Reservations to Multilateral Conventions

Report of the International Law Commission

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Chapter II

RESERVATIONS TO MULTILATERAL CONVENTIONS

12. By resolutions 478 (V), adopted on 16 November 1950, the General Assembly, *inter alia*,

"*Invites* the International Law Commission:

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

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

13. In pursuance of this resolution, the International Law Commission, in the course of its third session, gave priority to a study of the question of reservations to multilateral conventions and considered it at its 100th to 106th, 125th to 128th, and 133rd meetings, inclusive. The Commission had before it a "Report on Reservations to Multilateral Conventions" (A/CN.4/41) submitted by Mr. Brierly, special rapporteur on the topic of the law of treaties, as well as memoranda presented by Messrs. Amado (A/CN.4/L.9 and Corr.1) and Scelle (A/CN.4/L.14). In addition, the Commission studied the Official Records of the fifth session of the General Assembly relating to the item, and took account of the views contained therein.

14. It will be recalled that the Commission had, during its first session (1949), selected the law of treaties as one of the topics of international law for codification and had given it priority. In the course of its study of this topic during its second session (1950), the Commission had, on the basis of a report by Mr. Brierly (A/CN.4/23), embarked upon a preliminary discussion of the question of reservations to treaties. There was then a large measure of agreement on general principles and particularly on the point that "a reservation requires the consent at least of all parties to become effective. But the application of these principles in detail to the great variety of situations which might arise in the making of multilateral treaties was felt to require further consideration".[1]

15. By the same resolution referred to in paragraph 12 above, the General Assembly also requested the International Court of Justice to give an advisory opinion on the following questions:

"In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:

"I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

"II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and:

"(*a*) The parties which object to the reservation?

"(*b*) Those which accept it?

"III. What would be the legal effect as regards the answer to question I if an objection to a reservation is made:

"(*a*) By a signatory which has not yet ratified?

"(*b*) By a State entitled to sign or accede but which has not yet done so?"

16. On 28 May 1951, the International Court of Justice, by 7 votes to 5, gave an advisory opinion in which the questions referred to it are answered as follows:[2]

"The Court is of opinion,

"In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide, in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification,

"On Question I:

"that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

"On Question II:

"(*a*) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

"(*b*) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.

"On Question III:

"(*a*) that an objection to a reservation made by a signatory State which has not yet ratified the Con-

[1] A/1316, *Official Records of the General Assembly, Second Session, Supplement No. 12*, para. 164.

[2] Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, pp. 29 and 30.

vention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

"(*b*) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect".

The advisory opinion of the Court was accompanied by two dissenting opinions of four judges and one judge respectively. The International Law Commission has studied these opinions with care.

17. The Commission notes that the task entrusted to it by the General Assembly differs from that of the Court in two important respects. In the first place, the Commission has been invited to study the question of reservations to multilateral conventions in general, especially as regards multilateral conventions of which the Secretary-General of the United Nations is the depositary, whereas the questions submitted to the Court related solely to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. The Court underlined the nature of its task in the following words:

"All three questions are expressly limited by the terms of the resolution of the General Assembly to the Convention on the Prevention and Punishment of the Crime of Genocide, and the same resolution invites the International Law Commission to study the general question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law. The question thus having a clearly defined object, the replies which the Court is called upon to give to them are necessarily and strictly limited to that Convention."[3]

Moreover, in seeking to determine what kind of reservations might be made to the Convention on Genocide and what kind of objections might be taken to such reservations, the Court said:

"The solution of these problems must be found in the special characteristics of the Genocide Convention. The origin and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties."[4]

In the second place, the Commission has been asked to study the question "both from the point of view of codification and from that of the progressive development of international law", while the Court gave its advisory opinion on the basis of its interpretation of the existing law. The Commission therefore feels that it is at liberty to suggest the practice which it considers the most convenient for States to adopt for the future.

18. According to the practice of the League of Nations, a reservation to a multilateral convention, to be valid, had to be accepted by all the contracting parties. This practice was reviewed and endorsed by the Committee of Experts for the Progressive Codification of International Law of the League of Nations which stated in a report:[5]

"In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void".

The report of the Committee of Experts was considered by the Council of the League of Nations on 15 and 17 June 1927. On the latter date, the Council adopted a resolution in which it, *inter alia*, directed the report "to be circulated to the Members of the League" and requested:

"The Secretary-General to be guided by the principles of the report regarding the necessity for acceptance by all the Contracting States, when dealing in future with reservations made after the close of a Conference at which a convention is concluded, subject, of course, to any special decisions taken by the Conference itself."[6]

In accordance with this resolution, the Secretary-General circulated the report to the Members of the League of Nations on 13 July 1927.[7] It appears that the principles of the report were observed by the Secretariat of the League of Nations and became an established practice thereof.[8]

19. The Secretary-General of the United Nations has followed substantially the practice of the League of Nations. In his report to the fifth session of the General Assembly, the Secretary-General stated his practice in the following terms:[9]

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

[3] Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, p. 20.

[4] *Ibid.*, p. 23.

[5] *League of Nations Official Journal*, 8th Year, No. 7, p. 880.

[6] *League of Nations Official Journal*, Minutes of the 45th session of the Council, pp. 770-772 and 800-801.

[7] League of Nations document C.357.M.130.1927.V.

[8] Hudson, *International Legislation*, Vol. I, p. L, note 3.

[9] A/1372, paras. 5 and 6.

deposit only with the consent of all States which have ratified or acceded by the date of entry into force.

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

The report further states: [10]

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

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

20. Because of its constitutional structure, the established practice of the International Labour Organisation, as described in the Written Statement dated 12 January 1951 of the Organisation submitted to the International Court of Justice in the case of reservations to the Convention on Genocide,[11] excludes the possibility of reservations to international labour conventions. However, the texts of these conventions frequently take account of the special conditions prevailing in particular countries by making such exceptional provisions for them as will admit of their proceeding to ratification; indeed, this course is enjoined on the General Conference by article 19 (3) and other articles of the Constitution of the Organisation.

21. The Organization of American States follows a different system, as described in the Written Statement dated 14 December 1950 of the Pan-American Union, submitted to the International Court of Justice in the case of Reservations to the Convention on Genocide.[12] A resolution, approved on 23 December 1938, of the Eighth International Conference of Amercan States, held at Lima, Peru, provided that:

"In the event of adherence or ratification with reservations, the adhering or ratifying State shall transmit to the Pan-American Union, prior to the deposit of the respective instrument, the text of the reservation which it proposes to formulate, so that the Pan-American Union may inform the signatory States thereof and ascertain whether they accept it or not. The State which proposes to adhere to or ratify the treaty, may do it or not, taking into account the observations which may be made with regard to its reservations by the signatory States." [13]

Thus the tender of a reservation to a convention may delay the deposit by the reserving State of its ratification until inquiry can be made as to the attitude of the other signatory States with respect to the proposed reservation, and until the State offering the reservation has an opportunity to consider any observations made by other States. It does not preclude the reserving State, in spite of the fact that its reservation has been objected to by one or more signatory States, from proceeding to deposit its ratification definitively, if it so desires, and thereby becoming a party to the convention. It merely prevents the entry into force of the convention as between the reserving State and the objecting State. The legal position has been defined by the Governing Board of the Pan-American Union in a resolution adopted on 4 May 1932, as follows: [14]

"With respect to the juridical status of treaties ratified with reservations, which have not been accepted, the Governing Board of the Pan-American Union understands that:

"1. The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations, in the terms in which it was originally drafted and signed.

"2. It shall be in force as between the governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be modified by said reservations.

"3. It shall not be in force between a government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations."

22. The Commission recognizes that the members of a regional or continental organization may be in a special position, by reason of their common historical traditions and of their close cultural bonds, which have no counterpart in the relations of the general body of States. The members of the Organization of American States have adopted a procedure which they regard as suited to their needs. This procedure, as described in

[10] *Ibid.*, para. 46.

[11] I.C.J. document Distr. 51/10, pp. 212-278.

[12] *Ibid.*, pp. 11-16.

[13] Final Act of the Eighth International Conference of American States, Resolution XXIX, para. 2.

[14] I.C.J. document Distr. 51/10, p. 13.

the preceding paragraph, is designed to ensure the greatest number of ratifications. Yet an examination of the history of the conventions adopted by the Conferences of American States over the past twenty-five years has failed to convince the Commission that an approach to universality is necessarily assured or promoted by permitting a State which offers a reservation to which objection is taken to become a party *vis-à-vis* non-objecting States. In some multilateral conventions, the securing of universality may be the more important consideration; and when this is the case, it is always possible for States to adopt the procedure followed by the Pan-American Union by inserting a suitable provision to this effect in the convention. But there are other multilateral conventions where the integrity and the uniform application of the convention are more important considerations than its universality, and the Commission believes that this is especially likely to be the case with conventions drawn up under the auspices of the United Nations. These conventions are of a law-making type in which each State accepts limitations on its own freedom of action on the understanding that the other participating States will accept the same limitations on a basis of equality. The Pan-American Union practice is likely to stimulate the offering of reservations; the diversity of these reservations and the divergent attitude of States with regard to them tend to split up a multilateral convention into a series of bilateral conventions and thus to reduce the effectiveness of the former. The Commission, therefore, does not recommend that this practice should be applied to multilateral conventions in general, when the parties themselves have failed to indicate their intention.[15]

23. The International Court of Justice, in its advisory opinion of 28 May 1951 quoted in paragraph 16 above, adopted, with regard to reservations to the Convention for the Prevention and Punishment of the Crime of Genocide, the criterion of the compatibility of a reservation with the "object and purpose" of the Convention. Thus, in its answer to question I, the Court held "that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention".[16] It was left to each State party to the Convention to apply the criterion of compatibility. "Each State which is a party to the Convention," according to the Court, "is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint."[17] In its answer to question II, the Court held that a party to the Convention on Genocide "can in fact" consider that the reserving State is or is not a party to the Convention, accordingly as that party considers the reservation to be compatible or incompatible with the object and purpose of the Convention.

24. The Commission believes that the criterion of the compatibility of a reservation with the object and purpose of a multilateral convention, applied by the International Court of Justice to the Convention on Genocide, is not suitable for application to multilateral conventions in general. It involves a classification of the provisions of a convention into two categories, those which do and those which do not form part of its object and purpose. It seems reasonable to assume that, ordinarily at least, the parties regard the provisions of a convention as an integral whole, and that a reservation to any of them may be deemed to impair its object and purpose. Even if the distinction between provisions which do and those which do not form part of the object and purpose of a convention be regarded as one that it is intrinsically possible to draw, the Commission does not see how the distinction can be made otherwise than subjectively. If State A tenders a reservation which State B regards as compatible and State C regards as incompatible with the object and purpose of the convention, there is no objective test by which the difference may be resolved; even when it is possible to refer the difference of views to judicial decision, this might not be resorted to and, in any case, would involve delay. So long as the application of the criterion of compatibility remains a matter of subjective discretion, some of the parties being willing to accept a reservation and others not, the status of a reserving State in relation to the convention must remain uncertain. And where a convention confers jurisdiction on the International Court of Justice over disputes concerning the interpretation or application of its provisions, and such jurisdiction is invoked by a party, difficulty might arise in determining which are the parties to the convention entitled to intervene under Article 63 of the Court's Statute. Moreover, where, as frequently happens, the entry into force or the termination of a convention depends on the number of ratifications or denunciations deposited, even the status of the convention itself may be thrown into doubt.

25. The Commission has been asked to pay special 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 Secretary-General is already the depositary of more than a hundred such conventions, and he may be expected to become the

[15] Mr. Yepes declared that he deeply regretted having to vote against this paragraph for the following reasons, which he had explained at length during the Commission's discussions:

(1) If the so-called Pan-American system of making reservations could be successfully applied to a complex of States closely linked together and in intimate relations such as the Organization of American States, it could *a fortiori* be applied to a much vaster organization more loosely linked together such as the United Nations, whose universal character makes it less exacting in this respect than a purely regional organization such as the Organization of American States.

(2) As the Pan-American system was, in his opinion, used in practice by the majority of the Members of the United Nations, it could be regarded as the existing law in the matter and, for that reason, should have been adopted by the Commission.

[16] I.C.J. Reports 1951, p. 29.

[17] *Ibid.*, p. 26.

depositary of many more. The Commission is impressed with the compexity 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 their reservations. Situations may arise in which he would have to take a position, at least provisionally, concerning a difference of view as to the effect of a reservation tendered, and he would be expected to keep account of the manifold bilateral relationships into which such a rule would tend to split a multilateral convention.

26. When a multilateral convention is open for States generally to become parties, it is certainly desirable that it should have the widest possible acceptance. The very fact of its being open in this way indicates that it deals with some subject of wide international concern regarding which it is desirable to reform or amend existing laws. On the other hand, it is also desirable to maintain uniformity in the obligations of all the parties to a multilateral convention, and it may often be more important to maintain the integrity of a convention than to aim, at any price, at the widest possible acceptance of it. A reserving State proposes, in effect, to insert into a convention a provision which will exempt that State from certain of the consequences which would otherwise devolve upon it from the convention, while leaving the other States which are or may become parties to it fully subject to those consequences in their relations *inter se*. If a State is permitted to become a party to a multilateral convention while maintaining a reservation over the objection of any party to the convention, the latter may well feel that the consideration which prompted it to participate in the convention has been so far impaired by the reservation that it no longer wishes to remain bound by it.

27. It is 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 and for the effect that is to be given to objections taken to them, and it is usually when a convention contains no such provisions that difficulties arise. It is much to be desired, therefore, that the problem of reservations to multilateral conventions should be squarely faced by the draftsmen of a convention text at the time it is being drawn up; in the view of the Commission, this is likely to produce the greatest satisfaction in the long run. Various provisions might be adopted, depending, in some measure at least, on the relative emphasis to be placed on maintaining the integrity of the text, or on facilitating the widest possible acceptance of it, even in varied terms.

(1) In some cases, it may be desirable that the text of a convention should exclude all possibility of reservations, as was done in the European Broadcasting Convention, Copenhagen, 1948; this is particularly desirable in the case of international constitutional instruments.

(2) If some reservations are to be permitted, the precise text of the permissible reservations may be set out, as was done in the General Act of 26 September 1928 for the Pacific Settlement of International Disputes; or their scope may be limited by requiring them to relate only to particular parts of the text, as provided in the Convention on Road Traffic, Geneva, 1949.

(3) If the text places no limit on the admissibility of reservations, and if there is no established organizational procedure for dealing with reservations, the text should establish a procedure in respect of the tendering of reservations and their effect. Especially, it is important to make clear what States are to be qualified to make objections to reservations, within what time an objection is to be made in order to be admissible, and what the consequences of an objection are to be. Such a procedure should therefore cover, in particular, the following points:

(*a*) How and when reservations may be tendered;

(*b*) Notifications to be made by the depositary as regards reservations and objections thereto;

(*c*) Categories of States entitled to object to reservations, and the manner in which their consent thereto may be given;

(*d*) Time limits within which objections are to be made;

(*e*) Effect of the maintenance of an objection on the participation in the convention of the reserving State.

28. The Commission believes that multilateral conventions are so diversified in character and object that, when the negotiating States have omitted to deal in the text of a convention with the admissibility or effect of reservations, no single rule uniformly applied can be wholly satisfactory. Any rule may in some cases lead to arbitrary results. Hence, the Commission feels that its problem is not to recommend a rule which will be perfectly satisfactory, but that which seems to it to be the least unsatisfactory and to be suitable for application in the majority of cases. On the whole, the Commission believes that, subject to certain modifications as explained in paragraphs 29 and 30 below, such a rule is to be found in the practice hitherto followed by the Secretary-General of the United Nations. The Commission's views are formulated in some rules of practice, contained in paragraph 34 below.

29. The tender of a reservation constitutes, in substance, in so far as relations with the reserving State are concerned, a proposal of a new agreement, the terms of which would differ from those of the agreement embodied in the text of the convention. Such a new agreement would require acceptance by all the States concerned. The question arises, however, which are the States which can be said to be concerned. In the practice of the Secretary-General of the United Nations, described in paragraph 19 above, only States which have ratified or otherwise accepted the convention are such States. Where a convention is subject to ratification or acceptance, the objection to a reservation, taken by a signatory State which has not ratified or otherwise accepted the convention, does not have the effect of excluding the reserving State from becoming

a party to it. In the view of the Commission, however, the concern of a mere signatory State should also be taken into account; for, at the time the reservation is tendered, a signatory State may be actively engaged in the study of the convention, or it may be in the process of completing the procedure necessary for its ratification, or for some reason, such as the assembling of its parliament, it may have been compelled to delay its ratification. In this connexion, it has been suggested that a mere signatory to a convention should have the right of objecting only to reservations tendered before the convention has entered into force. Such a differentiation between reservations tendered before and those tendered after the entry into force of a convention would, however, be invidious where the entry into force of the convention is brought about as the result of the deposit of the ratiffcations of a very limited number of States, as in the case of the four Geneva Red Cross Conventions of 12 August 1949, to which more than sixty States are signatories, but which, it is provided, "shall come into force six months after not less than two instruments of ratification have been deposited". In such a case, a very few States might, by the tender and acceptance of reservations amongst themselves, so modify the terms of the convention that signatories, representing possibly the preponderant number of negotiating States, would find themselves confronted with a virtually new convention.

30. The Commission does not contemplate that a signatory State would advance an objection to a reservation from motives unrelated to its merits. Yet, in order to guard against any possible abuse by a signatory State of its right to object to a reservation and to forestall the possibility of a reserving State being indefinitely prevented from becoming a party to a convention by a State which itself refrains from assuming the obligations of a party, the Commission suggests that, while the objection by a mere signatory to a reservation should have the effect of excluding a reserving State, a time limit beyond which such effect would not endure should be prescribed. Taking into consideration the normal administrative and constitutional procedures of most governments in respect of the ratification of treaties and conventions, the Commission believes that a period of twelve months would be a reasonable time within which an objecting State could effect its ratification or acceptance of a convention. Accordingly, the Commission is of the opinion that if, upon the lapse of twelve months from the date a signatory State makes an objection to a reservation to a multilateral convention, it has not effected its ratification or acceptance of the convention, its objection should cease to have the effect of preventing the reserving State from becoming a party to the convention.

31. In some instances conventions are open to accession and not open to signature; an example is the Convention on the Privileges and Immunities of the United Nations of 13 February 1946. Such conventions, which are exceptional, present special problems with respect to reservations. As their number is somewhat limited, the Commission considers it unnecessary to formulate any practice applying to them.

32. The Commission is of the opinion that a duly accepted reservation to a multilateral convention limits the effect of the convention in the relations between the reserving State and the other States which have become or which may become parties to the convention.

Conclusions

33. The Commission suggests that organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them.

34. The Commission suggests that, in the absence of contrary provisions in any multilateral convention and of any organizational procedure applicable, the following practice should be adopted with regard to reservations to multilateral conventions, especially those of which the Secretary-General of the United Nations is the depositary:

(1) The depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention.

(2) The depositary of a multilateral convention, in communicating a reservation to a State which is entitled to object, should at the same time request that State to express its attitude towards the reservation within a specified period, and such period may be extended if this is deemed to be necessary. If, within the period so specified or extended, a State fails to make its attitude towards the reservation known to the depositary, or if, without expressing an objection to the reservation, it signs, ratifies, or otherwise accepts the convention within the period, it should be deemed to have consented to the reservation.

(3) The depositary of a multilateral convention should communicate all replies to its communications, in respect of any reservation to the convention, to all States which are or which are entitled to become parties to the convention.

(4) If a multilateral convention is intended to enter into force as a consequence of signature only, no further action being requisite, a State which offers a reservation at the time of signature may become a party to the convention only in the absence of objection by any State which has previously signed the convention; when the convention is open to signature during a limited fixed period, only in the absence of objection by any State which becomes a signatory during that period.

(5) If ratification or acceptance in some other form, after signature, is requisite to bring a multilateral convention into force,

(*a*) A reservation made by a State at the time of signature should have no effect unless it is repeated or

incorporated by reference in the later ratification or acceptance by that State;

(*b*) A State which tenders a ratification or acceptance with a reservation may become a party to the convention only in the absence of objection by any other State which, at the time the tender is made, has signed, or ratified or otherwise accepted the convention; when the convention is open to signature during a limited fixed period, also in the absence of objection by any State which signs, ratifies or otherwise accepts the convention after the tender is made but before the expiration of this period; provided, however, that an objection by a State which has merely signed the convention should cease to have the effect of excluding the reserving State from becoming a party, if within a peroid of twelve months from the time of the making of its objection, the objecting State has not ratified or otherwise accepted the convention.

Chapter III

QUESTION OF DEFINING AGGRESSION[18]

35. The General Assembly, on 17 November 1950, adopted resolution 378 B (V) which reads as follows:

"*The General Assembly*,

"*Considering* that the question raised by the proposal of the Union of Soviet Socialist Republics can better be examined in conjunction with matters under consideration by the International Law Commission, a subsidiary organ of the United Nations,

"*Decides* to refer the proposal of the Union of Soviet Socialist Republics and all the records of the First Committee dealing with this question to the International Law Commission, so that the latter may take them into consideration and formulate its conclusions as soon as possible."

36. The foregoing resolution was adopted in connexion with the agenda item "Duties of States in the event of the outbreak of hostilities". The proposal of the Union of Soviet Socialist Republics,[19] referred to in this resolution, was originally submitted to the First Committee of the General Assembly. It provided that the General Assembly "considering it necessary ... to define the concept of aggression as accurately as possible", declares, *inter alia*, that "in an international conflict that State shall be declared the attacker which first commits" one of the acts enumerated in the proposal.

37. In pursuance of the resolution of the General Assembly, the International Law Commission, at its 92nd to 96th, 108th, 109th, 127th to 129th, and 133rd meetings, considered the question raised by the aforementioned proposal of the USSR and, in that connexion, studied the records of the First Committee relating thereto.

38. The Commission first considered its terms of reference under the resolution in the light of the relevant discussions in the First Committee. Some members of the Commission were of the opinion that this resolution merely meant that the Commission should take the Soviet proposal and the discussions thereon in the First Committee into consideration when preparing the draft code of offences against the peace and security of mankind. The majority of the Commission, however, held the view that the Commission had been requested by the General Assembly to make an attempt to define aggression and to submit a report on the result of its efforts.

39. The Commission had before it a report entitled "The Possibility and Desirability of a Definition of Aggression", presented by Mr. Spiropoulos, special rapporteur on the draft code of offences against the peace and security of mankind (A/CN.4/44, chapter II). After a survey of previous attempts to define aggression, the special rapporteur stated that "whenever governments are called upon to decide on the existence or non-existence of 'aggression under international law', they base their judgment on criteria derived from the 'natural', so to speak, notion of aggression ... and not on legal constructions". Analysing this notion of aggression, he stated that it was composed of both objective and subjective elements, namely, the fact that a State had committed an act of violence and was the first to do so and the fact that his violence was committed with an aggressive intention (*animus aggressionis*). But what kind of violence, direct or indirect, or what degree of violence constituted aggression could not be determined *a priori*. It depended on the circumstances in the particulat case. He came to the conclusion that this "natural notion" of aggression is a "concept *per se*", which "is not susceptible of definition". "A 'legal' definition of aggression would be an artificial construction", which could never be comprehensive enough to comprise all imaginable cases of aggression, since the methods of aggression are in a constant process of evolution.

40. Two other members of the Commission, Mr. Amado and Mr. Alfaro, submitted memoranda on the question. Mr. Amado stated in his memorandum (A/CN.4/L.6 and Corr. 1) that a definition of aggression based on an enumeration of aggressive acts could not be satisfactory, as such an enumeration could not be complete and any omission would be dangerous. He suggested that the Commission might adopt a general and flexible formula laying down that:

[18] Mr. Hudson voted against this chapter of the report on the ground that in resolution 378 B (V), the General Assembly did not request the Commission to formulate a definition of aggression.

[19] A/C.1/108.