibility test occupied in the institution of reservations and on the residuary rule which the Commission was drafting. He had been surprised to hear the Chairman imply that there was perhaps a serious division in the Commission on that issue. If he had correctly understood the special rapporteur's intention in the text of article 17, paragraph 2 (*a*), as explained in the commentary and his introductory statement on the reservations articles, the compatibility test contained in that provision was a kind of general guide, though not sufficient in itself, and for the purpose of determining the effective law in the matter the objective tests remained consent and objection.

28. The combination of the general principle with such objective tests seemed to him the correct approach and to provide a key to the proper solution of the problem, but that was precisely why he thought it would be right to lay down the same test explicitly in article 19, and not to leave it merely as a matter of implication, as it appeared to be in the special rapporteur's draft. As the Court had declared in its Advisory Opinion on reservations to the Genocide Convention in answer to question II, in dealing with objections to reservations, the contracting states had a common duty to be guided in their judgement by the compatibility or incompatibility of the reservation with the object and purpose of the Convention.

29. Reference had been made during the discussion to a philosophical problem, whether the juridical regime resulting from a multilateral convention was in effect a series of bilateral relations or something more complex. Neither the Commission with its twenty-five members nor any other group of lawyers would ever reach agreement on that issue, and he doubted whether it was relevant to the task of elaborating a residual rule for cases when the treaty and any accompanying documents were silent on the subject of the admissibility of reservations. From a practical standpoint, what was important was for each state to know what its treaty relations were with other states so that the treaty was not deprived of material effectiveness. The United Nations publication "Status of Multilateral Conventions in respect of which the Secretary-General acts as Depositary" (ST/LEG/3/Rev.1), clearly showed the position where that category of treaties were concerned.

30. In regard to the theory of integrity, which he found somewhat difficult to understand, the special rapporteur had rightly argued in paragraph 7 of the commentary

that the detrimental effect of reservations upon the integrity of the treaty could easily be exaggerated. A problem existed but it should not inhibit the Commission from elaborating a workable rule to fit modern needs. As Mr. Tunkin had argued, perhaps there was a real danger in trying to be too specific about the ultimate consequences of an objection. Practice since 1951 indicated that states objecting to a reservation often refrained from drawing the conclusion that their objection meant refusal to enter into treaty relations with the reserving state. On that point he was willing to accept the general tenor of the special rapporteur's draft and he believed that it would not stand in the way of states which did not wish to draw all the conclusions from a formal objection to a reservation made by another state.

31. Mr. AGO said that, although in general the Commission appeared ready to accept the special rapporteur's proposals and subscribe to his conclusions, an element of controversy had entered into the discussion which might give the impression that serious doubts as to the substance still remained. In some instances, part of an argument had been taken out of its context in an effort to refute something that had never been said. For example, he had never contended that reservations to treaties should be prohibited. Practice showed clearly that they were necessary, and nothing would be gained by ignoring the realities of international life; what he had said was that if reservations were allowed without restriction they could entirely nullify the effects of a treaty and the progress of codification of international law. Some speakers had eloquently described the advantages of reservations, but he preferred to approach the matter from the standpoint that the effective purpose of treaties must be safeguarded.

32. The institution of reservations undoubtedly existed. The real question to be answered by the Commission's drafts was in what circumstances they might be admissible. Moreover, while he could agree that reservations were indispensable because it was impossible to obtain universal acceptance of general rules quickly, he could certainly not agree that reservations *per se* represented an advance in the development of international law.

33. Though it was true, as Mr. Tunkin had said, that the possibility of making reservations might attract more parties to a treaty, that advantage would be entirely destroyed if the reservations nullified the essence of the treaty itself. The proposition was therefore true only up to a certain point, because unless the essential character of the treaty were preserved, wide participation would prove an empty achievement.

34. The special rapporteur's criterion that reservations should be compatible with the object and purpose of the treaty might give rise to practical difficulties of interpretation. As Mr. Tunkin had pointed out, the situation was clear if the treaty itself, as it should, indicated which provisions were essential to the extent that they did not admit a reservation, and which were not of that character, but doubts were likely to arise if the treaty was silent either because the question of reservations had not been discussed during the negotiations or because the states concerned had failed to reach agreement on a reservations clause.

35. In regard to the effect of reservations, Mr. Tunkin had reached the same conclusion as his own, that the treaty was in force as between the state making the reservation and that accepting the reservation, except that the provisions to which the reservation related were not operative between them.

36. He thought, however, that if the treaty was silent the criterion by which the admissibility of reservations could be judged was the collective, as distinct from the individual, intention of the parties at the time when it had been drawn up and he could not accept Mr. Tunkin's conclusion that the final decision on the admissibility of a reservation should be left to each individual state. Nor could he share the view that there was no need for an objecting state to specify whether or not its objection entailed refusal to enter into treaty relations with the state making the reservation. Such an element of uncertainty was undesirable and although it was not the Commission's task to give paternal advice to states, where possible it must frame clear and precise rules. A system whereby any state could make any reservation to any clause of a treaty, and any party was free either to accept or to object without indicating the consequences of its objection, would lead to a situation where *fiat apparentia juris pereant jus et mundus.*

37. Mr. VERDROSS said that, although there appeared to be a considerable difference of opinion between Mr. Tunkin and Mr. Ago, they both agreed that everything depended on the common will of the parties. At a time when there was no supra-national authority, the decision as to whether a reservation was compatible with the object of the treaty had to be left to the parties, for it was hardly likely that such a decision could be entrusted to the Secretary-General of the United Nations.

38. Mr. TUNKIN, in answer to Mr. Ago, said that, while reservations could not be considered as an advance *per se,* they could not be separated from the context of the treaty relations. Within that framework they were recognized as a useful institution.

39. He agreed with Mr. Ago that the core of the problem lay in the requirement that the reservation should be compatible with the object and purpose of the treaty; the Commission might either try to frame a rule to determine that issue or leave it to the states concerned.

40. Mr. Ago had suggested that if the treaty was silent, it could be assumed that the parties were opposed to reservations or at least would not regard them as admissible to all the articles. Personally, he would have thought that if the treaty was silent, it was difficult to draw any inference regarding the intention of the parties and that it was preferable to leave the decision to them by their acceptance or rejection of the specific reservation.

41. In practice, there were few cases where reservations were of such a nature or so numerous as to impair the universal character of a multilateral treaty. A rule could not be constructed out of rare exceptions.

42. The CHAIRMAN, speaking as a member of the Commission, said that as the provision in question related only to cases where the treaty was silent on the point, future treaty makers would have ample warning to take special care in that respect after accepting the Convention. The only difficulty might arise in relation to treaties already concluded, if the provisions were to be retroactive to any extent; otherwise the question as it affected such treaties would have to be resolved by making presumptions in the light of the law at the time of the conclusion of the particular treaty. If it could be presumed that the parties had intended to allow only reservations expressly provided for, silence should be interpreted to mean that none were admissible. If the Commission succeeded in drafting a precise rule concerning reservations and its articles were finally accepted by States, presumably the kind of difficulties that arose when no provision concerning reservations was included in a treaty would no longer occur. In the Genocide case the question of presumption from silence had also been dealt with and the Court had expressed the opinion that the absence of a specific reservation clause did not necessarily preclude the possibility of reservations.[6]

43. Mr. JIMÉNEZ de ARÉCHAGA said that the discussion on articles 17, 18 and 19 had been concerned largely with the case where a state made a reservation which might defeat the object and purpose of the treaty. Attention should preferably be focused on the situation where a state made a reservation and another state, or other states, accepted it. Obviously a reservation must be accepted by other states, in order to have any legal effects. The *pacta sunt servanda* rule had been invoked; but that rule surely meant that what states agreed to constituted the law. If a state made a reservation and another state accepted it, the rule meant precisely that those two states had entered into a treaty relationship.

44. The two states could just as well have formulated their agreement as a bilateral treaty. He could not see on what grounds a third state could claim to prevent the two states concerned from entering into that same legal relationship within the framework of a multilateral treaty. Freedom should constitute the residuary rule in the matter. Such a rule would be in keeping with the practice followed since 1952 by the Secretary-General in accordance with the decision of the General Assembly.

45. It had been suggested that the proposed system would result in complications in legal relationships, but those complications would be no greater than those which would arise if a series of bilateral treaties were entered into by the states concerned, a thing which those states were perfectly entitled to do. In any event, fear of administrative complications should not prevent the Commission from abiding by the *pacta sunt servanda* rule.

46. Only in very exceptional cases would the interests of third parties be in any way affected by a state's acceptance of another state's reservations. In fact, in the case of the Geneva Convention on Fishing of 1958, mentioned by Mr. Gros at the previous meeting, specific provisions had been inserted stating which reservations were not permissible. The residuary rule to be formulated by the Commission would not prevent that type of clause being inserted in a treaty in similar cases in the future.

47. It had been suggested by Mr. Briggs that the acceptance of reservations should be decided by a majority vote of the parties. Such a system was open to the objection that a particular reservation was often of interest to two states only and a matter of indifference to all the rest. For example, in the case of any world-wide treaty in which it participated, Argentina always made a reservation concerning the Falkland Islands. The majority of states had no objection to that reservation, since it did not concern them. It was manifestly not a tenable proposition to say that a two-thirds majority of the states concerned could compel the United Kingdom to accept that reservation. The matter should be left to be decided by the objecting and reserving states. The Commission had already decided, in accepting article 13, paragraph 4 (*b*), on provisions according to which the objecting state should not have treaty relations with the acceding state to whose accession it was opposed, and had agreed to a proposal by Mr. Ago that the rule should be optional for the objecting State.[7]

48. The situation in regard to reservations was similar to that in regard to accession, and he favoured Mr. Tunkin's suggestion that the objecting and reserving states should have the option of having treaty relations despite the reservations made by the latter state and objected to by the former.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that he would reply to the remarks of members, not only in his capacity as special rapporteur but also as a member of the Commission.

50. Several members had commended his progressive approach to the subject of reservations. In fact, his intention had been simply to reflect the existing practice and to put forward, in regard to the problem of reservations, proposals which would prove acceptable to states.

51. Some members had indicated that their views had changed since 1951. If he had been a member of the Commission in 1951, his views would have been very close to those which Mr. Amado had then expressed. It was necessary, however, to take into account developments since then, which tended to qualify the traditional principles of the integrity of the treaty and the unity of its legal regime.

52. State practice in regard to multilateral conventions had evolved since 1951 in the direction of a system approaching the Latin American system. The General Assembly, however, had not yet committed itself: it had merely instructed the Secretary-General, by resolutions 598 (VI) and 1452 (XIV) B, to circulate reserva-

[6] *Reservations to the Convention on Genocide, Advisory Opinion:* I.C.J. Reports 1951, p. 22.

[7] 650th meeting, para. 46.

tions and objections to reservations "without passing upon the legal effect of such documents". That practice had been followed consistently since 1952, but the Secretariat document, "Summary of the Practice of the Secretary-General" (ST/LEG/7) showed that when the Secretary-General communicated the text of documents relating to reservations, an accession or ratification to which a reservation had been made was marked down for purposes of counting the number of accessions or ratifications necessary to bring the treaty into force. There was thus an indication that something resembling the Latin American system was growing up in the practice of the General Assembly. The debates in the General Assembly in 1951 and 1959 also showed a tendency in the same direction.

53. He had formulated his proposals in a realistic spirit. The subject was an extremely important one; the Commission had once before tried to codify the relevant rules but its proposals had not been accepted. It would cause considerable damage if the Commission's draft articles being prepared in 1962 were rejected because the articles on reservations proved unacceptable to states. The situation created would mean the continuation of the existing practice of freedom of reservations. If, on the other hand, the Commission were to clarify the situation in regard to the formulation of reservations, it would be making a positive contribution to the improvement of the existing state of affairs.

54. His proposals did not necessarily represent his own ideas as to what was theoretically best in the matter of reservations; they were an attempt to formulate a set of provisions which would have a chance of being accepted by states.

55. Notwithstanding suggestions to the contrary, he believed there was a definite division in the Commission with regard to his proposals. Some members had expressed approval of the general concept contained in those proposals; Mr. Tsuruoka, Mr. Ago, Mr. Briggs and Mr. Gros, on the other hand, had expressed uneasiness, regarding the system as unduly loose and as likely to encourage reservations and to sacrifice the unity of the legal regime of the treaty to the interests of universality.

56. In view of that cleavage of opinion, it could be expected that a divergence of views would become apparent in the General Assembly on the articles on reservations, and the Commission should seriously consider the need to avoid the possible consequent rejection of its draft articles. Apart from accession, reservations was the main subject on which the Commission could make a real contribution to the law of treaties, if its draft articles were accepted.

57. The main question to be decided by the Commission was whether it should put forward, in its provisions concerning reservations to general multilateral treaties, a modified Latin American system. The system had to be taken as a whole. In that respect, the provisions of article 17, paragraph 1, were very important. If the Commission accepted considerable freedom of reservations, it should also accept the principle that, if a reservation was expressly prohibited or impliedly excluded by the treaty itself, that prohibition or exclusion held. That proposition had been accepted by all members of the Commission and constituted an important point of departure: the freedom to make reservations applied only outside the terms of article 17, paragraph 1.

58. Another point had been raised by Mr. Ago, who admitted the usefulness of the compatibility test laid down in article 17, paragraph 2 (*a*), but attached more importance to the intention of the original negotiating states. That intention was partly taken into account in the formula "a state shall have regard to the compatibility of the reservation with the object and purpose of the treaty"; the object of the treaty and the compatibility of the reservation with the object were largely determined by reference to the intention of the negotiating states.

59. Mr. Ago, however, wished to go further and investigate the intention of the original negotiating states in regard to the making of reservations. Where the negotiators had agreed on express provisions on reservations their intentions were manifest; but where the negotiations had not resulted in such express provisions, it was difficult to deduce the common intention of the parties on the subject of reservations. An example of the difficulties that could ensue was provided by the Antarctic Treaty signed at Washington on 1 December 1959. That Treaty was open to the accession of a large number of states; it included an article XII on the modification and amendment of the Treaty but nothing on reservations. It was doubtful whether the inference could be drawn that no reservations were possible to that treaty.

60. Mr. Rosenne had suggested that the compatibility test should be introduced into articles 18 and 19, and it would seem logical, if the test were accepted for reservations, to extend it to consents and objections to reservations as well. He had hesitated to propose that extension because a state was always free to accept or reject a reservation without applying the criterion of compatibility. The matter was not of great practical importance, for a state wishing to object to a reservation would invariably say that the reservation was incompatible with the essence of the treaty.

61. The real problem for the Commission was to decide whether to put forward provisions modelled on the Latin American practice in the matter of reservations, which left the decision to individual states, or whether to put forward a system involving some sort of collegiate decision on the acceptability of reservations.

62. He had considered the possibility of a system under which consent to reservations would be left, in the case of a convention formulated by an international conference, to the decision of a two-thirds majority of the states concerned, or where the treaty had been formulated by an international organization, to the decision of the competent organ of the international organization; in the latter case, the rule would be subject to the proviso indicated by Mr. Yasseen. The Commission could of course put forward some such proposal

de lege ferenda, but he did not suggest that. His reason for not doing so was that, while it was modern practice to follow the procedure of a collegiate decision in regard to accession, there was little evidence of such practice in regard to the acceptance of reservations. Most of the examples which could be cited were the constituent instruments of international organizations, which formed a special class; very few multilateral conventions, however, incorporated the system of collegiate decisions in respect of the acceptance of reservations.

63. Mr. AMADO did not believe that any great harm would be done if a number of bilateral agreements were entered into within the framework of a multilateral treaty: he would be glad to have the opinion of Mr. Ago and Mr. Gros on the subject.

64. He agreed that it was theoretically desirable to have uniform rules which were universally accepted. However, states would not be prepared to renounce their freedom to make reservations, a right derived from their sovereignty, merely in the interests of uniformity.

65. As had been pointed out by the special rapporteur, the Commission was faced with the choice between acknowledging the realities of the contemporary situation and retiring into its ivory tower. It would not command the respect of the General Assembly if it did not submit proposals calculated to gain the acceptance of states.

66. Mr. de LUNA, with regard to article 19, paragraph 4 (*c*), said that he took the same view as Mr. Tunkin and Mr. Rosenne that nothing prevented the objecting state from agreeing to the partial entry into force of the treaty in its relations with the reserving state. He therefore suggested, as a compromise solution, that after the words "as between the objecting and the reserving states" the words "unless the objecting state makes an explicit statement to the contrary" should be inserted.

67. The compatibility test laid down in article 17, paragraph 2 (*a*), was reasonable in principle; unfortunately, it was impracticable in the absence of any authority to decide the question of compatibility. He therefore suggested that the contents of paragraph 2 (*a*) should be transferred to the commentary.

68. If, however, they were retained in article 17, then Mr. Rosenne had made a convincing case in favour of including a similar provision in articles 18 and 19. Personally, he agreed with Mr. Tunkin that states should be left to decide for themselves whether a particular reservation was compatible with the object and purpose of the treaty, and to accept or reject it accordingly.

69. Mr. CADIEUX said he favoured a flexible system in the matter of reservations. Such a system was particularly useful to federal countries like Canada. Because it had to take into account the rights of the component units of the federation, the Federal Government was often obliged to append reservations when signing a treaty. Unless a flexible system were adopted, countries like Canada would find themselves in the position where they could not join many multilateral treaties which it was desirable that they should.

70. The interests of the newly-independent states also weighed in favour of a flexible system. Those states were not as yet certain what either their future social evolution or their future economic interests would be. Reservations offered them a means of safeguarding their future position and a flexible system would be of great assistance to them.

71. The special rapporteur had just indicated that the Commission had a choice between the so-called Latin American system and a system embodying some form of collegiate decision. It was interesting to note that the special rapporteur had excluded the possibility of adopting the unanimity rule. He was prepared to accept the special rapporteur's proposals.

72. Mr. AGO said that there would be no harm in the conclusion of a series of bilateral agreements in the circumstances indicated by Mr. Amado, if the points to which they related were secondary ones; great harm would, however, be done if the points at issue were essential features of the multilateral treaty.

73. It would be dangerous to leave to individual states the decision as to the acceptance of reservations. At a time when general rules of international law were being increasingly codified by means of multilateral conventions, such a system would leave it to each individual state to decide whether a rule was essential or not in connexion with the international law governing a particular subject.

74. It had been rightly indicated by the special rapporteur that his proposals were in line with what had been agreed by the Commission for accession, namely, that the question of the admissibility of an accession would be decided at the later stage by the same authority as was competent to admit accessions at the earlier stage. Personally, he did not think — and that was his reply to Mr. Amado — that the Commission would fail to command the respect of the General Assembly if it suggested that the Assembly should be competent to decide on the interpretation of the essential purpose of a multilateral treaty concluded under the auspices of the Assembly itself. It was, of course, essential that the parties to such a treaty should express their intentions clearly by including in it a specific provision stating which clauses admitted reservations.

75. But where the treaty was silent, it was possible to adopt a system which would leave it to the General Assembly to decide whether the clause of the treaty to which a reservation related was an essential clause or not. The states invited to codification conferences were very largely the same as the membership of the United Nations. It was therefore possible to have the question of the acceptance of reservations decided by a body very similar to that which had adopted the treaty itself.

76. The Chairman had suggested that the problem was unlikely to arise in the future because future treaties would contain clauses on the subject of reservations. The experience of the 1958 Geneva Conference on the Law of the Sea had shown the difficulty of agreeing on what clauses of a treaty should admit of no reservations. It was therefore very undesirable to leave complete

freedom of reservation to states in the event of a treaty's silence on the subject of reservations; such a system would impair the chances of an agreement on a reservations clause. Negotiators would not make a sufficient effort to reach agreement during the negotiations, knowing that failure in that respect would leave states free to make reservations at will.

77. Mr. VERDROSS said he favoured the system proposed by the special rapporteur. He also agreed with the special rapporteur that the main question to be decided by the Commission was whether the acceptance of reservations should be left to the individual decision of states, or be the subject of some sort of collegiate decision.

78. Since the draft articles were being adopted by the Commission only on first reading, perhaps the Commission might wish to consider submitting alternative texts, as it had done on previous occasions. States would thus be offered a choice between the Latin American system and the system proposed by Mr. Ago. In the light of their reactions and of the preferences expressed by them for one or the other system, the Commission could then come to a decision on second reading.

The meeting rose at 1.5 p.m.

654th MEETING

Wednesday, 30 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Law of treaties (A/CN.4/144 and Add.1) (Item 1 of the agenda) (*continued*)

ARTICLE 17. — POWER TO FORMULATE AND WITHDRAW RESERVATIONS (*continued*)

ARTICLE 18. — CONSENT TO RESERVATIONS AND ITS EFFECTS (*continued*)

ARTICLE 19. — OBJECTION TO RESERVATIONS AND ITS EFFECTS (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of the three articles on reservations.

2. Mr. YASSEEN said that the discussion on the draft articles concerning reservations showed that there was a good deal of common ground on many essential points.

3. On the question of freedom to make reservations, there was agreement on the necessity to examine first and comply with the provisions of the treaty itself. Some controversy had arisen, however, over the case where the treaty contained no provisions on the subject of reservations.

4. Some members interpreted the silence of the treaty as meaning that reservations were admissible; that might be correct in some cases, but not in all. The answer hinged on the interpretation of the intention of the parties and that involved an examination not only of the text of the treaty, but also of the will of those who had formulated the text.

5. On the question of the effects of the acceptance of a reservation, there was agreement on the essential point that acceptance brought into force between the reserving state and the accepting state all the provisions of the treaty except those to which the reservation related.

6. On the question of objections to reservations, it was agreed that the objecting state was entitled not to consider the reserving state as a party to the treaty. That was not, however, the result in all cases. It could happen that the objecting state did not intend to debar the reserving state from becoming a party to the treaty. It was necessary to examine the document containing the objection for the purpose of determining the objecting state's intentions in that respect. If, however, an objection was categorical without any suggestion that the objecting state did not wish to debar the reserving state from becoming a party, then the reserving state could not be considered a party to the treaty.

7. The one important question on which there was a division of opinion was that of the system to be recommended for the acceptance of reservations to a general multilateral treaty. Some members favoured a system based on the Latin American practice, according to which an objection to a reservation did not debar the reserving state from becoming a party to the treaty with respect to those states which accepted the reservation. Other members thought that admission of the reserving state as a party to the treaty should be subject to the unanimous consent of the parties, or to the consent of a specified majority of the parties. In view of that division of opinion, it would be advisable for the Commission to adopt the suggestion of Mr. Verdross, and leave it to the states themselves to decide that question.

8. Mr. TUNKIN said he agreed with Mr. Yasseen that there was no great difference of views in the Commission on the main points of articles 17, 18 and 19, and consequently those articles could soon be referred to the Drafting Committee.

9. The Commission might adopt the principle of article 17, that states were free to formulate reservations unless the making of reservations was implicitly excluded by the treaty itself. The article itself could be shortened by the Drafting Committee; in particular he saw no need to refer to the usage of international organizations, which might vary from one organization to another.

10. He said the Commission might also adopt the leading principle which ran through all the paragraphs of article 18, except paragraph 4 which conflicted with that principle. He saw no reason for drawing any distinction between treaties formulated within or under the auspices of international organizations and other treaties. The Drafting Committee should therefore consider omitting paragraph 4.

11. There appeared also to be general agreement in regard to the basic principles laid down in article 19. With reference to paragraph 4 (*c*), he recalled the suggestion he had made at the previous meeting,[1] a

[1] 653rd meeting, para. 26.