Reservations To The Convention On The Prevention And Punishment Of The Crime Of Genocide

International Court of Justice
May 28, 1951

Advisory Opinion

Present: President BASDEVANT; Vice-President GUERRERO; Judges ALVAREZ, HACKWORTH, WINIARSKI, ZORICIC, DE VISSCHER, Sir Arnold MCNAIR, KLAESTAD, BADAWI PASHA, READ, HSU MO; Registrar HAMBRO.

THE COURT,

composed as above,

gives the following Advisory Opinion:

On November 16th, 1950, the General Assembly of the United Nations adopted the following resolution:

'The General Assembly,

Having examined the report of the Secretary-General regarding reservations to multilateral conventions,

Considering that certain reservations to the Convention on the Prevention and Punishment of the Crime of Genocide have been objected to by some States,

Considering that the International Law Commission is studying the whole subject of the law of treaties, including the question of reservations,

Considering that different views regarding reservations have been expressed during the fifth session of the General Assembly, and particularly in the Sixth Committee,

1. Requests 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?

2. 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 connection 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;

3. Instructs the Secretary-General, pending the rendering of the Advisory Opinion by the International Court of Justice, the receipt of a report from the International Law Commission and further action by the General Assembly, to follow his prior practice with respect to the receipt of reservations to conventions and with respect to the notification and solicitation of approvals thereof, all without prejudice to the legal effect of objections to reservations to conventions as it may be recommended by the General Assembly at its sixth session.'

By a letter of November 17th, 1950, filed in the Registry on November 20th, the Secretary-General of the United Nations transmitted to the Court a certified true copy of the General Assembly's resolution.

On November 25th, 1950, in accordance with Article 66, paragraph 1, of the Court's Statute, the Registrar gave notice of the request to all States entitled to appear before the Court.

On December 1st, 1950, the President-as the Court was not sitting-made an order by which he appointed January 20th, 1951, as the date of expiry of the time-limit for the filing of written statements and reserved the rest of the procedure for further decision. Under the terms of this order, such statements could be submitted to the Court by all States entitled to become parties to the Genocide Convention, namely, any Member of the United Nations as well as any non-member State to which an invitation to this effect had been addressed by the General Assembly. Furthermore, written statements

could also be submitted by any international organization considered by the Court as likely to be able to furnish information on the questions referred to it for an Advisory Opinion, namely, the International Labour Organization and the Organization of American States.

On the same date, the Registrar addressed the special and direct communication provided for in Article 66, paragraph 2, of the Statute to all States entitled to appear before the Court, which had been invited to sign and ratify or accede to the Genocide Convention, either under Article XI of that Convention or by virtue of a resolution adopted by the General Assembly on December 3rd, 1949, which refers to Article XI; by application of the provisions of Article 63, paragraph 1, and Article 68 of the Statute, the same communication was addressed to other States invited to sign and ratify or accede to the Convention, by virtue of the resolution of the General Assembly, namely, the following States: Albania, Austria, Bulgaria, Cambodia, Ceylon, Finland, Hungary, Ireland, Italy, Jordan, Korea, Laos, Monaco, Portugal, Romania, and Viet-Nam. Finally, the Registrar's communication was addressed to the International Labour Organization and the Organization of American States.

Written statements were deposited within the prescribed time-limit by the following governments and international organizations: the Organization of American States, the Union of Soviet Socialist Republics, the Hashemite Kingdom of Jordan, the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Secretary-General of the United Nations, Israel, the International Labour Organization, Poland, Czechoslovakia, the Netherlands, the People's Republic of Romania, the Ukrainian Soviet Socialist Republic, the People's Republic of Bulgaria, the Byelorussian Soviet Socialist Republic, the Republic of the Philippines.

By a despatch dated December 14th, 1950, and received on January 29th, 1951, the Secretary-General of the United Nations transmitted to the Registry the documents which he had been requested to furnish pursuant to Article 65 of the Court's Statute. All these documents are enumerated in the list attached to the present Opinion.

As the Federal German Republic had been invited on December 20th, 1950, to accede to the Genocide Convention, the Registrar, by a telegram and a letter of January 17th, 1951, which constituted the special and direct communication provided for under Article 66, paragraph 2, of the Statute, informed the Federal German Government that the Court was prepared to receive a written statement and to hear an oral statement on its behalf; no action was taken in pursuance of this suggestion.

By a letter dated March 9th, 1951, filed in the Registry on March 15th, the Secretary-General of the United Nations announced that he had designated Dr. Ivan S. Kerno, Assistant Secretary-General in charge of the Legal Department, as his representative before the Court, and that Dr. Kerno was authorized to present any statement likely to assist the Court.

The Government of the United Kingdom, the French Government and the Government of Israel stated, in letters dated respectively January 17th, March 12th and March 19th, 1951, that they intended to present oral statements.

At public sittings held from April 10th to 14th, 1951, the Court heard oral statements presented:

on behalf of the Secretary-General of the United Nations by Dr. Ivan S. Kerno, Assistant Secretary-

General in charge of the Legal Department;

on behalf of the Government of Israel by Mr. Shabtai Rosenne, Legal Adviser to the Ministry of Foreign Affairs;

on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland by the Right Honourable Sir Hartley Shawcross, K.C., M.P., Attorney-General, and by Mr. G. G. Fitzmaurice, C.M.G., Second Legal Adviser to the Foreign Office;

on behalf of the Government of the French Republic by M. Charles Rousseau, Professor at the Faculty of Law in Paris, Assistant Legal Adviser of the Ministry of Foreign Affairs.

* * *

In the communications which they have addressed to the Court, certain governments have contended that the Court is not competent to exercise its advisory functions in the present case.

A first objection is founded on the argument that the making of an objection to a reservation made by a State to the Convention on the Prevention and Punishment of the Crime of Genocide constitutes a dispute and that, in order to avoid adjudicating on that dispute, the Court should refrain from replying to Questions I and II. In this connection, the Court can confine itself to recalling the principles which it laid down in its Opinion of March 30th, 1950 (I.C.J. Reports 1950, p. 71). A reply to a request for an Opinion should not, in principle, be refused. The permissive provision of Article 65 of the Statute recognizes that the Court has the power to decide whether the circumstances of a particular case are such as to lead the Court to decline to reply to the request for an Opinion. At the same time, Article 68 of the Statute recognizes that the Court has the power to decide to what extent the circumstances of each case must lead it to apply to advisory proceedings the provisions of the Statute which apply in contentious cases. The object of this request for an Opinion is to guide the United Nations in respect of its own action. It is indeed beyond dispute that the General Assembly, which drafted and adopted the Genocide Convention, and the Secretary-General, who is the depositary of the instruments of ratification and accession, have an interest in knowing the legal effects of reservations to that Convention and more particularly the legal effects of objections to such reservations.

Following a similar line of argument, it has been contended that the request for an opinion would constitute an inadmissible interference by the General Assembly and by States hitherto strangers to the Convention in the interpretation of that Convention, as only States which are parties to the Convention are entitled to interpret it or to seek an interpretation of it. It must be pointed out in this connection that, not only did the General Assembly take the initiative in respect of the Genocide Convention, draw up its terms and open it for signature and accession by States, but that express provisions of the Convention (Articles XI and XVI) associate the General Assembly with the life of the Convention; and finally, that the General Assembly actually associated itself with it by endeavouring to secure the adoption of the Convention by as great a number of States as possible. In these circumstances, there can be no doubt that the precise determination of the conditions for participation in the Convention constitutes a permanent interest of direct concern to the United Nations which has not disappeared with the entry into

force of the Convention. Moreover, the power of the General Assembly to request an Advisory Opinion from the Court in no way impairs the inherent right of States parties to the Convention in the matter of its interpretation. This right is independent of the General Assembly's power and is exercisable in a parallel direction. Furthermore, States which are parties to the Convention enjoy the faculty of referring the matter to the Court in the manner provided in Article IX of the Convention.

Another objection has been put forward to the exercise of the Court's advisory jurisdiction: it is based on Article IX of the Genocide Convention which provides that disputes relating to the interpretation, application of fulfilment of that Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. It has been contended that there exists no dispute in the present case and that, consequently, the effect of Article IX is to deprive the Court, not only of any contentious jurisdiction, but also of any power to give an Advisory Opinion. The Court cannot share this view. The existence of a procedure for the settlement of disputes, such as that provided by Article IX, does not in itself exclude the Court's advisory jurisdiction, for Article 96 of the Charter confers upon the General Assembly and the Security Council in general terms the right to request this Court to give an Advisory Opinion 'on any legal question'. Further, Article IX, before it can be applied, presupposes the status of 'contracting parties'; consequently, it cannot be invoked against a request for an Opinion the very object of which is to determine, in relation to reservations and objections thereto, the conditions in which a State can become a party.

In conclusion, the Court considers that none of the above-stated objections to the exercise of its advisory function is well founded.

* * *

The Court observes that the three questions which have been referred to it for an Opinion have certain common characteristics.

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 questions 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. The Court will seek these replies in the rules of law relating to the effect to be given to the intention of the parties to multilateral conventions.

The three questions are purely abstract in character. They refer neither to the reservations which have, in fact, been made to the Convention by certain States, nor to the objections which have been made to such reservations by other States. They do not even refer to the reservations which may in future be made in respect of any particular article; nor do they refer to the objections to which these reservations might give rise.

Question I is framed in the following terms:

'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?'

The Court observes that this question refers, not to the possibility of making reservations to the Genocide Convention, but solely to the question whether a contracting State which has made a reservation can, while still maintaining it, be regarded as being a party to the Convention, when there is a divergence of views between the contracting parties concerning this reservation, some accepting the reservation, others refusing to accept it.

It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and raison d'etre of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.

This concept, which is directly inspired by the notion of contract, is of undisputed value as a principle. However, as regards the Genocide Convention, it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle. Among these circumstances may be noted the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention. Extensive participation in conventions of this type has already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations-all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions.

It must also be pointed out that although the Genocide Convention was finally approved unanimously, it is nevertheless the result of a series of majority votes. The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations. This observation is confirmed by the great number of reservations which have been made of recent years to multilateral conventions.

In this state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations. Account should also be taken of the fact that the absence of such an article or even the decision not to insert such an article can be explained by the desire not to invite a multiplicity of reservations. The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any

express provision on the subject, the possibility of making reservations, as well as their validity and effect.

Although it was decided during the preparatory work not to insert a special article on reservations, it is none the less true that the faculty for States to make reservations was contemplated at successive stages of the drafting of the Convention. In this connection, the following passage may be quoted from the comments on the draft Convention prepared by the Secretary-General: '.... (1) It would seem that reservations of a general scope have no place in a convention of this kind which does not deal with the private interests of a State, but with the preservation of an element of international order....; (2) perhaps in the course of discussion in the General Assembly it will be possible to allow certain limited reservations.'

Even more decisive in this connection is the debate on reservations in the Sixth Committee at the meetings (December 1st and 2nd, 1948) which immediately preceded the adoption of the Genocide Convention by the General Assembly. Certain delegates clearly announced that their governments could only sign or ratify the Convention subject to certain reservations.

Furthermore, the faculty to make reservations to the Convention appears to be implicitly admitted by the very terms of Question I.

The Court recognizes that an understanding was reached within the General Assembly on the faculty to make reservations to the Genocide Convention and that it is permitted to conclude therefrom that States becoming parties to the Convention gave their assent thereto. It must now determine what kind of reservations may be made and what kind of objections may be taken to them.

The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins 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. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary

principles of morality. In such a convention the contracting States do not have any interests of their own;they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'etre of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

The foregoing considerations, when applied to the question of reservations, and more particularly to the effects of objections to reservations, lead to the following conclusions.

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.

Any other view would lead either to the acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in mind, or to recognition that the parties to the Convention have the power of excluding from it the author of a reservation, even a minor one, which may be quite compatible with those purposes.

It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.

On the other hand, it has been argued that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties. This theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted. This view, however, cannot prevail if, having regard to the character of the convention, its purpose and its mode of adoption, it can be established that the parties intended to derogate from that rule by admitting the faculty to make reservations thereto.

It does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law. The considerable part which tacit assent has always played in estimating the effect which is to be given to reservations scarcely permits one to state that such a rule exists, determining with sufficient precision the effect of objections made to reservations. In fact, the examples of objections made to reservations appear to be too rare in international practice to have given

rise to such a rule. It cannot be recognized that the report which was adopted on the subject by the Council of the League of Nations on June 17th, 1927, has had this effect. At best, the recommendation made on that date by the Council constitutes the point of departure of an administrative practice which, after being observed by the Secretariat of the League of Nations, imposed itself, so to speak, in the ordinary course of things on the Secretary-General of the United Nations in his capacity of depositary of conventions concluded under the auspices of the League. But it cannot be concluded that the legal problem of the effect of objections to reservations has in this way been solved. The opinion of the Secretary-General of the United Nations himself is embodied in the following passage of his report of September 21st, 1950: 'While it is universally recognized that the consent of the other governments concerned must be sought before they can be bound by the terms of a reservation, there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State's objecting to a reservation.'

It may, however, be asked whether the General Assembly of the United Nations, in approving the Genocide Convention, had in mind the practice according to which the Secretary-General, in exercising his functions as a depositary, did not regard a reservation as definitively accepted until it had been established that none of the other contracting States objected to it. If this were the case, it might be argued that the implied intention of the contracting parties was to make the effectiveness of any reservation to the Genocide Convention conditional on the assent of all the parties.

The Court does not consider that this view corresponds to reality. It must be pointed out, first of all, that the existence of an administrative practice does not in itself constitute a decisive factor in ascertaining what views the contracting States to the Genocide Convention may have had concerning the rights and duties resulting therefrom. It must also be pointed out that there existed among the American States members both of the United Nations and of the Organization of American States, a different practice which goes so far as to permit a reserving State to become a party irrespective of the nature of the reservations or of the objections raised by other contracting States. The preparatory work of the Convention contains nothing to justify the statement that the contracting States implicitly had any definite practice in mind. Nor is there any such indication in the subsequent attitude of the contracting States: neither the reservations made by certain States nor the position adopted by other States towards those reservations permit the conclusion that assent to one or the other of these practices had been given. Finally, it is not without interest to note, in view of the preference generally said to attach to an established practice, that the debate on reservations to multilateral treaties which took place in the Sixth Committee at the fifth session of the General Assembly reveals a profound divergence of views, some delegations being attached to the idea of the absolute integrity of the Convention, others favouring a more flexible practice which would bring about the participation of as many States as possible.

It results from the foregoing considerations that Question I, on account of its abstract character, cannot be given an absolute answer. The appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case.

* * *

Having replied to Question I, the Court will now examine Question II, which is framed as follows:

'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?'

The considerations which form the basis of the Court's reply to Question I are to a large extent equally applicable here. As has been pointed out above, each State which is a party to the Convention is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint. As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention. In the ordinary course of events, such a decision will only affect the relationship between the State making the reservation and the objecting State; on the other hand, as will be pointed out later, such a decision might aim at the complete exclusion from the Convention in a case where it was expressed by the adoption of a position on the jurisdictional plane.

The disadvantages which result from this possible divergence of views-which an article concerning the making of reservations could have obviated-are real; they are mitigated by the common duty of the contracting States to be guided in their judgment by the compatibility or incompatibility of the reservation with the object and purpose of the Convention. It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application.

It may be that the divergence of views between parties as to the admissibility of a reservation will not in fact have any consequences. On the other hand, it may be that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by the procedure laid down in Article IX of the Convention.

Finally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.

Such being the situation, the task of the Secretary-General would be simplified and would be confined to receiving reservations and objections and notifying them.

* * *

Question III is framed in the following terms:

'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?'

The Court notes that the terms of this question link it to Question I. This link is regarded by certain States as presupposing a negative reply to Question I.

The Court considers, however, that Question III could arise in any case. Even should the reply to Question I not tend to exclude, from being a party to the Convention, a State which has made a reservation to which another State has objected, the fact remains that the Convention does not enter into force as between the reserving State and the objecting State. Even if the objection has this reduced legal effect, the question would still arise whether the States mentioned under (a) and (b) of Question III are entitled to bring about such a result by their objection.

An extreme view of the right of such States would appear to be that these two categories of States have a right to become parties to the Convention, and that by virtue of this right they may object to reservations in the same way as any State which is a party to the Convention with full legal effect, i.e. the exclusion from the Convention of the reserving State. By denying them this right, it is said, they would be obliged either to renounce entirely their right of participating in the Convention, or to become a party to what is, in fact, a different convention. The dilemma does not correspond to reality, as the States concerned have always a right to be parties to the Convention in their relations with other contracting States.

From the date when the Genocide Convention was opened for signature, any Member of the United Nations and any non-member State to which an invitation to sign had been addressed by the General Assembly, had the right to be a party to the Convention. Two courses of action were possible to this end: either signature, from December 9th, 1948, until December 31st, 1949, followed by ratification, or accession as from January 1st, 1950 (Article XI of the Convention). The Court would point out that the right to become a party to the Convention does not express any very clear notion. It is inconceivable that a State, even if it has participated in the preparation of the Convention, could, before taking one or the other of the two courses of action provided for becoming a party to the Convention, exclude another State. Possessing no rights which derive from the Convention, that State cannot claim such a right from its status as a Member of the United Nations or from the invitation to sign which has been addressed to it by the General Assembly.

The case of a signatory State is different. Without going into the question of the legal effect of signing an international convention, which necessarily varies in individual cases, the Court considers that signature constitutes a first step to participation in the Convention.

It is evident that without ratification, signature does not make the signatory State a party to the Convention; nevertheless, it establishes a provisional status in favour of that State. This status may decrease in value and importance after the Convention enters into force. But, both before and after the

entry into force, this status would justify more favourable treatment being meted out to signatory States in respect of objections than to States which have neither signed nor acceded.

As distinct from the latter States, signatory States have taken certain of the steps necessary for the exercise of the right of being a party. Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification.

Until this ratification is made, the objection of a signatory State can therefore not have an immediate legal effect in regard to the reserving State. It would merely express and proclaim the eventual attitude of the signatory State when it becomes a party to the Convention.

The legal interest of a signatory State in objecting to a reservation would thus be amply safeguarded. The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect and consequently, it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation. In the circumstances, it is of little importance whether the ratification occurs within a more or less long time-limit. The resulting situation will always be that of a ratification accompanied by an objection to the reservation. In the event of no ratification occurring, the notice would merely have been in vain.

For these reasons,

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:

by seven votes to five,

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:

by seven votes to five,

(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:

by seven votes to five,

(a) that an objection to a reservation made by a signatory State which has not yet ratified the Convention 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.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-eight day of May, one thousand nine hundred and fifty-one, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) BASDEVANT, President.

(Signed) E. HAMBRO, Registrar.

Vice-President GUERRERO, Judges Sir Arnold MCNAIR, READ and HSU MO, while agreeing that the Court has competence to give an Opinion, declare that they are unable to concur in the Opinion of the Court and have availed themselves of the right conferred on them by Articles 57 and 68 of the Statute and appended to the Opinion the common statement of their dissenting opinion.

Judge ALVAREZ, declaring that he is unable to concur in the Opinion of the Court, has availed himself of the right conferred on him by Articles 57 and 68 of the Statute and has appended to the Opinion the statement of his dissenting opinion.

(Initialled) J. B.
(Initialled) E. H.

DISSENTING OPINION OF JUDGES GUERRERO, SIR ARNOLD MCNAIR, READ, HSU MO

We regret that we are unable to concur in the Opinion of the Court, while agreeing that the Court has competence to give an Opinion.

We also consider that the role of the Court in this matter is a limited one. The Court is not asked to

state which is in its opinion the best system for regulating the making of reservations to multilateral conventions. States engaged in the preparation of a multilateral convention, by means either of a diplomatic conference or of the machinery of the United Nations, are free to insert in the text provisions defining the limits within which, and the means by which, reservations can be proposed and can take effect. With these questions of policy the Court is not concerned. Its Opinion is requested as to the existing law and its operation upon reservations to the Genocide Convention, which contains no express provision to govern this matter. But the Court cannot overlook the possibility that its Opinion may have a wider effect- more particularly having regard to the fact that Dr. Kerno, the representative of the Secretary-General of the United Nations, in addressing the Court, treated the matter generally and expressed the hope that the Opinion would be useful in dealing with the general problem of reservations to multilateral conventions.

The three questions are described in the majority Opinion as 'purely abstract'. They are abstract in the sense that they do not mention any particular States or any particular reservations. We consider, however, that it will make our examination of the problem more realistic if we state that before the end of 1950 the Secretary-General had received notice of eighteen reservations, proposed, some by one State, some by another, the total number of States being eight, and that those reservations relate to Article IV (removal of any jurisdictional immunities of 'constitutionally responsible rulers, public officials or private individuals'), Article VI (jurisdiction of municipal tribunals), Article VII (extradition), Article IX (the compulsory jurisdiction of the International Court of Justice), and Article XII (the 'colonial clause'). Every one of the eight reserving States has made a reservation against, or in regard to, Article IX.

In considering the requirements of international law as to the proposal of reservations and the conditions of their effectiveness, the Court is not confronted with a legal vacuum. The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservation or at the same time or later. The fact that in so many of the multilateral conventions of the past hundred years, whether negotiated by groups of States or the League or Nations or the United Nations, the parties have agreed to create new rules of law or to declare existing rules of law, with the result that this activity is often described as 'legislative' or 'quasi-legislative', must not obscure the fact that the legal basis of these conventions, and the essential thing that brings them into force, is the common consent of the parties.

The practice of proposing reservations to treaties (though the word 'reservations' is not always used) is at least a century old, but it did not receive much attention from legal writers until the present century. The following quotations show clearly that the practice of governments has resulted in a rule of law requiring the unanimous consent of all the parties to a treaty before a reservation can take effect and the State proposing it can become a party.

(a) From Fauchille: Traite de droit international public (tome I, 3me partie, paragraphe 8231), published in 1926, the following passage may be extracted [translation from French]:

'In our opinion, reservations on signature are not admissible unless all the contracting States agree to accept them, whether expressly or tacitly: the final result would be a new treaty, quite different from that first negotiated. If the States which sign without reservations do not agree, they will be entitled to

insist that the contracting States which made reservations must either withdraw them or accept the position that the convention will not apply in relation to other interested States.'

(b) Sir William Malkin, in his article entitled 'Reservations to Multilateral Conventions', in the British Year Book of International Law of 1926, at page 159, traced the gradual development, during the previous half century and more, of the practice of proposing reservations and the variety of forms which it has taken. He concluded as follows:

'It will be seen that of all the cases examined above where an actual reservation was made to any provision of a convention, there is hardly one as to which it cannot be shown that the consent of the other contracting Powers was given either expressly or by implication. Where the reservation is embodied in a document (which must have formed the subject of previous discussion and agreement) signed by the representatives of the other contracting Powers, consent is express; where the reservation had been previously announced at a sitting of the conference and was repeated at the time of signature without any objection being taken, consent is implied. And certainly there is no case among those examined which could be quoted as a precedent in favour of the theory that a State is entitled to make any reservations it likes to a convention without the assent of the other contracting parties.'

(c) From Hildebrando Accioly, Tratado di direito internacional publico, published in 1934 (p. 448) [translation from Portuguese]:

'1288. Be that as it may, the general principle which is universally accepted is that ratification cannot be made subject to reservations, whether by the ratifying authority, or by the constitutional organ competent to authorize ratification, unless the other contracting parties agree to these reservations, or provision is made in the treaty itself for reservations. This principle was enshrined a few years ago in a resolution adopted by the Assembly of the League of Nations on September 25th, 1931, on the subject of the entry into force of the Protocol concerning the Revision of the Statut of the Permanent Court of International Justice.' (The said resolution is expressed as follows: 'The Assembly considers that a reservation can only be made at the moment of ratification if all the other signatory States agree or if such a reservation has been provided for in the text of the Convention. ') (League of Nations, Official Journal, Special Supplement No. 92, October 1931, p. 10.)

(d) From Podesta Costa, Manual de derecho internacional publico (2a edicion) (1947), page 189 [translation from Spanish]:

'The presentation of a reserve is tantamount to a new proposal made to the other party. If the latter accepts it, a consensus of opinion exists and a new clause is embodied in the treaty; if the latter does not accept it, there is only a unilateral expression of intention which cannot constitute a source of obligations. This is the basic rule which governs the matter.'

The application of this rule in practice is illustrated by the Slavery Convention of 1926. It was an important humanitarian convention and, after prolonged study of slavery by the League of Nations Assembly, a convention was drafted by a committee appointed by the Assembly. It was approved by the Assembly on September 25th, 1926 (apparently without dissent), and then opened for signature, ratification and accession. On August 11th, 1930, the Secretary-General made a report (A.17.1930.VI) upon the state of the signatures, ratifications and accessions. The following passage may be extracted

from page 2 of this document:

'The accessions by Hungary (April 16th, 1927 and by the United States of America (March 21st, 1929) were given with certain reservations, which have been submitted for acceptance to the parties to the Convention. Fourteen States have not yet replied as regards the Hungarian reservations; ten replies have still to be received regarding the United States reservations.'

In the annexed list of ratifications and accessions appear the names of the United States of America and Hungary, subject, in each case, to the following note:

'Subject to a reservation which has been submitted to the signatory States for acceptance.'

On page 6 of the same document is printed a letter to the Secretary-General from the Hungarian Delegation, containing the following passage:

'(b) The Hungarian Government has already made known its accession to the Convention on Slavery of September 25th, 1926. This accession will become effective as soon as the governments of the following countries have declared their acceptance of the reservation made by Hungary at the time of her accession....' [Here follow the names of eleven countries.]

In 1927 the law and practice as to reservations engaged the attention of the Council of the League of Nations. In 1925 the Austrian Government had attached a reservation to its signature of the Convention on Opium and Drugs of that year to which, with other States, Austria had been invited to become a party. (This humanitarian convention, which has much in common with the Genocide Convention in point of structure, was negotiated at conferences held under the auspices of the League of Nations.) That reservation involved the non- acceptance of certain obligations which formed part of the system of control of the drug traffic devised by the Conference. It was disputed whether or not Austria could make this reservation without obtaining the assent of the States which were parties to the Convention. The matter was referred by the Council of the League of Nations to the League Committee for the Progressive Codification of International Law, which appointed a Sub-Committee, with M. Fromageot as rapporteur, to study the subject. The Report of that Sub- Committee will be found in League of Nations Document C.357.M.130.1927.V., and the following sentence may be extracted from it:

'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.'

Thereupon, the Codification Committee approved the Report and sent it to the Council of the League of Nations. The Council adopted it on June 17th, 1927, directed it 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'.

The Council of the League of Nations had, of course, no power to make law. What it did was to give its

approval to the statement of the law prepared by the Codification Committee. The law, as thus stated, was followed by the League of Nations thereafter and has later been followed by the United Nations, as we shall see in the case of the Genocide Convention.

* * *

Since 1927, while multilateral conventions have varied (as indeed they did before that date) in regard to clauses dealing with reservations, the rule of law applicable to reservations in the absence of any express provision has remained clear. So far as the activities of the United Nations are concerned, the Secretary-General-who is in a position to know-stated in his Report on 'Reservations to Multilateral Conventions', dated September 20th, 1950 (A.1372), to the General Assembly:

'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 definitively accepted only after it has been ascertained that there is no objection on the part of any of the other States directly concerned....'

'7. In following the practice referred to above, the Secretary-General has of course done no more than follow the practice already established by the League of Nations....'

In particular, he cited (in paragraphs 11 tot 16 of that Report) four instances of the practice, and it is instructive to note that the first two occurred in the same year as that in which the Genocide Convention was approved by the General Assembly and opened for signature, and before that took place. The first was the reservation which the United States of America desired to attach to its adherence to the Constitution of the World Health Organization. The Secretary-General says (paragraph 12):

'12. .... Only after a unanimous acceptance by the [World Health] Assembly of the ratification as not inconsistent with the Constitution did the Secretary-General proceed with his notification that the United States had become a party.'

This Constitution entered into force on April 7th, 1948.

The second instance is contained in the following paragraph 13 of his Report:

'13. Prior to the entry into force of the Constitution of the International Refugee Organization, the Secretary-General circulated the text of reservations made by several States in accepting that Constitution. Finally, when the last instrument of acceptance necessary to permit the entry into force had been deposited, the Secretary-General so notified the interested States, requesting their observations before a specified date. Only after that date had passed did he declare that the Constitution had entered into force.'

This Constitution entered into force on August 20th, 1948.

The Genocide Convention was approved by the General Assembly on December 9th, 1918, and was

opened for signature two days later.

The other two instances cited by the Secretary-General relate to reservations made to a Protocol modifying the General Agreement on Tariffs and Trade by the Union of South Africa and Southern Rhodesia in 1949. (These four instances are described in some detail in the American Journal of International Law, Vol. 44, January 1950, pp. 120-127.)

Again, the Secretary-General's representative said to the Court on April 10th, 1951, that

'The principle which the Secretary-General has heretofore followed is based on the theory that all the States most directly interested must consent to reservations....'

And early in the course of his speech on April 11th, he said:

'.... I should like to emphasize that the Secretary-General's practice is a continuation of that constantly followed by the League of Nations.'

It has been objected that the statement quoted above from the Report of the Codification Committee made in 1927, which has formed the basis of the practice of the League of Nations and the United Nations since then, is not a rule of law but a mere 'administrative practice'. Upon this, three things may be said: firstly, that the League Codification Committee appear to have regarded it as a rule of law; secondly, that those responsible for the preparation of the Harvard Research Draft Convention on the Law of Treaties (see Articles 14, 15, 16 and Comment) have accepted the principle of unanimous assent to reservations laid down in 1927 as right; thirdly, there can be no doubt that this principle, whether it is a rule of law or a rule of practice, was being followed by the United Nations when the Genocide Convention was negotiated and opened for signature.

While the principle of law governing reservations is clear, it permits negotiating governments the greatest flexibility in making express provisions in treaties. Against this background of principle, the law does not dictate what practice they must adopt, but leaves them free to do what suits them best in the light of the nature of each convention and the circumstances in which it is being negotiated. The following are some illustrations:

(a) The Department of International Law and Organization of the Pan-American Union has submitted to the Court a valuable Statement dated December 14th, 1950, from which it appears that, in the case of treaties negotiated within the framework of the Pan-American Union, when a State, on ratifying a treaty, makes or maintains a reservation, the reservation is communicated to the other signatory States, and the treaty does not enter into force between the reserving State and any State which declines to accept the reservation, but the reserving State nevertheless becomes a party to the treaty.

There is, however, a significant difference between the Pan-American Union procedure and the United Nations procedure, which is expressed in this Statement as follows:

'The Pan-American Union procedure permits a State to proceed with its ratification in spite of the fact that one or more of the signatory States may object to the reservation, whereas the procedure followedby the Secretary-General of the United Nations has the effect of preventing the particular State from

becoming a party to the convention if any single State among those which have already ratified voices its disapproval of the proposed reservation.' (Italics ours.)

(Evidently the Pan-American Union has no doubt as to what is the procedure of the United Nations and as to its effect.)

What is important to note is that the Pan-American Union procedure rests upon rules adopted by the Governing Body of the Union, as approved by the International Conference of American States held at Lima in 1938; that is to say, it depends on the prior agreement of the contracting parties.

(b) Another procedure is illustrated by the General Act for the Pacific Settlement of International Disputes adopted at Geneva on September 26th, 1928. Article 39 expressly provided that 'a party, in acceding to the present General Act, may make his acceptance conditional upon' reservations in respect of three kinds of dispute precisely specified in that Article. The same practice was adopted in the Revised General Act adopted by the General Assembly of the United Nations on 28th April, 1949.

Another instance is afforded by Article 64 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms as follows:

'I. Any State may, when signing this Convention or when depositing its instrument of ratification, made a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

2. Any reservation made under this Article shall contain a brief statement of the law concerned.'

Again, the Convention on the Declaration of Death of Missing Persons, of 1950, negotiated by the General Assembly of the United Nations, affords, in Article 19, an example of an express power to attach any reservations to an instrument of accession, coupled with an express provision permitting any contracting State which does not accept any reservation, to notify the Secretary-General 'that it considers such accession as not having entered into force between the State making the reservation and the State not accepting it. In such case the Convention shall be considered as not being in force between such two States.'

(c) Other instances might be noted in which express provisions were included in multilateral conventions, or collateral agreements: prescribing the parts of the conventions to which reservations might freely be made; providing a special measure of control over reservations or a special regimen of consent; or otherwise enabling States to become parties to the conventions with limited obligations. Reference may be made to the following:

Convention on the Simplification of Customs Formalities, Geneva, November 3rd, 1923; Protocol of the same date.

Convention relating to Economic Statistics, Geneva, December 14th, 1926: Art. 17, and Protocol of the same date: as amended by Protocol of December 9th, 1948.

Convention on the Suppression of Counterfeiting Currency, Geneva, April 20th, 1929; Protocol of the same date.

Sanitary Convention for Aerial Navigation, The Hague, April 12th, 1933: Art. 67.

Convention for the Prevention and Punishment of Terrorism, Geneva, November 16th, 1937: Art. 23.

Convention on Road Traffic, Geneva, September 19th, 1949: Art. 2 (I), and Final Act of the Conference on Road and Motor Transport: paragraph 7.

Protocol on Road Signs and Signals, Geneva, September 19th, 1949; and Final Act of the Conference on Road and Motor Transport: paragraph 7.

In such cases the negotiating governments in effect agree in advance they would rather have a State become a party to the convention minus certain provisions than not at all. But there is a fundamental difference between reservations permitted in advance by the treaty and ex post facto claims by States that such and such a reservation is compatible with the object and purpose of a convention and that, therefore, a State has a unilateral right to make it, subject to its claim being challenged on the ground of compatibility. The fact that there is a recognized method of ear-marking in advance and by agreement those provisions against which a reservation will be permitted is the strongest possible evidence that the governments negotiating the Genocide Convention did not contemplate giving to intending parties a unilateral right of making reservations deemed by them to be compatible with the purpose of the Convention.

(d) Another practice is illustrated by the Havana Convention on Private International LAw of 1928 (the Bustamante Code), Article 3 of which provides that:

'Each one of the contracting Republics, when ratifying the present Convention, may declare that it reserves acceptance of one or more articles of the annexed Code, and the provisions to which the reservation refers shall not be binding upon it.'

The value of permitting flexibility to the parties in providing for reservations was remarked upon by the Secretary-General in paragraph 47 (c) of his Report to the General Assembly on 'Reservations to Multilateral Conventions', dated 20th September, 1950, which is as follows:

'It is inevitable that any rule followed by the Secretary-General, in the absence of express provisions in the convention, will not suit the circumstances of every convention or every relationship proposed between given parties. This difficulty can be met by the conscious use, in the drafting of such a convention, of final articles best adapted to any special situation. If, for example, it is desired to forestall certain objections in order to make a convention acceptable to a maximum number of States, it is always possible to include an article expressly approving specified reservations [FN27]. (Italics ours.) If it is desired in special cases to permit signatories, and not only parties, to reject proposed reservations, the League of Nations formula mentioned above, used in the Convention for the Prevention and Punishment of Terrorism, might be applicable [FN28].'

(Footnote 27 refers to Article 39 (1) of the Revised General Act for the Pacific Settlement of

International Disputes; footnote 28 to Article 23 of the Convention on Terrorism.)

* * *

Let us now see how the question of reservations was dealt with during the preparation of the Genocide Convention. TheSecretary-General prepared a 'Draft Convention on the Crime of Genocide' in pursuance of a resolution of the Economic and Social Council, and this document is dated 26th June, 1947. It consisted of draft articles followed by comments. The passage dealing with reservations is as follows:

'Article XVII

(Reservations.) No proposition is put forward for the moment.

Comment.

At the present stage of the preparatory work, it is doubtful whether reservations ought to be permitted and whether an article relating to reservations ought to be included in the Convention.

We shall restrict ourselves to the following remarks:

(1) It would seem that reservations of a general scope have no place in a convention of this kind which does not deal with the private interests of a State, but with the preservation of an element of international order.

For example, the convention will or will not protect this or that human gr oup. It is unthinkable that in this respect the scope of the convention s hould vary according to the reservations possibly accompanying accession b y certain States.

(2) Perhaps in the course of discussion in the General Assembly it will be possible to allow certain limited reservations.

These reservations might be of two kinds: either reservations which would be defined by the convention itself, and which all the States would have the option to express, or questions of detail which some States might wish to reserve and which the General Assembly might decide to allow.'

It is evident from the final paragraph that what the Secretary-General had in mind was that it was open to the delegates either to define any permissible reservations in the Convention itself or to obtain for them the express permission of the General Assembly, that is to say that, in accordance with a not infrequent practice, the permitted reservations should be agreed in advance. Instances of this practice have already been given; it was not adopted in this case.

The Draft Convention was first referred to all the Member States for comment. The United States of

America was the only one that commented on this part of the Draft, and its comment was limited to the statement: 'An article on the subject of 'reservations' should be omitted.' The Draft was then referred to a body known as the 'Ad Hoc Committee on Genocide', which appointed a sub-committee, consisting of the representatives of Poland, the Union of Soviet Socialist Republics, and the United States of America, to study it. This sub-committee 'saw no need for any reservations' (Document E/AC/25/10, page 5), and this conclusion was unanimously adopted by the full Ad Hoc Committee on 27th April, 1948 (E/AC/25/SR/23, page 7). Accordingly, the Draft prepared, as revised by the Ad Hoc Committee, contained no provision concerning reservations. No proposal for a reservations article was made in the Sixth Committee or in the plenary meetings of the General Assembly and, accordingly, the text of the Convention as now in force contains no provision on this subject.

After the Sixth Committee had approved the final text of the Convention at its 132nd and 133rd meetings, on the 1st and 2nd December, 1948, the representatives of several governments reserved their position in regard to this or that article or in regard to the whole Convention, and a summary of this discussion will be found on pages 88 and 89 of the printed volume containing inter alia the 'Written Statement of the Secretary-General' submitted to the Court. In the course of that discussion, the rapporteur, M. Spiropoulos, referring to this discussion, said:

'Those reservations could be made at the time of the signature of the Convention. However, if a government made reservations regarding a convention, it could not be considered as a party to that convention unless the other contracting parties accepted those reservations, expressly or tacitly.'

The Chairman of the Sixth Committee, in closing the discussion on this point, said that 'the purport of those statements would be recorded in the summary record of the meeting in the usual way. [He] felt that there was no necessity to open a discussion on the legal implications of the reservations which had been made.'

We do not find it possible to infer from the manner in which the question of reservations was dealt with throughout the preparatory work that there was any agreement to confer upon States desiring to sign, ratify or accede to this Convention any right to make reservations which would not be dealt with in accordance with the normal law and practice observed by the United Nations.

To summarize our argument up to this point, we are of the opinion:

(a) that the existing rule of international law, and the current practice of the United Nations, are to the effect that, without the consent of all the parties, a reservation proposed in relation to a multilateral convention cannot become effective and the reserving State cannot become a party thereto;

(b) that the States negotiating a convention are free to modify both the rule and the practice by making the necessary express provision in the convention and frequently do so;

(c) that the States negotiating the Genocide Convention did not do so;

(d) that therefore they contracted on the basis that the existing law and the current practice would apply in the usual way to any reservations that might be proposed.

* * *

In these circumstances, can it be conceded that it was agreed by the negotiating governments, during the preparation of the Genocide Convention, that reservations would be permitted and accepted by the parties to the Convention in so far as they might be compatible with the object and purpose of the Convention; and further that each of the existing parties to the Convention should appraise the admissibility of the reservation, individually and from its own standpoint, and determine its subsequent action, in the light of this criterion?

This attempt to classify reservations into 'compatible' and 'incompatible' would involve a corresponding classification of the provisions of the Convention into two categories-of minor and major importance; when a particular provision formed part of 'the object and purpose of the Convention', a reservation made against it would be regarded as 'incompatible', and the reserving State would not be considered as a party to the Convention; when a particular provision did not form part of 'the object and purpose', any party which considered a reservation made against it to be 'compatible' might regard the reserving State as a party. Any State desiring to become a party to the Convention would be at liberty to assert that a particular provision was not a part of 'the object and purpose', that a reservation against it was 'compatible with the object and purpose of the Convention', and that it had therefore a right to make that reservation-subject always to an objection by any of the existing parties on the ground that the reservation is not 'compatible'.

We regret that, for the following reasons, we are unable to accept this doctrine:

(a) It propounds a new rule for which we can find no legal basis. We can discover no trace of any authority in any decision of this Court or of the Permanent Court of International Justice or any other international tribunal, or in any text-book, in support of the existence of such a distinction between the provisions of a treaty for the purpose of making reservations, or of a power being conferred upon a State to make such a distinction and base a reservation upon it. Nor can we find any evidence, in the law and practice of the United Nations, of any such distinction or power.

If, therefore, such a rule is to apply to the Genocide Convention, it would have to be deduced from the intentions of the parties. It must be remembered that the representatives of the governments which negotiated this Convention were in complete control of its machinery, of its procedural clauses, and were free to insert in the text any stipulations in the matter of reservations which seemed to them to be suitable. They refrained from doing so, although, as has been shown, the question of making provision for reservations was discussed at several stages during the negotiations. It is difficult to see how their intention that reservations should be governed by some new criterion of 'compatibility' can be deduced from the fact that they decided against making the obvious and simple provision required to give effect to such intention. If they had intended to permit certain reservations, there was available a well recognized method of doing so, to which we have already referred, namely, for them to agree in advance upon, and specify in the text of the Convention, those reservations which their governments were prepared to accept. As we have seen, the Secretary-General, in the Draft of this Convention prepared by him and dated 26th June, 1947, drew attention to this procedure, so that it must have been present to the minds of the governments. But the g vernments responsible for this Convention adopted no such

procedure and agreed upon the text on the basis of the existing law and practice, which require unanimous assent to all reservations.

Can it be said, then, that the governments which negotiated and voted for this Convention through their delegates did so in the belief that any State when signing, ratifying or acceding to it would be at liberty to divide its provisions into those which do, and those which do not, form part of 'the object and purpose of the Convention' and to make reservations against any of the latter, which would thereupon take effect without the consent of the other parties? We can find no evidence of any such belief.

On the contrary, such a rule is so new, and the test of the compatibility of a reservation with 'the object and purpose of the Convention' is so difficult to apply, that it is inconceivable that the General Assembly could have passed the matter over in silence and assumed that all the contracting States were fully aware of the existence of such a test in international law and practice and were capable of applying it correctly and effectively. We feel bound therefore to conclude that the parties entered into this Convention on the basis of the existing law and practice, and in these circumstances we do not see how one can impute to them the intention to adopt a new and different rule.

(b) Moreover, we have difficulty in seeing how the new rule can work. When a new rule is proposed for the solution of disputes, it should be easy to apply and calculated to produce final and consistent results. We do not think that the rule under examination satisfies either of these requirements.

(i) It hinges on the expression 'if the reservation is compatible with the object and purpose of the Convention'. What is the 'object and purpose' of the Genocide Convention? To repress genocide? Of course; but is it more than that? Does it comprise any or all of the enforcement articles of the Convention? That is the heart of the matter. One has only to look at them to realize the importance of this question. As we showed at the beginning of our Opinion, these are the articles which are causing trouble.

(ii) It is said that on the basis of the criterion of compatibility each party should make its own individual appraisal of a reservation and reach its own conclusion. Thus, a reserving State may or may not be a party to the Convention according to the different view-points of States which have already become parties. Under such a system, it is obvious that there will be no finality or certainty as to the status of the reserving State as a party as long as the admissibility of any reservation that has been objected to is left to subjective determination by individual States. It will only be objectively determined when the question of the compatibility of the reservation is referred to judicial decision; but this procedure, for various reasons, may never be resorted to by the parties. If and when the question is judicially determined, the result will be, according as the reservation is judicially found to be compatible or incompatible, either that the objecting State or States must, for the first time, recognize the reserving State as being also a party to the Convention, or that the reserving State ceases to be a party in relation to those other parties which have accepted the reservation. Such a state of things can only cause the utmost confusion among the interested States. This lack of finality or certainty is especially to be deprecated in the case of the operation of the clauses relating to the coming into force of the Convention (Article XIII) and its termination by denunciations (Article XV). We may add that, as we understand the questions referred to the Court, what the General Assembly wishes to know is whether in given circumstances a reserving State can or cannot be regarded by the law as a party to the treaty- not whether, or when, an existing party, in the light of its individual appraisal, may consider a reserving State as a party or not.

(iii) It is suggested that certain contracting States holding different opinions upon the compatibility of a reservation may decide to settle the dispute which thus arises by adopting the procedure laid down in Article IX of the Convention; this article provides for the compulsory jurisdiction of the Court, but it should be noted that eight States have already made reservations against, or in relation to, this very article.

(iv) With regard to objections which are not based on incompatibility, the suggestion is made that the reserving State and the objecting State should enter into discussion and that an understanding between them would have the effect that the Convention would enter into force between them, except for the clauses affected by the reservation. But we cannot regard to admissibility of a reservation as a private affair to be settled between pairs of States. Moreover, it is clear that different pairs of States may come to different understandings upon the same reservations and that some States may consider a reserving State to be a party while others do not.

(v) When the question of reservations to this Convention first arose in the fifth session of the General Assembly, the conditions required for bringing the Convention into force did not yet exist. It was necessary to consider how Article XIII, which requires twenty ratifications or accessions to bring the Convention into force, was going to work in the event of some of the ratifications or accessions being accompanied by reservations. Suppose that one of the first twenty ratifications or accessions tendered to the Secretary- General had been accompanied by a reservation which one or more of the States previously ratifying or acceding were prepared to accept, while the other States previously ratifying or acceding were not prepared to accept it, what is the position according to the new rule? In the view of some States the requirement of twenty ratifications or accessions would have been satisfied and the Convention would enter into force on the ninetieth day after the date of the last deposit. In the view of others, the requirement would not be satisfied. Would the Convention be in force? And suppose later that it was judicially determined that the reservation referred to was not 'compatible with the object and purpose of the Convention', what would happen? Would the Convention cease to be in force from that moment? And would it be regarded ab initio as never having been in force? Such problems are bound to arise when the question whether a State is or is not a party remains in doubt, and, as we have already indicated, the importance of that question is not confined to Article XIII. In addressing the Court on April 10th, 1951, the representative of the Secretary-General showed, by means of numerous examples, how essential it is to the discharge of his functions as depositary of this Convention and many other multilateral conventions that he should know definitely whether a State is or is not a party; he told the Court that the Secretary-General is the depositary of more than sixty multilateral conventions which have been drafted or revised under the auspices of the United Nations.

We regret, therefore, that we do not find in the new rule that has been proposed any reliable means of solving the problems to which reservations to this Convention have given and may continue to give rise, nor any means that are likely to produce final and consistent results.

* * *

We believe that the integrity of the terms of the Convention is of greater importance than mere

universality in its acceptance. While is it undoubtedly true that the representatives of the governments, in drafting and adopting the Genocide Convention, wished to see as many States become parties to it as possible, it was certainly not their intention to achieve universality at any price. There is no evidence to show that they desired to secure wide acceptance of the Convention even at the expense of the integrity or uniformity of its terms, irrespective of the wishes of those States which have accepted all the obligations under it.

It is an undeniable fact that the tendency of all international activities in recent times has been towards the promotion of the common welfare of the international community with a corresponding restriction of the sovereign power of individual States. So, when a common effort is made to promote a great humanitarian object, as in the case of the Genocide Convention, every interested State naturally expects every other interested State not to seek any individual advantage or convenience, but to carry out the measures resolved upon by common accord. Hence, each party must be given the right to judge the acceptability of a reservation and to decide whether or not to exclude the reserving State from the Convention, and we are not aware of any case in which this right has been abused. It is therefore not universality at any price that forms the first consideration. It is rather the acceptance of common obligations-keeping step with like-minded States-in order to attain a high objective for all humanity, that is of paramount importance. Such being the case, the conclusion is irresistible that it is necessary to apply to the Genocide Convention with even greater exactitude than ever the existing rule which requires the consent of all parties to any reservation to a multilateral convention. In the interests of the international community, it would be better to lose as a party to the Convention a State which insists in face of objections on a modification of the terms of the Convention, than to permit it to become a party against the wish of a State or States which have irrevocably and unconditionally accepted all the obligations of the Convention.

The Opinion of the Court seeks to limit the operation of the new rule to the Genocide Convention. We foresee difficulty in finding a criterion which will establish the uniqueness of this Convention and will differentiate it from the other humanitarian conventions which have been, or will be, negotiated under the auspices of the United Nations or its Specialized Agencies and adopted by them. But if the Genocide Convention is in any way unique, its uniqueness consists in the importance of regarding it as a whole and maintaining the integrity and indivisibility of its text, whereas it seems to us that the new rule propounded by the majority will encourage the making of reservations.

* * *

In conclusion, the enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation; but the Genocide Convention is an instrument which is intended to produce legal effects by creating legal obligations between the parties to it, and we have therefore felt it necessary to examine it against the background of law.

* * *

On Question I our reply is in the negative.

Accordingly, Question II does not arise for us.

On Question III we dissent from the reply given by the majority; having regard to the dominating importance that we attach to the issues raised by Question I, we do not propose to add the reasons for our dissent upon Question III.

(Signed) J. G. GUERRERO.

(Signed) ARNOLD D. MCNAIR.

(Signed) JOHN E. READ.

(Signed) HSU MO.

DISSENTING OPINION OF M. ALVAREZ

I

[Translation]

The General Assembly of the United Nations, at its plenary session of November 16th, 1950, asked the International Court of Justice for an Opinion upon certain questions concerning reservations to the Convention for the Prevention and Punishment of the Crime of Genocide; the admission of these reservations had evoked objections on the part of certain Staets, as well as differences of opinion among the representatives of the United Nations themselves.

As was well said by the Attorney-General of the United Kingdom in his oral statement before the Court, this Court has the power and the duty both to devote itself in the first place to the examination of questions relating to the Convention on Genocide and to formulate its conclusions in such a manner that they may be, as far as possible, applicable, not only to conventions of this type which may be drawn up within the framework of the United Nations but also to multilateral conventions in general.

Moreover, it is natural that the Court should proceed in this manner: it should, in order that its Opinion may be properly founded, view the subject from a broader angle than that indicated in the Request transmitted to it by the Assembly of the United Nations.

It has been pointed out, in the course of the discussions which have taken place upon this subject, that there are no precise rules or precedents well established in international law regarding reservations to multilateral conventions in general; three kinds of practices have been mentioned to us, one of which was called the Pan-American practice.

Up to the present time, multilateral conventions have been established under the individualist system, based upon the absolute sovereignty of States. According to this system, States are only bound to the extent to which they consent to be obliged; consequently, they are free to make reservations to these conventions as they please. Furthermore, these conventions have become more and more numerous since the beginning of this century and relate to a wide diversity of matters; they constitute an important part of what is called international legislation.

The multiplicity of reservations made to these multilateral conventions, together with the adhesions to them and the denunciations of them, has produced much uncertainty, because it is difficult to be sure as to the States between which these conventions are in force. A real crisis, to which some persons-including myself-have drawn attention for some time past, has thus arisen in international treaty law. The task of the Secretary-General of the League of Nations and after that the United Nations in connection with the registration of these conventions has become extremely complicated; and it is without doubt partly to remedy this situation that the General Assembly of the United Nations has sent to the Court the Request for an Opinion which is now before us.

II

In appraising multilateral conventions-and specifically that on genocide-in the future, we shall be forced to abandon traditional criteria, because we are now confronted with an international situation very different from that which existed before the last social cataclysm; the latter has caused a profound and rapid evolution of facts and ideas in the international sphere.

Consequently, a very important point invites the consideration of the Court.

According to current opinion, this Court has to apply the principles of international law deemed to be in existence at the moment when it delivers its judgment or opinion, without considering whether they have undergone any more or less sudden changes, or whether they are in accord with the new conditions of international life; it appertains-we are told-to the International Law Commission created by the United Nations to determine what modifications should be made in international law.

That is a view which it is impossible to accept. As a result of the great changes in international life that have taken place since the last social cataclysm, it is necessary that the Court should determine the present state of law in each case which is brought before it and, when needed, act constructively in this respect, all the more so because in virtue of Resolution 171 of the General Assembly of the United Nations of 1947, it is at liberty to develop international law, and indeed to create law, if that is necessary, for it is impossible to define exactly where the development of this law ends and its creation begins. To proceed otherwise would be to fail to understand the nature of international law, which must always reflect the international life of which it is born, if it is not to be discredited.

The method I have just indicated is that applied to domestic constitutional law. If, for example, consequently upon a revolution, a new republican political regime establishes itself in the place of a monarchy, it is obvious that both old and new institutions must at once be applied and interpreted in

conformity with the new regime.

There are stronger reasons why the same course should be followed in regard to international law. After the social cataclysm which we have just passed through, a new order has arisen and, with it, a new international law. We must therefore apply and interpret both old and new institutions in conformity with both this new order and this new law.

III

In order not to go outside the scope of the Request for an Opinion, I will confine myself to indicating the characteristics of the new international law, so far as concerns multilateral conventions of a special character.

In this respect, this law includes within its domain four categories of multilateral conventions, three of which were formerly unknown: (a) those which seek to develop world international organization or to establish regional organizations, such as the European organization which is of such great present-day interest; (b) those which seek to determine the territorial status of certain States; such conventions have existed in Europe since the beginning of the XIXth century, and have constituted what may be called 'European public law'; (c) conventions which seek to establish new and important principles of international law; (d) conventions seeking to regulate matters of a social or humanitarian interest with a view to improving the position of individuals.

It is among the conventions referred to under (c) and (d) above that we find the Convention on Genocide. The new international law, reflecting the new orientation of the legal conscience of the nations, condemns genocide-as it condemns war-as a crime against civilization, although this was not admitted till quite recently.

Conventions of the above four categories present characteristics which differentiate them markedly from ordinary multilateral conventions.

To begin with, they have a universal character; they are, in a sense, the Constitution of international society, the new international constitutional law. They are not established for the benefit of private interests but for that of the general interest; they impose obligations upon States without granting them rights, and in this respect are unlike ordinary multilateral conventions which confer rights as well as obligations upon their parties.

Furthermore, these conventions are not merely formulated under the auspices of the United Nations, but in its Assemblies; they are discussed there at length by all States, who have the opportunity to comment upon them as they see fit; and the conventions which are proposed by these Assemblies can be modified by them up to the last moment.

The decisions of these Assemblies are taken upon a majority vote (Art. 18 of the Charter). The old unanimity rule is thus abolished, or rather it exists only in the exceptional cases mentioned in the said Article 18. This rule of the majority vote is, moreover, in conformity with our ideas of international

organization, of the interdependence of States and of the general interest; national sovereignty has to bow before the will of the majority by which this general interest is represented.

(Let us note, in passing, that the judgments and opinions of this Court are given on a majority vote.)

Thus, in fact, these Assemblies of the United Nations are, in these cases, fulfilling a legislative function.

It is convenient to recall that at times certain States have given the General Assembly of the United Nations truly legislative powers by submitting themselves in advance to its decisions upon questions which they have referred to it. We find a typical case in the peace treaty signed between Italy and the four Great Powers, in the part which relates to the future of the former Italian colonies. The General Assembly of 1949 determined their fate; and its resolution concerning Eritrea contains the broad outline of a Constitution.

In addition to the multilateral conventions which have just been mentioned, the Assemblies of the United Nations pass Declarations and Resolutions of a very important nature. These Declarations do not require ratification, and, by reason of their nature, are not susceptible to reservations; they have not yet acquired a binding character, but they may acquire it if they receive the support of public opinion, which in several cases has condemned an act contrary to a Declaration with more force than if it had been a mere breach of a convention of minor importance.

Finally, the General Assembly of the United Nations is the meeting place where States discuss political matters of general interest (open diplomacy); in doing so, the Assembly is in a good position to reconcile Law and Politics.

In short, the Assembly of the United Nations is tending to become an actual international legislative power. In order that it may actually become such a power, all that is needed is that governments and public opinion should give it support. Public opinion is an important factor which comes into play in the new international law.

Certain consequences of great practical importance ensue from the nature of the four categories of multilateral conventions which have just been mentioned, and from the manner in which they were drawn up.

To begin with, the said conventions are almost real international laws.

Secondly, these conventions signed by a great majority of States ought to be binding upon the others, even though they have not expressly accepted them: such conventions establish a kind of binding custom, or rather principles which must be observed by all States by reason of their interdependence and of the existence of an international organization.

It follows from the foregoing that the said conventions must not be interpreted with reference to the preparatory work which preceded them; they are distinct from that work and have acquired a life of their own; they can be compared to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard. These conventions must be interpreted without regard to the past, and only with regard to the future.

Nor must they be interpreted in the light of arguments drawn from domestic contract law, as their nature is entirely different.

IV

Let us next consider the particular question of the reservations to which the conventions of which I have just spoken-and in particular that on genocide-may be subjected.

These conventions, by reason of their nature and of the manner in which they have been formulated, constitute an indivisible whole. Therefore, they must not be made the subject of reservations, for that would be contrary to the purposes at which they are aimed, namely, the general interest and also the social interest.

To support this view, one may refer to what has happened in the case of certain instruments of our international organization, in particular the Charter of the United Nations and the Statute of the International Court of Justice. After long discussions preceding their formulation, these instruments were accepted without reservation by all participating States; and, at the present time, countries which desire to take part in the United Nations are prepared to sign this Charter and this Statute upon the same terms.

These instruments, to be sure, have given occasion to many criticisms, and if the States had been allowed to make reservations in regard to them they would have done so; nevertheless, they accepted them as they stood, because they could not do otherwise. A psychological factor, in fact, comes into consideration in regard to these instruments: States are unwilling to remain aloof from these conventions, for, if they did so, they would find themselves in an awkward position in international society.

Those who advocate the admissibility of reservations even in the four categories of statements to which I have referred, argue that States desire to make reservations, and that if they were not allowed to, they would not sign these instruments.

To this it can be replied that, when the said conventions were debated in the Assemblies of the United Nations, the States had an opportunity of making criticisms or objections on any points that they pleased, and that, consequently, they cannot afterwards return to those points. It would be inadmissible that an instrument approved by the Assembly of the United Nations and designed to form one of the foundations of our international life could be destroyed, or even shaken, by the independent action of one or more States, which actually took part in drawing up the conventions concerned.

To avoid these difficulties, conventions of the kind referred to above ought to be established in their essential points without going into details, so that they can be accepted by the greatest possible number of States; a less ambitious pact, upon which all parties are in agreement, is preferable to a more elaborate pact to which numerous reservations have been made.

As regards the Convention on Genocide in particular, it is contended that it may be made the subject of reservations because this possibility was mentioned in the General Assembly of the United Nations; and because certain States gave their adhesion to this Convention subject to reservations, and, finally, because the matter of reservations is mentioned in the Request for the opinion of the Court.

To this it can be replied that if reservations to this Convention are contemplated, that is a consequence of the survival of old-fashioned ideas on multilateral conventions; people are still considering this subject in relation to the old criterion, without taking its new aspect into consideration.

It has been proposed to seek a solution of the problem stated in the Request by having recourse to doctrinal or practical systems. According to one point of view, reservations, to be valid, must be accepted by all the contracting States. Following another more recent system-that adopted by this Court- reservations are inadmissible if they are not compatible with the aims and objects of the Convention.

Neither of these points of view is satisfactory. So far as the latter is concerned, States making reservations could argue that their reservations were not in conflict with the aim of the Convention, while States objecting to the reservations might allege the opposite. And, when one realizes that in this event it would be the duty of the International Court of Justice to settle the dispute, this tribunal will find itself so overburdened with controversies of this nature that its functions would be utterly distorted.

The best solution would be to establish plainly that reservations are inadmissible in the four categories of multilateral conventions which have been mentioned, and in particular in that on genocide: the psychological factor which has been referred to would then come into play, and States would sign these conventions without reservations.

If, however, the admissibility of reservations in these conventions is to be maintained, it would be necessary that the conventions should state this fact expressly, and explain the legal effect that they would possess. In that event the said conventions would become ordinary multilateral conventions; and they would no longer be fundamental conventions of international law.

If the scope of the reservations were not determined in the convention itself, it would have to be admitted that they would only involve the minimum legal result.

These results could then be as follows:

If the reservations proposed by a State are not accepted by one or several others of the States parties to the convention, the reserving State is not to be considered as a party to the convention.

If the reservations are accepted by the majority of other States, then the convention is transformed, and another convention takes its place; the States which have not accepted the reservations are not parties to the new convention.

Finally, if the reservations are accepted by certain States but objected to by others, then there is no convention at all.

V

The foregoing considerations regarding the new international law concerning multilateral conventions of the kinds indicated above, and in particular the Convention on Genocide, provide a new criterion which we must employ in finding a solution to the questions put to the Court in the Request.

To the first of these questions, I reply with a categorical NO: as I have just said, the Convention on Genocide cannot admit of reservations. In any event, even if they were allowed, they should produce the minimum of legal effect in favour of the States making the reservation.

The second question does not fall to be considered, in view of the reply given to Question I.

As regards Question III, I reply that legal effect must be given to objections made to reservations by a State coming within the categories stated in my paragraphs (a) and (b).

The conclusions which I have set forth may assist in preventing States from making reservations to the Convention.

(Signed) A. ALVAREZ.